December 14, 2017

Chip Harter
Deputy Assistant Secretary (International Tax Affairs)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Mr. Harter,

USCIB\(^1\) is writing to urge the Treasury to adopt guidance concerning section 965 addressing issues that will arise under the proposed repatriation rules. In cases where it may be necessary for Congress to provide the Treasury with additional regulatory authority to resolve these issues, proposed language is included below. There are several key concepts that will require further clarification, these include: the concept of “cash position”; the avoidance of double counting of cash positions; the definition of accumulated post-1986 deferred foreign income, particularly to the extent that allocations are required between November 2, 2017 (under the House bill) or November 9, 2017 (under the Senate bill) (the “November Measurement Date”) and December 31, 2017; and clarification of PTI deficits and basis adjustments under section 961.

\[\textbf{A. Cash Position - Regulatory Authority to Determine Cash Positions and Non-Cash Positions and Relevant Examples}\]

New section 965(c)(2)(B) of the Senate bill and new section 965(c)(3)(B) of the House bill each provide a definition of “cash position” that is so broad that it includes several categories of non-cash assets. The Secretary should be given a broad grant of regulatory authority to determine whether an amount constitutes cash, cash equivalents or a non-cash asset.

Regulatory authority under section 965(c)(2)(D) of the Senate bill or a new section 965(c)(3)(I) of the House bill could be clarified by inserting the text in bold below:

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\(^1\) USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.
AUTHORITY TO PRESCRIBE REGULATIONS.—The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to determine whether or not an amount constitutes a cash position for purposes of subparagraph (B).

Examples of non-cash assets that might be mischaracterized in the absence of guidance:

1. *Intercompany receivables (relevant to Senate bill).* Intercompany receivables, including intercompany short-term loan receivables, do not represent real cash in the system and should be excluded from the definition of “cash position” in the Senate bill. The House bill includes intercompany receivables in the definition of “cash position”, but clarifies that such amounts are not counted in section 965(c)(3)(D)(ii). The House bill position on this issue should be adopted.

2. *Cash used for acquisitions of stock or assets constituting substantially all of the assets of a trade or business during the cash measurement period (relevant to House and Senate bills).* “Aggregate foreign cash position” is defined in the House bill as an average of November 2, 2017, and the prior two year ends (2016 and 2015 in the typical case) cash amounts and under the Senate bill as the greater of 2017 cash amounts or the average of 2016 and 2015 cash amounts. Using an average works appropriately if a company has normal business operations during the measurement period. However, if a company made a major acquisition during the measurement period, that acquisition would result in cash going down and non-cash assets going up. Given that the reason for the lower rate on non-cash assets is that the taxpayer may not have the ability to pay the higher tax rate because the asset is in an illiquid form, it is unfair to include the amount spent on a major acquisition in pre-acquisition cash levels. The inclusion of such an amount in the calculation will result in the taxpayer being treated as having much more cash available to pay the higher repatriation tax than it actually has. Like blocked cash, which as discussed below should be excluded from the cash considered available to repatriate, cash paid to a third party to buy a business cannot readily be repatriated. There should be an exception granted for legitimate foreign acquisitions, which is often how companies grow their businesses and help grow U.S. jobs overseeing the expanded business. There is already another provision in the bill text to prevent abuse.

3. *Blocked / Restricted / Segregated Cash.* (i) Cash that is blocked locally or subject to currency restrictions (relevant for the Senate bill); (ii) Cash subject to regulatory restrictions (e.g., restrictions on the use of the cash, such as liquidity or solvency requirements, applicable regulations or external governance directives); and (iii) Cash segregated or earmarked as specified by contractual obligations with a third party are not available for repatriation and should not be considered part of the cash position.
4. *Cash pledged against defined liabilities and potential (or contingent) liabilities.* Such cash is not available for repatriation and should not be considered part of the cash position.

5. *Cash held in a fiduciary or trust capacity.* Such cash is not available for repatriation and should not be considered part of the cash position.

