May 30, 2025

Internal Revenue Service
CC:PA:01:PR (Notice 2025-19)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: NFTC Recommendations for Items to Be Considered for the Deregulatory Initiative under E.O. 14219 and the 2025-2026 Priority Guidance Plan

The National Foreign Trade Council (the "NFTC") is writing in response to the Department of the Treasury's ("Treasury") and the Internal Revenue Service's ("IRS") invitation in Notice 2025-19 ("the Notice"), published April 4, 2025, to submit recommendations for items to be included as part of the Administration's Deregulatory Initiative under Executive Order 14219 and the Notice 2025-19 requesting input for the 2025-2026 Priority Guidance Plan (the "PGP"). 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.

General Comments

The NFTC appreciates the IRS and Treasury for inviting public recommendations on the PGP, including input on the deregulation initiative. We respectfully submit recommendations for the removal of regulations, proposed regulations, and other guidance, in whole or in part, for Treasury's consideration. We also request the promulgation of guidance consistent with the statute.

Regulations, Proposed Regulations, and Tax Guidance for Reconsideration

1. *Foreign Tax Credit Regulations* (T.D. 9959) (NFTC Comments) and Related Guidance
   NFTC's January 2023 comments on REG-112096-22, September 2023 comments on Notice 2023-55

The NFTC recommends that the final Foreign Tax Credit ("FTC") Regulations, which were issued in 2022, but which have been largely deferred pursuant to Notice 2023-55 and Notice 2023-80, be withdrawn as they are not consistent with the best reading of the underlying statutory authority, depart from longstanding interpretations, and would increase the risk of double taxation, which harms the competitiveness of American companies abroad and threatens jobs in the United States. The regulations would narrow the definition of creditable "foreign income tax", thereby denying FTCs for foreign taxes that were clearly creditable under prior law and the best reading of the statute. For example, the Regulations contain unnecessarily strict cost recovery rules that limit FTC eligibility to taxes that closely match U.S. income taxes, which creates a mismatch between U.S. and foreign tax systems and increases the risk of double taxation. Similarly, the Regulations' narrow definition of "foreign income tax" causes unintended denials of FTC claims that should be eligible, such as digital services taxes and alternative minimum taxes; this rigidity causes undue compliance burden and uncertainty for multinational corporations. The Regulations also include the jurisdictional nexus requirement, which disregards established principles of international taxation in a way that makes it harder for U.S. companies to claim credits on legitimate foreign tax burden. And lastly, the regulations require allocating and apportioning foreign income taxes with respect to certain disregarded transactions such as remittances based on an asset-based methodology that can be materially distortive.

These Regulations directly threaten U.S. centralized service jobs, like headquarter jobs such as IT, human resources, legal, and actuarial service jobs, by no longer considering withholding taxes applied to payments for these services by foreign affiliates as eligible for an FTC. This creates an incremental tax on U.S. services, which could encourage the adoption of a number of alternative models to the U.S. central service or headquarter model, such as creating offshore service hubs or outsourcing service roles. A similar negative incentive and noncreditable withholding tax is created for the reimbursement of U.S.-based engineering services by foreign projects or affiliates for their projects.

In sum, these Regulations represent a significant change in interpretation, with no change in statute, that stood for decades and should be repealed.

2. *Rules Regarding Certain Disregarded Payments and Dual Consolidated Losses* (REG-105128-23 and T.D. 10026) (NFTC Comments)

NFTC recommends the removal of the proposed Dual Consolidated Loss ("DCL") Regulations and final Disregarded Payment Loss ("DPL") Regulations, as they fail to consider many of the concerns raised by the business community. This includes concerns raised in NFTC's comment letter on the Proposed Regulations, as well as prior NFTC comments on the treatment of dual consolidated losses ("DCL") rules and Pillar Two of the Inclusive Framework, and should be reconsidered wholesale. The final DPL regulations were published on January 14, 2025. These final regulations run counter to the Administrative Procedures Act ("APA") and recent Supreme Court ruling in that they do not align with the best reading of the underlying statutory authority or Congressional intent. In addition to withdrawing the proposed DCL regulations and the DCL rules provided in Notice 2023-80, Treasury and the IRS should issue guidance clarifying that Pillar Two taxes do not trigger "foreign use" under the U.S. DCL rules. This guidance would provide much-needed certainty for taxpayers and would align with the current Administration's position that the U.S. tax system should coexist with Pillar Two, and that U.S. companies should not be adversely affected or treated unfavorably as a result of Pillar Two implementation by foreign jurisdictions.

