February 26, 2024

Internal Revenue Service
CC:PA:LPD:PR (Notice 2024-16)
Office of Associate Chief Counsel (International)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: National Foreign Trade Council Comments on Notice 2024-16**

The National Foreign Trade Council (the "NFTC") is writing to provide comments on Notice 2024-16, "Guidance Related to Section 961 and Certain Inbound Nonrecognition Transactions" (the "Notice") released by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") on December 28, 2023.

The NFTC, organized in 1914, is an association of U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities. Our members support establishing and maintaining international tax norms that provide certainty to enterprises conducting cross-border operations.

We appreciate the issuance of the Notice in providing guidance prior to the end of the calendar year. In general, the Notice provides welcome relief for certain transactions in preserving section 961(c) basis. However, we request some additions and modifications to the Notice in future guidance.

**Specific Comments**

*Loss in Stock of Acquired CFC*

We request Treasury to reconsider the rule in section .04(2) of the Notice regarding the denial of section 961(c) basis of an acquired CFC in an otherwise covered inbound transaction if the tax basis in that CFC's stock is greater than its fair market value. We recommend that future guidance allow retention of the section 961(c) basis in these circumstances. We request that Treasury reconsider this rule due to the section 362(e) anti-loss importation rule. The rule denying the benefit of the basis preservation altogether is overly harsh.

If Treasury and the IRS do not agree with such an approach, instead, we suggest the usage of a principal purpose test to determine if the primary motivation of the "covered inbound transaction" was to make use of the built-in loss (i.e., a business purpose of the "covered inbound transaction"). While we understand the need for a rule to mitigate potential abuse and selective importing of built-in losses for purposes of calculating the taxable income of a US corporation, we believe this rule is not warranted for a transaction that otherwise qualifies as a covered inbound transaction, absent any abusive element. Section 961(c) basis can exist in shares of any lower tier CFC as result of regular business operations and represents income that has been previously subject to US tax as either Subpart F or GILTI. If a transaction is a covered inbound transaction that meets the non-recognition requirements of section 368 or section 332, it should not be viewed as abusive per se and cause any section 961(c) basis to be lost.

Alternatively, should the IRS seek to prevent the importation of built-in losses of a lower tier CFC, the Notice unnecessarily and disproportionately harms taxpayers by potentially causing the full loss of the section 961(c) basis by excluding the transaction from the definition of "covered inbound transaction", even if the section 961(c) basis only exceeds FMV in the shares of the CFC by a small amount. We request Treasury to reconsider this "all or nothing" approach and instead limit the loss of the section 961(c) basis to the amount that exceeds the FMV of the shares. Therefore, if Treasury determines a rule preventing the importation of built-in loss of a lower CFC is needed, we request that the basis be reduced only "to the extent of" the built-in loss.

Another approach to mitigate double taxation in this scenario is to recognize section 961 basis for a lower tier CFC that becomes a first tier CFC in a non-recognition inbound transaction to the extent that the US shareholder has a section 959 PTEP account with respect to prior section 951 inclusions of such CFC. In other words, to tie post-inbounding section 961 tax basis to the amount of the section 959 PTEP account and corresponding section 961(a) or section 961(b) basis that is attributable to the CFC's prior section 951 inclusions. If taxpayers do not receive this treatment, future distribution of section 959 PTEP without corresponding basis could lead to capital gains and, therefore, double inclusion for the same income.

*De minimis rules for stock ownership*

We request that Treasury consider expanding the de minimis ownership threshold included in the Notice 2024-16. Under the notice, a transaction is still a covered inbound transaction if, immediately before the transaction, the CFC has multiple shareholders and the minority shareholder(s) hold an aggregate of shares equal to 1% or less of the fair market value of the acquired CFC. As an alternative, we propose that the de minimis threshold be raised to 5% in the aggregate to be consistent with the usage of de minimis elsewhere in the Code regarding disregarded ownership (e.g., Treas. Reg. § 1.7874-7(c)).

*961(c) basis in inbound section 355 transactions*

The Notice only addresses section 368 and section 332 inbound transactions. However, uncertainty regarding section 961(c) basis can also be relevant in an inbound transaction where a CFC distributes the shares of a lower-tier CFC to its US shareholder in a tax-free section 355 distribution. If the shares of the lower tier CFC have section 961(c) basis, such basis should be preserved after a section 355 distribution where it becomes a first tier CFC. There is no policy reason to eliminate section 961(c) basis in such a transaction, as it can result in double taxation upon a future distribution by the CFC or sale of the CFC by the acquiring US shareholder.

One methodology would be to reduce the section 961 basis in the shares of distributing CFC to the extent of the section 961(c) basis in the shares of distributed CFC and allow that section 961(c) basis to remain with the shares of distributed CFC post transaction. This would prevent double taxation for future distributions (or sales) of the distributed CFC and at the same time, eliminate the double benefit that would arise from the section 961 basis that was created in the shares of distributing CFC from prior section 951 inclusions attributable to income of the distributed CFC.

*Unrelated party transactions*

The Notice does not apply to situations where the acquired CFC stock is transferred to a partnership or foreign corporation. The Notice does not differentiate related versus unrelated acquisitions within two years of the transaction. It is unclear where the potential abuse lies with an unrelated party acquisition and why the two-year per-se rule is needed. We request that Treasury revisit the per se rule for unrelated party transactions.

**Conclusion**

Thank you for the opportunity to comment on the Notice, and we look forward to reviewing the forthcoming PTEP guidance. We are happy to provide additional information or answer any questions on the comments provided.

Sincerely,

Anne N Gordon

Anne Gordon
Vice President, International Tax Policy