6. *Certain obligations with a remaining term of less than one year.* If a taxpayer holds a third-party obligation with an original 5-year term, but only 10 months remain on the term as of the November Measurement Date or on December 31, 2017, that obligation should not be considered an obligation with a term of less than one year under new section 965(c)(2)(B)(iii)(III). This clause should be interpreted to mean an obligation with an “original term” of less than one year, so that longer term obligations are not viewed as cash equivalents just because the remaining term is less than one year.

7. *Obligations of U.S Shareholders.* Cash positions include any obligation held by a specified foreign corporation with a term of less than a year. If the cash has been loaned to a U.S. shareholder that loan may have been included in income of the U.S. shareholder under section 956. In such a case, treating the obligation as a cash position would result in full U.S. corporate taxation on the U.S. shareholder (as a result of the inclusion under section 956) in addition to taxation imposed under section 965. This is inconsistent with the purpose of Congress in adopting section 965 and should be prevented by excluding such obligations from the definition of cash.

8. *Offsets for accounts payable.* Accounts payable should be allowed to offset both the taxpayer’s cash and accounts receivable. Accounts payable are near term commitments against the cash position of the taxpayer, and thus the “committed” cash is not available for distribution.

9. *Net Accounts Receivable.* A specified foreign corporation that is engaged in an active financing business may hold accounts receivable and notes receivable from providing financing to third parties in the ordinary course of its business. The specified foreign corporation may have incurred short-term obligations (e.g., issuing commercial paper or other short-term debt) to obtain liquidity for its financing business. In this situation, the cash position of the specified foreign corporation (Senate bill § 965(c)(2)(C); House bill § 965(c)(3)(C)) should be limited to the short-term obligations it holds in the ordinary course of its business, reduced by the short-term borrowings it incurs in the ordinary course of its business. This would put active financing businesses on an equal footing with businesses that deal in goods and services.
The definition of “net accounts receivable” included in the “cash position” of a specified foreign corporation, should be clarified to provide that (i) accounts receivable should be limited to short-term obligations held by the specified foreign corporation in the ordinary course of its business and (ii) accounts payable should include short-term obligations issued by the specified foreign corporation in the ordinary course of its business.

10. Pass-through Entities Owned by Specified Foreign Corporations. Clarification is needed to prevent the improper allocation of cash to U.S. shareholders that own an interest in a pass-through entity through a specified foreign corporation. A U.S. shareholder’s pro rata share of the cash position of a pass-through entity held by a specified foreign corporation should be determined with reference to the amount to which the specified foreign corporation would have been entitled had the pass-through entity distributed its assets in liquidation, taking into account applicable distribution and liquidation preferences.

Under each bill, a pass-through entity is treated as a specified foreign corporation of a U.S. shareholder for purposes of determining such U.S. shareholder’s aggregate foreign cash position if any interest in such entity is held by a specified foreign corporation of such U.S. shareholder and such entity would be a specified foreign corporation of such U.S. shareholder if such entity were a foreign corporation. Under each bill, a U.S. shareholder that owns an interest in a pass-through entity through a specified foreign corporation may be attributed cash held by that pass-through entity that is much higher or lower than the cash it is legally entitled to receive.

For example, assume that a U.S. shareholder owns 100% of a specified foreign corporation, which owns a preferred interest in a non-US pass-through entity. If the pass-through entity has current year earnings of $100 and the preferred yield is $90 annually, then the U.S. shareholder, applying the rules of 951(a)(2) literally, would include 90% ($90/$100) of the cash balance of the pass-through entity in its aggregate foreign cash position. If the pass-through entity had never made cash distributions to the common equity holders, the specified foreign corporation may be legally entitled to a much smaller share of the cash than what it would be allocated under the formula described above because the preferred interest does not give the U.S. shareholder rights to 90% of the entity’s accumulated cash. The inverse may also occur, for example, if the specified foreign corporation held common stock and a third party held preferred shares.