Additionally, the final DPL regulations should be withdrawn as they apply the DCL rules in a manner that is not consistent with the underlying statutory authority or Congressional intent. Specifically, the final DPL regulations apply to cases where there is no net operating loss of a domestic entity or separate business unit that can be used to offset foreign tax. We reiterate our concern that the statutory provisions cited by Treasury and the IRS (Sections 245A(e), 267A, and 1503(d)) provide no specific authorization for the DPL rules. As stated in our comment letter, "There simply is no grant of authority under the DCL framework or anywhere else in the Code for creating a U.S. income inclusion solely because a foreign jurisdiction allows a deduction under its own law with respect to a payment that is disregarded for U.S. tax purposes." Through these rules, Treasury and the IRS are attempting to modify the entity classification regulations under Section 7701 to force taxpayers to consent to new extra-statutory rules that turn off the entity classification election for specific transactions for the purpose of addressing perceived policy issues on which Congress has not legislated.

Beyond just the extra-statutory nature of these Regulations, it is not clear that the final DPL regulations further U.S. revenue or other tax policy interests, and we urge Treasury and the IRS to weigh U.S. revenue considerations in determining whether to regulate in an area that has not been addressed by Congress.

While the proposed DCL regulations and the final DPL regulations should be rescinded, we appreciate Treasury's inclusion of transitional relief in the preamble of the final DPL regulations with regard to the GloBE Model Rules and request that Treasury maintain that provision as the Inclusive Framework negotiations progress.

3. *Previously Taxed Earnings and Profits ("PTEP") and Related Basis Adjustments* (REG-105479-18) (NFTC Comments)

The NFTC appreciates the reopening of the comment period for the proposed PTEP regulations, and will consider providing additional technical comments in the notice and comment period.

As currently drafted, the PTEP regulations require unwarranted segregation of PTEP into multiple accounts based on tax year, income class, and tax rate, which places an excessive administrative burden on multinational enterprises. The regulations contain other problematic provisions including share-by-share approach to basis adjustments under Section 961(b) and a stringent ordering rules for PTEP distributions, which can discourage foreign earnings repatriation. In addition to Section 961(b), regulations under Section 965(g) at Treas. Reg. § 1.965-5 improperly attribute foreign taxes to Section 965 PTEP beyond what was contemplated by Congress, and the result is a disallowance of creditable foreign tax expenses beyond what is supported by the statutory text. However, the regulations do provide helpful guidance, consistent with Advice Memorandum (AM 2023-22), on the timing of CFC stock basis adjustments and PTEP for mid-year distributions.

Additionally, the Proposed Regulations' approach to section 961(c) differs from many taxpayers' interpretations. While section 961(c) has been seen as a U.S. shareholder attribute, the Regulations treat it as a CFC attribute. This change impacts how distributions of PTEP are handled between CFCs, affecting section 961(b)(2) gains.

4. *Corporate Alternative Minimum Tax Applicable* (REG-112129-23) (NFTC Comments)

The proposed CAMT regulations are extremely problematic, and NFTC urges their withdrawal. Despite this, we recommend maintaining guidance provided in Notices 2023-7, 2023-20, 2023-42, 2023-64, and 2024-10. Should CAMT not be repealed, NFTC has additional input on clarity needed for new CAMT regulations.

Among NFTC's primary concerns with the proposed regulations is the wholesale importation of regular tax restrictions and limitations on the foreign tax credit into the CAMT. In particular, the application of the limitations in sections 245A(d), 901(m), 907, and 909 are not consistent with the text or purpose of the CAMT.

We also recommend that the IRS and Treasury reconsider the application of Section 482 principles to create adjusted financial statement income ("AFSI"), rather than reallocate AFSI, in a manner that seems inconsistent with the purpose of the CAMT.

Additionally, the calculation of AFSI and related reporting for foreign-parented groups should be simplified to avoid undue burden on taxpayers while still providing the IRS information needed to administer the CAMT. NFTC has numerous other concerns related to the rules for partnerships, corporate reorganizations, adjustments to AFSI, and CAMT attributes.

5. *Excise Tax on Repurchase of Corporate Stock* (REG-115710-22) and TD 10002 (NFTC Comments)

The proposed Stock Buyback Excise Tax regulations contain numerous provisions that warrant reconsideration and ideally withdrawal, but NFTC's concerns specifically address the issues with an international tax nexus.

