UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

November 13, 2020

Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20044

RE: USCIB Comments related to 2020 Proposed Regulations under Sections 958(b) and 954(c)(6) (REG-110059-20)

Dear Commissioner Rettig:

USCIB[1] is pleased to provide comments related to 2020 Proposed Regulations under Sections 958(b) and 954(c)(6).

Prior to TCJA, section 958(b)(4) provided an exception that section 318(a)(3) shall not be applied so as to consider a U.S. person as owning stock which is owned by a person who is not a U.S. person, i.e., a "foreign person." As a result of TCJA's repeal of section 958(b)(4), stock of a foreign corporation owned by a foreign person can be attributed to a U.S. person under section 318(a)(3) for purposes of determining whether a U.S. person is a U.S. shareholder of the foreign corporation, and therefore whether the foreign corporation is a CFC. This is commonly referred to as downward attribution. The natural result of downward attribution is to cause U.S. multinationals to have more CFCs, particularly as a result of minority investments in foreign corporations.

In relevant part, the proposed regulations disallow an important exception to subpart F treatment, section 954(c)(6), in situations where downward attribution alone creates CFCs. There are instances where the disallowance is warranted. The proposed regulations illustrate such a scenario. However, there are other situations where the disallowance is unwarranted, specifically in the context of a minority investment by a U.S. corporation in a foreign corporation or in the case of a joint venture between U.S. and foreign corporations. The preamble to the proposed regulations alludes to these situations in asking whether section 954(c)(6) should apply to them: "Comments are requested as to whether, and if so, to what extent, the section 954(c)(6) exception should be available in cases in which a related foreign

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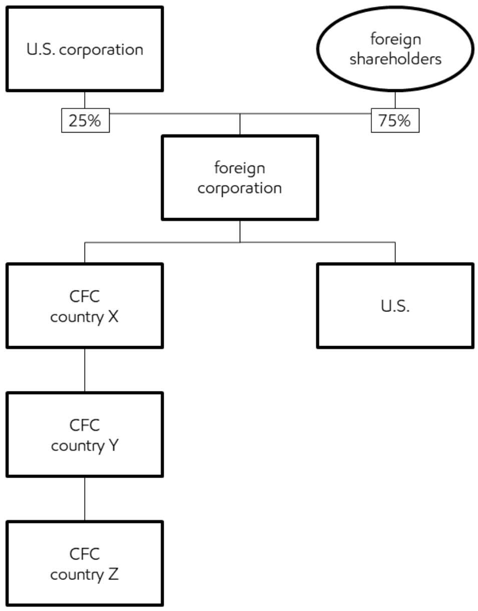
payor corporation (that is a CFC solely as a result of downward attribution) has section 958(a) U.S. shareholders and therefore is partially under U.S. tax jurisdiction."

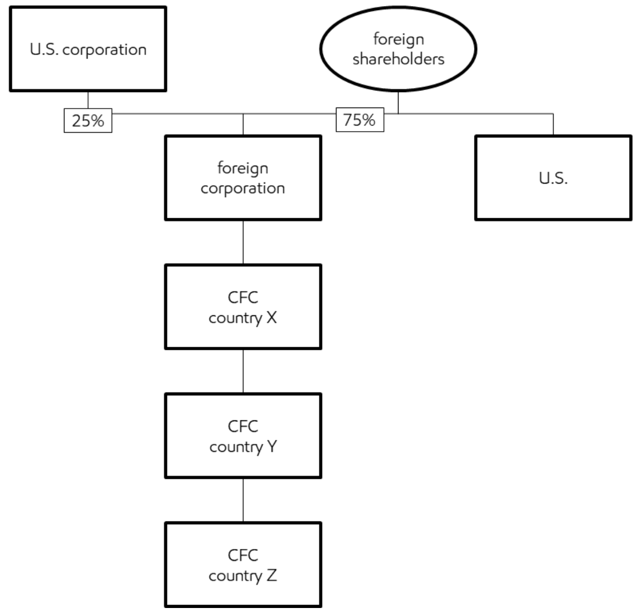
We are aware that many U.S. multinationals have CFCs resulting solely from downward attribution, and these CFCs generate subpart F inclusions to the U.S. shareholder where no subpart F inclusion existed prior to TCJA. Given the U.S. shareholder recognizes subpart F inclusions related to entities that are only CFCs solely as a result of downward attribution, good tax policy should permit the U.S. shareholder use of section 954(c)(6). Downward attribution should be coextensive for both CFC status and the section 954(c)(6) exception in situations in which any Subpart F income associated with the structures would be subject to U.S. tax.

In order to achieve the intended purpose of the regulations as expressed in the preamble, section 954(c)(6) should apply on payments from a CFC (that would not be a CFC but for downward attribution) provided the CFC payor has a section 958(a) U.S. shareholder—and especially where the CFC payor and CFC payee have the same section 958(a) U.S. shareholder. Such an approach should isolate application of section 954(c)(6) to payments between the CFCs of a U.S. multinational group. This achieves the anti-abuse objectives as articulated in the preamble without imposing additional tax on U.S. shareholders where there is no policy reason that section 954(c)(6) should not apply.

Below are illustrative fact patterns where the section 954(c)(6) exception should be fully available. Absent the section 954(c)(6) exception, payments of dividends, interest, rents and royalties between members in the CFC ownership chain would generate subpart F inclusions (as the same-country exception under section 954(c)(3)(A) would be unavailable), notwithstanding that the U.S. shareholder is liable to tax under subpart F with respect to both the CFC payor and the CFC payee. The concern expressed by the IRS is formulating the proposed rule denying the availability of section 954(c)(6)—that the paying related CFC is not subject to U.S. tax jurisdiction—is not present in these cases as the payor CFC have a section 958(a) U.S. shareholder. The concern is especially inapplicable when the CFC payor and CFC payee have the same section 958(a) U.S. shareholder.

In the examples, it is noteworthy that each foreign entity in the ownership chain (save for "foreign corporation," which is not a CFC, and thus section 954(c)(6) is inapplicable) is a CFC with a section 958(a) U.S. shareholder—the same section 958(a) U.S. shareholder, in fact. As a result, the section 958(a) U.S. shareholder's pro rata portion of earnings and profits of both the CFC payor and the CFC payee will remain subject to U.S. taxation (that is, subject to the subpart F and GILTI provisions).





We recognize that the repeal of section 958(b)(4) has resulted in many unintended consequences and administrative difficulties for taxpayers and the government in cases where foreign corporations are treated as CFCs notwithstanding the fact that they are not controlled by U.S. shareholders. In response, Treasury and the IRS have in some cases altered these consequences by treating CFCs resulting from the repeal of section 958(b)(4) as a different class of CFCs, subject to different treatment from CFCs as determined under prior law rules. This is particularly the case outside of the subpart F context, for example in regulations under sections 332(d), 863, and 904(d)(3). While we commend the efforts of Treasury and IRS to attempt to chart a reasonable course in this difficult context subject to the constraints of their regulatory authority, it seems incongruous to treat a foreign corporation as a CFC for one purpose of the subpart F rules – namely whether U.S. shareholders of that corporation are subject to tax on inclusions under sections 951(a) or 951A(a) – but not for other purposes of the subpart F rules. To the extent that Treasury and IRS believe the repeal of section 958(b)(4) was targeted more narrowly than the literal terms of the statute suggest, consistent with the ample legislative history and statutory context supporting such a view, that intent should be implemented uniformly throughout the subpart F rules.

Sincerely,

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