11. Treatment of Cash Pools. Companies with cash pools, especially notional cash pools, do not appear to be able to net their long cash position (under the Senate bill, and it’s
questionable under the House bill) against related party short cash positions, so that the aggregate foreign cash position reported most likely would be overstated relative to the actual net cash position with respect to the U.S. shareholder. The Senate bill’s double counting relief in section 965(c)(2)(D) does not appear to cover this situation (and the respective House bill version arguably provides only partial relief). Some potential fixes for this include (1) requesting Congress to provide legislative authority to issue regulations to address issues including the impact of the transition tax rules on cash pooling to allow a netting of the respective positions; (2) issuing regulations to provide offsets for short cash positions against long cash positions that are part of a pooling arrangement; (3) issuing regulations allowing taxpayers in determining the aggregate foreign cash positions to take negative cash positions with respect to a pool into account as “cash”, or (4) issuing regulations allowing taxpayers to affirmatively use principles similar to Rev. Rul. 87-89 and the related-party conduit financing provisions of Treasury. Reg. Sec. 1.882-3(a) for purposes of ensuring there is no double counting of actual cash.

In addition, cash amounts that are used to cross guaranty other overdrafts in cash pooling should not be included in the cash position.

**B. Cash Position - Regulatory Authority to Prevent Double Counting of Cash Positions**

New section 965(c)(2)(D) of the Senate bill provides that net accounts receivable and obligations with a term of less than one year are disregarded in determining the cash position if the U.S. shareholder demonstrates to the satisfaction of the Secretary that such amount is also taken into account by another specified foreign corporation of the U.S. shareholder. This language is helpful in reducing some risk of double counting the same assets in measuring the cash position of specified foreign corporations owned by a single U.S. shareholder. However, the intended scope of the language is too narrow, and does not address many other instances of double counting, including double counting of intercompany receivables across specified foreign corporations of U.S. shareholders that are members of the same affiliated group and common cash pooling arrangements.

The Secretary should be given a broad grant of regulatory authority to determine appropriate circumstances for the elimination of double counting of cash positions. Regulatory authority under section 965(c)(2)(D) of the Senate bill could be clarified by inserting the text in bold below:

**AUTHORITY TO PRESCRIBE REGULATIONS.** — The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to determine (a) whether or not an amount constitutes a cash position for purposes of subparagraph (B) and to prevent the double counting of cash positions of any specified foreign corporation.
described in clause (ii) or (iii)(III) of subparagraph (B), including (but not limited to) where such amounts are taken into account by a United States shareholder that is an includible corporation in the same affiliated group (as the term is defined under section 1504(a)) as another United States shareholder and (b) net accounts receivable for purposes of subparagraph (C), including the appropriate treatment of a negative net accounts receivable position after netting accounts payable arising in the ordinary course of business.

C. Post-1986 Deferred Foreign Income – Double Counting of Post-1986 Deferred Foreign Income and Relevant Examples

There are several potential double (or multiple) counting issues with respect to computing post-1986 deferred foreign income. The Secretary should be given a broad grant of regulatory authority to determine appropriate circumstances for the elimination of double counting of post-1986 deferred foreign income. Regulatory authority under section 965(c)(2)(D) of the Senate bill could be clarified by inserting the text in bold below:

**AUTHORITY TO PRESCRIBE REGULATIONS.** — The Secretary is authorized to prescribe such regulations as may be necessary or appropriate to prevent the double counting of post-1986 deferred foreign income, including (but not limited to) where such amounts are taken into account by a United States shareholder that is an includible corporation in the same affiliated group (as the term is defined under section 1504(a)) as another United States shareholder.

Examples of scenarios that may result in the double counting of post-1986 deferred foreign income in the absence of guidance:

1. **Dividend Distributions.** Dividends distributed (or deemed distributed, for example under Section 304) by a specified foreign corporation (SFC) with a taxable year ending after the applicable November Measurement Date and before December 31, 2017 to another SFC during the distributor’s taxable year that includes the November Measurement Date would seem to be counted in both the post-1986 deferred foreign income of the distributor and the post-1986 deferred foreign income of the distributee. This is because the post-1986 deferred foreign income of the distributor determined as of the November Measurement Date would not be reduced by the distributed dividends (under the Section 965(d)(3) and because a distribution of the earnings would not be treated as previously taxed income of a US shareholder), but would be included in the post-1986 deferred foreign income of the distributee (as of December 31).
Similarly, dividends distributed (or deemed distributed) by a SFC with a taxable year ending after the November Measurement Date and before December 31, 2017 during the SFC’s taxable year that includes the November Measurement Date to a U.S. corporation would also seem to be double counted. This is because the dividends would be includible in the income of the US corporation, but under section 965(d)(3) would also be taken into account in the post-1986 deferred foreign income of the SFC.