Our primary concern with the proposed regulations is with the so-called Funding Rule, which is inconsistent with the best reading of the underlying statutory authority and Congressional intent. Instead of aligning with the language and intent of Section 4501 to limit the application of the Excise Tax to actual purchases of foreign parent stock by a U.S. subsidiary, the Funding Rule reaches well beyond that intent to apply the excise tax in situations where the U.S. subsidiary does not acquire stock, including in routine, non-abusive transactions. In addition, the proposed regulations require shareholder certification of dividend treatment in order to use the dividend exemption under the excise tax. This requirement is excessively burdensome for multinational entities and, as a practical matter, will find it extremely difficult, if not impossible, to obtain certification from a foreign shareholder who does not file U.S. tax returns and otherwise has no U.S. tax nexus.

NFTC recommends withdrawal of the proposed regulations.

6. *Taxable Income or Loss and Currency Gain or Loss With Respect to a Qualified Business Unit (T.D. 10016); Section 987 Regulations - Accounting for Disregarded Transactions Between a Qualified Business Unit and Its Owner* (REG-117213-24) (NFTC Comments) and *Income and Currency Gain or Loss With Respect to a Qualified Business Unit; Correction* (REG-132422-17) (NFTC Comments)

The Final Regulations under section 987, issued in December 2024, are overly complex and require an inflexible, multi-step calculation process applying businesses to track historical exchange rates, currency pools, and layering rules. The convoluted rules place great compliance costs on multinational groups with several QBUs in more than one jurisdiction as well as a risk of double taxation. We are particularly concerned about the imposition of the FEEP method, and would recommend that the prior Earnings and Capital method be reinstated. However, Treasury should permit taxpayers that currently use the FEEP method under the final 2024 regulations to continue to use it as a reasonable method. Separately, NFTC reiterates our prior comments on the proposed 987 regulations. NFTC recommends the suspension of the application of the Section 987 Final Regulations.

7. *Guidance Regarding Elections Relating to Foreign Currency Gains and Losses* (REG-111629-23) (NFTC Comments)

The proposed section 988 regulations add unnecessary complications for many taxpayers by requiring alignment with Section 475 for the timing of making the Section 988 election. Aligning Section 988 elections with Section 475 is not always appropriate, and automatic consent should be permitted for revocations of these elections. NFTC recommends revisiting and reinstating the 2017 proposed regulations (REG-119514-15).

8. *The Treatment of Certain Interests in Corporations as Stock or Indebtedness* (Sec. 385) (TD 9897) (NFTC Comments)

The TCJA's introduction of the BEAT regime, the Section 163(j) limitation on interest deduction, and the reduction in corporate tax rate has greatly obviated the need for Treas. Reg. § 1.385-3. Therefore, Treas. Reg. § 1.385-3 should be removed, given that the marginal benefits are now vastly outweighed by the compliance and administrative burdens. Alternatively, if the Treasury and the IRS are determined to keep Treas. Reg. § 1.385-3, the regulations should be significantly simplified, as outlined below.

Treas. Reg. § 1.385-3 should be revisited to provide more meaningful and administrable exceptions to accommodate companies' ordinary business transactions and cash management needs relating to their U.S. operations. The existing rules impose unwarranted complexity that causes significant compliance costs for any company with a meaningful U.S. presence, thereby running contrary to the policy goal of facilitating the flow of capital into the U.S. and encouraging companies to grow operations in the U.S.

The per se rule and the successor rule can be very costly and impractical to monitor on a regular basis for companies with a complex group structure and intra-group cash management needs. The regulations should remove the per se rule and the successor rule, or limit them to circumstances where there is a principal purpose of tax avoidance.

The regulations should expand the availability of the qualified short-term debt instrument exception: for example, the current requirements for qualifying as a short-term funding arrangement impose rigid limits with respect to an issuer's debt-to-asset ratio and monitor lender-specific indebtedness. These mechanical requirements significantly add to the compliance costs and prevent companies from pursuing the most efficient cash management strategies.

To reduce monitoring costs, the scope of debt instruments relevant for Section 385 purposes should be limited by, for example, (i) specifically providing that outstanding indebtedness is only tested annually at the end of a taxable year; (ii) disregarding for all Section 385 purposes any debt instrument that is outstanding for less than a year, including any overdraft on any existing credit facility that is outstanding for less than a year; and/or (iii) allowing a U.S. consolidated group to net the borrowings and lendings of its members.

The computation of expanded group earnings should tie more closely to the computation of E&P for general tax purposes to reduce the costs resulting from companies having to maintain a separate set of records and run a separate set of calculations solely to monitor Section 385 compliance. Alternatively, if the Treasury and the IRS see a need to keep the Section 385-specific calculation rules, they should be simplified by, for example, (i) disregarding any distributions or acquisitions that do not exceed a certain de minimis threshold and/or (ii) removing the per se rule and successor rule as described above.

The regulations should be revised to clearly exclude distributions or acquisitions (rather than just debt issuances) made by foreign companies from the scope of Section 385, as consistent with the intent of the final regulations elaborated in regulatory history.

9. *Acquisition of Parent Stock for Property in Triangular Reorganizations* (T.D. 9526, amended by T.D. 10004)

In 1976, Congress authorized regulations in section 367(b) that override the application of enumerated Code provisions involving nonrecognition exchanges (*e.g.*, sections 332, 351). This authority has otherwise been used to deem taxable distributions of earnings and profits in connection with either actual repatriations to the U.S. shareholder or breaks in the U.S. shareholder's section 1248 relationship, in each case as part of a controlled foreign corporation's CFC's nonrecognition exchange.

The regulations issued in 2011 treat a subsidiary's purchase of parent stock in connection with a triangular reorganization as a taxable distribution from the subsidiary to the parent under certain circumstances. They exceed the statutory authority in section 367(b) because they override a Code provision – section 1032 – that is not listed in the statute and, moreover, create taxable income to the parent when there has been no repatriation of earnings and profits to the U.S.

shareholder and no break in a section 1248 relationship between the U.S. shareholder and the CFC.

After Treasury and IRS issued Notice 2016-73, and certainly after offshore earnings were taxed under section 965, taxpayers no longer used a subsidiary to purchase parent stock in triangular reorganizations to effect a tax-efficient repatriation of cash.

Nevertheless, in July 2024, Treasury and IRS amended the 2011 regulations in final regulations, purportedly to implement the regulatory changes announced in Notice 2016-73 and Notice 2014-32. The amendments go beyond those announcements and make certain changes that are impermissibly retroactive. And, regardless, these regulations were unnecessary once the TCJA was enacted.

Both the 2011 regulations and the 2024 amendments should be withdrawn.

10. *Treas. Reg. § 1.482-7(i)(6) - The "Periodic Adjustment Rule"*

Treasury should rescind Treas. Reg. § 1.482-7(i)(6) (the "periodic adjustment rule") because it conflicts with section 482. The regulation harms the national interest by creating irrational disputes about well-established statutory and economic principles and thus wastes taxpayer and government resources. Taxpayers and the IRS regularly resolve disputes regarding the upfront valuation of contributions to cost sharing arrangements ("CSAs"). The periodic adjustment rule purports to authorize the IRS to increase the amount payable for contributions to CSAs, even if taxpayers and the IRS previously agreed on the upfront value. In 2005, commentators informed Treasury that its proposed regulation conflicted with the statute and fundamental arms-length economic principles, but Treasury disregarded the comments.

Under the periodic adjustment rule, if actual results are greater than forecasted, the IRS can make a periodic adjustment that denies all economic profit (*i.e.*, all profit in excess of the cost of capital) to the investors who pay for use of the intangibles contributed to the CSA, which is economically irrational. No investor would agree to invest in a risky joint venture based on a set of expected outcomes when an outside party (the IRS) can subsequently increase the price paid by the investor to eliminate all the potential profit the investor anticipated, even profit earned in tax years that are closed under the statute of limitations. The IRS asserts that it may use later-in-time developments to upend arm's-length, ex ante pricing, even pricing to which the IRS previously agreed. *See* IRS Chief Counsel Memorandum ("CCM") AM2025-001. By requiring valuations that are based on the best available probability-weighted projections at the time of IP transfer and then subsequently eliminating all upside profit potential, the periodic adjustment rule imposes "heads I win, tails you lose" outcomes.

Section 482 permits the Secretary to make an allocation when "necessary in order to prevent evasion of taxes or clearly to reflect the income" of related parties (the "Arm's-Length Requirement"), and it requires, in the case of a transfer (or license) of an intangible, that income with respect to such transfer "be commensurate with the income attributable to the intangible" ("CWI Requirement"). The periodic adjustment rule is inconsistent with this language for at least two reasons: (i) the elimination of the positive outcomes for the investor violates the Arm's Length Requirement—no arm's length investor would choose to make the upfront investment; and (ii) the periodic adjustment rule violates the CWI Requirement because the regulation provides for a one-size-fits-all adjustment amount that, instead of being tied to the amount "attributable to" each originally transferred intangible, eliminates all economic profit. This approach contradicts the fact-specific approach the statute requires (i.e., evaluating the income from the specific intangible(s)). Treasury could have, but did not, write a rule consistent with section 482 that respected the contributions of the foreign cost-sharing participant, and was consistent with upfront valuations.