Both of these issues would be addressed by not applying section 965(d)(3) in respect of dividends made (or deemed made) by SFCs with taxable years ending after the November Measurement Date and before December 31, 2017 in respect of distributions made during the distributor’s taxable year that includes the November Measurement Date.

2. **Intercompany Transactions.** Intercompany transactions – for example, transfer pricing payments, intercompany interest or intercompany financial transactions - among SFCs during the period (the “applicable period”) beginning on the November Measurement Date and ending December 31 would also give rise to double counting. For instance, if SFC 1 provides services to SFC 2 and receives $X from SFC 2 in respect of these services during the applicable period, SFC 1’s post-1986 deferred foreign income would be increased by $X as of December 31. However, as of the November Measurement Date SFC 2’s earnings will not yet have been decreased by the payment. This issue could be addressed by disregarding, for purposes of determining post-1986 deferred foreign income as of December 31, payments made pursuant to intercompany transactions (other than dividends) among SFCs during the applicable period.

3. **End of Period Adjustments.** Earnings and profit adjustments that accrue only as of the end of a period – for example, adjustments in respect of liabilities for tax or incentive compensation - could also give rise to double counting because such adjustments would arguably not be included in the determination of post-1986 deferred foreign income as of the November Measurement Date, but would be taken into account in the determination of post-1986 deferred foreign income as of December 31. Guidance should be issued permitting taxpayers to use any reasonable method (for instance, pro-rata or closing of the books) to determine post-1986 deferred foreign income as of the November Measurement Date. An analogous rule that makes provision for using either

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2 Separately, many taxpayers will be unable to determine earnings and profits as of a particular date. Guidance should be issued to permit taxpayers to use reasonable methods to approximate the earnings and profits as of the November Measurement Date. For instance, taxpayers that close their books monthly might use earnings and profits through Oct 31 adjusted by a pro-rata portion of the November amounts.
pro-ration or closing of the books is provided in Treas. Reg. §1.367(b)-7(f)(5)(ii) could provide a basis for drafting guidance in this area.

4. **Stacking Issues.** Double counting and definitional issues may stack on top of one another to create instances of double or cascading taxation. For example, if earnings are double counted to the extent of 100k, so that the repatriation provision would treat the U.S. as having 200k of deferred earnings and 100k of cash that is not available to be repatriated because it is spent on an acquisition, but is nevertheless counted as cash, 100k would be subject to 14.5% rate, another 100k would be subject to the 7.5%. The total effect would be to tax the true deferred earnings at a rate of 21.5%. Clearly, not an outcome that is consistent the intention of Congress in adopting the repatriation provision.

**D. Clarification of PTI and Deficits and Basis Adjustments under Section 961**

Proposed section 965(b)(4)(A) provides that a deficit of another specified foreign corporation that is allocated to a deferred income corporation will increase such deferred income corporation’s PTI for purposes of applying section 959 in any taxable year after December 31, 2017. We believe this is intended to prevent a U.S. shareholder from having an inclusion under section 965. It is unclear, however, whether PTI created as a result of section 965(b)(4)(A) is available with respect to an actual distribution during the toll charge year. To ensure that taxpayers are not delaying the repatriation of cash and reinvestment of foreign earnings in the United States until the year after the toll charge inclusion year, regulations should clarify that a section 965 inclusion creates PTI and section 961 basis, including any PTI and section 961 basis relating to deficits allocated under section 965(b)(4)(A), with respect to the deferred foreign income corporation's stock in the same year as the U.S. shareholder's toll charge inclusion under section 951(a). The regulations should further clarify that the U.S. shareholder's pro rata share of E&P of a specified E&P deficit foreign corporation's E&P should be increased under section 965(b)(4)(B) in the same year as the year that such specified foreign corporation's deficit is taken into account by such U.S. shareholder. The guidance should also make explicit that the basis increase applies for determining gain under section 1248.

Sincerely,

William J. Sample  
Chair, Taxation Committee  
United States Council for International Business (USCIB)