11. *Source of Income from Cloud Transactions Proposed Regulations* (REG-107420-24) (NFTC Comments)

As described in NFTC's comment letter, the Proposed Regulations on Cloud Computing add significant complexity and should be withdrawn and subsequently revisited. Among the primary issues with the Proposed Regulations is the assumption that taxpayers have the ability to gather and possess the granular, detailed information necessitated by the personnel factor about how each and every worker spends their time. As outlined in more detail by our comment letter, this is simply not feasible. The Proposed Regulations also lack consideration of collateral effects, such as the effect on decisions regarding the place of performance for Subpart F income, the computation of U.S. source income in controlled foreign corporations, and the global distribution of digital products through the potential extendability of U.S. extraterritorial withholding tax impacts to end-user consumers of foreign resellers. Likewise, the Proposed Regulations fail to address the question of how to apportion costs included in the tax bases of sourcing income that may be applicable to "cloud" and "non-cloud" transactions alike. This lack of clarity is problematic.

Additionally, the Proposed Regulations inappropriately provide that the location where intangible property is developed may influence the sourcing of income derived from cloud services utilizing those intangibles. This runs counter to the long-standing tax norm that service sourcing has been determined by where the service is performed or provided, not where R&D and design work were performed. The tangible property factor also fails to adequately consider data hosting costs in the sourcing rules and creates the potential for disparities by suggesting that all payments made for third-party data hosting should be excluded from the formula, as they seem irrelevant to the determination of source income. It is extremely troubling that the Proposed Regulations fail to align with the global position that resellers do not obtain IP rights and, therefore, do not pay royalties. This is a significant issue, as non-U.S. jurisdictions may seek to use these rules to increase locally taxable income of resellers or assert withholding tax on their transactions.

NFTC recommends these regulations be withdrawn and subsequently revisited.

12. *Foreign Tax Credit Redeterminations* (partial withdrawal of T.D. 9922)

NFTC appreciates the IRS's engagement with stakeholders to explore alternatives for addressing the considerable administrative and compliance challenges associated with foreign tax redeterminations (FTRs), which impose a heavy burden on both taxpayers and the IRS. The final regulations in § 1.905-4 (Notification of foreign tax redetermination) impose significant compliance hurdles for taxpayers, including:

1. The need to file amended returns for the year the FTR occurred—a resource-intensive and recurring task that many companies lack the staff or budget to handle, especially when older-year returns must be submitted on paper due to e-filing limitations.
2. Extensive additional disclosures required in the current year's tax return.
3. A strict 120-day deadline for notifying IRS exam teams of foreign tax changes that increase U.S. tax for years currently under audit.
4. The obligation to revise Form 5471 filings, which can trigger cascading changes across a taxpayer's entire CFC structure due to updates in earnings, tested income, and allocation percentages.
5. Secondary consequences for financial reporting and state/local filings that stem from amending a federal return.

The above requirements also create a significant administrative load for the IRS itself. A more streamlined approach to reporting FTRs would provide meaningful relief for all parties involved. For this reason, NFTC recommends replacing the complex requirements in § 1.905-4 with a more streamlined and simpler approach for both the IRS and the taxpayer..

13. *Guidance Regarding Certain Matters Relating to Nonrecognition of Gain or Loss in Corporate Separations, Incorporations, and Reorganizations* (REG-112261-24)

These rules issued in the final days of the prior adminsitration require taxpayers to prepare and disclose to the IRS a single "plan of reorganization" document that lists out the individual steps for a reorganization and states a specific business purpose for each step with an explanation of the intended tax treatment, among other things. While the Proposed Regulations state that failure to comply with the rules does not "on its own" prevent qualification of a reorganization, the Proposed Regulations go beyond what is statutorily allowed and would give the Commissioner authority to rewrite or substitute its own plan of reorganization in order to determine compliance with existing regulatory requirements in Treas. Reg. § 1.368-1. These Proposed Regulations are overly burdensome regulations that go beyond the scope of the statute. Additionally, the IRS already receives adequate information on reorganizations from required disclosures under Treas. Reg. § 1.368-3.

Thus, the NFTC requests Treasury fully retract Prop. Reg. § 1.368-4.

14. Limitation on Deductions for Dividends Received from Certain Foreign Corporations and Amounts Eligible for Section 954 Look-Through Exception (T.D. 9909 and T.D. 9865).

NFTC recommends removal of Treas. Reg. § 1.245A-5(c) and, to the extent necessary, Temp. Treas. Reg. § 1.245A-5T(c) (together, the "Extraordinary Disposition Regulations") as unlawful regulations that depart from the "best reading of the underlying statutory authority[.]" The Extraordinary Disposition Regulations impermissibly seek to supersede unambiguous effective dates provided by Congress in the 2017 Tax Cuts and Jobs Act. Under rules addressing earnings arising from "extraordinary dispositions" during a specified transition period, the regulations purport (i) to deny 50 percent of the section 245A dividends received deduction and (ii) deny application of 50 percent of the look-thru exception to subpart F. The stated purpose of the regulations is to reach a result comparable to an earlier effective date for section 951A rather than the date expressly provided by Congress.[1] The preamble to the regulations acknowledges that "a literal application of section 245A" would allow the full section 245A deduction for earnings arising during this transition period.[2] Where Congress has clearly and unambiguously defined the effective date for legislation, the implementing agency has no authority to ignore the "literal application" of that statutory command.

The defect in the Extraordinary Disposition Regulations closely tracks the defect in comparable regulations issued under section 78, which the Tax Court recently ruled were substantively invalid. Varian Med. Sys. v. Commissioner, 163 T.C. No. 4 (Aug. 26. 2024). In Varian, the Tax Court unanimously held that the plain language of effective date provisions entitled a fiscal year taxpayer to a section 245A DRD for section 78 dividends the taxpayer was deemed to receive during a similar transition period. Because Treas. Reg. § 1.78-1 "impermissibly attempts to change an unambiguous provision of the statute," it "falls outside the boundaries of any authority that Congress may have delegated" to Treasury. The Extraordinary Disposition Regulations suffer the same flaws, and the NFTC recommends their removal.

15. *Recapture of Overall Foreign Losses ("OFL") Regulations* (2012 Final Regulations T.D. 9595)

Current Treas. Reg. § 1.904(f)-2(c)(1) is not consistent with the best reading of the underlying statute (Section 904(f)(1)) and should therefore be withdrawn. To provide taxpayers clarity as to the application of Section 904(f)(1), prior Treas. Reg. § 1.904(f)-2(c)(1) (as finalized in T.D. 8153 (1987)) should be reinstated (but with the reference to now-repealed Section 936 deleted). Example 4 of current Treas. Reg. § 1.904(f)-2(c)(5) should also be revised to conform with the statute and subparagraph -2(c)(1) as so revised.

[1] Former Temp. Treas. Reg. §§ 1.245A-5T(c), (d); see also T.D. 9865, 84 Fed. Reg. at 28,404 ("[T]he 50 percent reduction of the section 245A deduction approximates the reduced tax rate by reason of the deduction provided under section 250(a)(1)(B) with respect to section 951A inclusions or section 965(c) with respect to the transition tax.").

[2] T.D. 9865, 84 Fed. Reg. at 28,400.

As currently drafted, Treas. Reg. § 1.904(f)-2(c)(1) requires OFL recapture in an amount equal to the aggregate of, with respect to each separate category of income, the lesser of the taxpayer's overall foreign loss account in that separate category or the amount of foreign source taxable income in that separate category for the taxable year, capped at an aggregate amount of fifty percent of the taxpayer's total foreign source taxable income (subject to the taxpayer's election to recapture a greater amount). Thus, the 50% limitation of section 904(f)(1)(B) is, under the current regulations, applied on the basis of the taxpayer's aggregate foreign source taxable income, rather than on the basis of the taxpayer's foreign source taxable income in the separate category to which the OFL recapture account relates.

This interpretation is not consistent with the best reading of the statute, because it inappropriately assigns two different meanings to the same phrase repeated in a single sentence in section 904(f)(1). Specifically, it interprets the phrase "of the taxpayer's taxable income from sources without the United States" in the flush language of Section 904(f)(1) to refer to foreign source taxable income in the relevant separate category (as it must, taking into account section 904(d) and the overall framework of the statute) but interprets the exact same phrase used in clause (B) of the same sentence to encompass all of the taxpayer's foreign source taxable income in all separate categories. This is not the best (or even a reasonable) reading of the statutory language, as is evidenced by the fact that the original version of the same regulation section that was finalized in T.D. 8153 in 1987 adopted a rule that interpreted the repeated language consistently, referring in each case to the taxpayer's foreign source taxable income in the relevant separate category. Notably, the only explanation offered for the reversal in position was that the change was made to reflect a statement in the Conference Report with respect to the Tax Reform Act of 1986. However, that legislation did not modify Section 904(f)(1) (which was enacted in 1976), and it is well established that such after-the-fact legislative history has no bearing on the interpretation of a statute. In order to conform to the best reading of the statute, the fifty percent calculation in Treas. Reg. § 1.904(f)-2(c)(1) should be reverted to the prior language, referencing "fifty percent of the taxpayer's foreign source taxable income of the same limitation as the loss that resulted in the overall foreign loss account".

Reverting Treas. Reg. § 1.904(f)-2(c)(1) to the prior version will reduce controversy by eliminating the need for taxpayers to challenge the application of the current invalid regulation and will thereby lessen the burden on taxpayers and the IRS. Moreover, such reversion to once again conform the regulations to the best reading of the statute will promote sound tax administration. The recommended guidance, which was previously included in final regulations, has already been drafted in a manner that enabled taxpayers to easily understand and apply the guidance and can be administered by the IRS on a uniform basis.

The introduction of Section 951A (GILTI) in 2017 materially increased the amount of foreign source income in a separate category outside the general limitation separate category, and therefore the significance of the fifty percent limitation in Section 904(f)(1), for many taxpayers with historical general limitation OFLs. Generally, for these companies, GILTI inclusions significantly exceed other foreign source income. In such a case, the approach of the current regulations that apply the fifty percent limitation based on total foreign source taxable income, including GILTI inclusions, results in the taxpayer's foreign source income in the OFL category being subject to full OFL recapture up to the amount of the OFL. In addition to being contrary to the statute, this result disadvantages companies with historical OFL accounts. Further, it discourages domestic investment and activities that would lead to the generation of future foreign source taxable income in the US (income generated through development and ownership of IP in the US, as an example), as the recapture result disallows any foreign tax credit in the basket to which the OFL is recaptured, resulting in double taxation.

NFTC recommends the withdrawal of the OFL regulations.

16. *Regulations Related to the Narrowing of Scope of "any computer software" at Treas. Reg. § 1.199* (Treas. Reg. § 1.199-3(i)(6)(ii), Treas. Reg. § 1.199-3(i)(6)(iii), and Treas. Reg. § 1.199-3(i)(6)(v))

Section 199 was repealed; however, the regulations under that provision inappropriately narrowed the scope of "any computer software" to exclude software that should have been eligible for the domestic production incentive. As Congress and the Administration contemplate new domestic production incentives, the existence of these prior regulations threatens to inappropriately restrict eligibility for future incentives. Specifically, Treas. Reg. § 1.199-3(i)(6)(ii) treats all online software as a service, which disqualifies it from eligibility. Further, Treas. Reg. § 1.199-3(i)(6)(iii) provides exceptions for online software that meets certain criteria, which allows the treatment of gross receipts from that online software as being derived from the lease, rental, license, sale, exchange, or other disposition of computer software. If the software fails to meet the criteria, it is not qualified under Section 199. Treas. Reg. § 1.199-3(i)(6)(v) outlines examples of the application of Treas. Reg. § 1.199-3(i)(6).

Taken together, these regulations create an overly restrictive scope in defining "any computer software." NFTC requests the withdrawal of these regulations.

17. *IRS Memorandum AM 2023-008*

This memorandum purports to allow the service to consider so-called "implicit support" in the pricing of certain intercompany finance transactions under section 482. The conclusion of the GLAM is a rulemaking, relied upon as such by the IRS during audits, and is not appropriately issued without notice and comment. Furthermore, the conclusion reached in the GLAM is inconsistent with the text of section 482 and longstanding regulations governing the pricing of intercompany loans, which focus on the credit standing of the borrower and not the group as a whole, making the conclusion of the GLAM very difficult for taxpayers to incorporate into their attempts to properly price intercompany finance arrangements. NFTC requests withdrawal of this memorandum.

18. *IRS Memorandum* 202436010

This memorandum purports to deny the 245A dividend received deduction in the case of dividends received by a CFC. Furthermore, the conclusion reached is not supported by statutory text (*see e.g.*, Sec. 964(e)) or the legislative history (*see* Conference Report footnote 1486).[3] The conclusion of the memo is a de facto rulemaking, relied upon as such by the IRS during audits. However, this was issued as a Chief Counsel memo, and thus was not subject to notice and comment. NFTC requests the withdrawal of this memorandum.

19. *IRS Memorandum CCA 202501008*

This memorandum also purports to deny the 245A dividend received deduction in the case of dividends received by a CFC. Furthermore, the conclusion reached is not supported by statutory text (*see e.g.*, Sec. 964(e)) or the legislative history (see Conference Report footnote 1486).[4] The conclusion of the memo is a de facto rulemaking, relied upon as such by the IRS during audits. However, this was issued as a Chief Counsel memo, and thus was not subject to notice and comment. NFTC requests the withdrawal of this memorandum.

20. *901(m) Regulations - Covered Asset Acquisitions* (TD 9895)

The section 901(m) regulations were universally panned as too complex and administratively burdensome, in particular after the TCJA (which dramatically reduced the impact of “credit hyping” that section 901(m) was intended to prevent).

Treas. Reg. § 1.901(m)-2(b) provides an enumerated list of five covered asset acquisitions (i.e., transactions that are subject to section 901(m)), and then includes a catch-all provision:

> Any transaction (or series of transactions occurring pursuant to a plan) to the extent it is treated as an acquisition of assets for both U.S. income tax and. Foreign income tax, provided the transaction results in an increase in the U.S. basis without a corresponding increase in the foreign basis of one or more assets.

After proposed regulations were released, comments criticized this rule as overbroad and recommended either (1) replacing it with one or more specified transactions; or (2) eliminating it and adding an anti-abuse rule. Treasury rejected this comment. Nonetheless, the rule is overbroad and creates unnecessary administrative burden to both determine whether it should apply and then to track differences if it does.

The provisions of section 901(m) apply to a covered asset acquisition regardless of whether a US person includes gain in income. Comments requested a broad exception when gain was included by a US person (especially after TCJA and the enactment of the GILTI regime). Treasury mostly rejected the comment, other than a limited exception when assets were transferred from one member of a consolidated group to another. NFTC requests that a broader exception be added.

Additionally, the regulations created an “aggregate basis difference carryover” regime. Comments requested that it be eliminated due to the increased compliance costs and other

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[3] H.R. Rep. No. 115-466, at 598-99 (2017).
[4] H.R. Rep. No. 115-466, at 598-99 (2017).

administrative burden created from tracking these amounts. Treasury rejected this comment because, in its view, the rule was necessary to prevent the avoidance of the purpose of section 901(m), particularly in the case of timing differences.

In light of the TCJA and the reduced impact of "credit hyping," the balance of equities favors eliminating this administratively burdensome rule.

21. *§ 1.78-1 Regulations*

The effective date for the dividends received deduction ("DRD") under Section 245A provides that *distributions* made after December 31, 2017, are eligible for the DRD. Whereas the TCJA amendments to Section 78 provide that the Section 78 gross up will not be treated as a dividend for purposes of Section 245A, it applies to *tax years beginning after December 31, 2017*. The statute is unambiguous as to these effective dates; however, Treas. Reg. Sections §§ 1.78-1(a) and (c) provide that amounts treated as dividends under Section 78 that relate to taxable years of foreign corporations that *begin before January 1, 2018*, are not treated as dividends for purposes of Section 245A. This regulation is in direct contradiction with the unambiguous statute and should be withdrawn.

Requests for Guidance:

1. *174(a) - Specified Research or Experimental Expenditures*

Section 174(a) amended in TCJA required capitalization of both foreign and domestic R&D and added the word "specified" before "research or experimental expenditures" ("SRE Expenditures").

For foreign R&D, Notices 2023-63 and 2024-12 were intended to address "multiple capitalization" of the same economic expense (*e.g.*, double capitalization when a CFC provides contract research to another CFC, which owns the rights to the SRE Products). However, the notices did so by defining SRE Expenditures to include a new "rights or risks" requirement, which would have knock-on consequences to other provisions in the Code that incorporate the longstanding definition of "research or experimental expenditures" by reference to section 174.

Request:
We urge Treasury to confirm that the definition of SRE Expenditures (as provided in Notices 2023-63 and 2024-12) applies only for purposes of the capitalization rules under section 174(a) and that the long-standing definition of "research or experimental expenditures" continues to apply for all other purposes.

In addition, we encourage Treasury to clarify that any "research or experimental expenditures" that are not required to be capitalized by section 174(a) continue to be eligible for 10-year elective amortization.