Legislative Developments

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Subpart F: A Changing Legislative Landscape

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Introduction

The Staff of the Joint Committee on Taxation recently estimated that the tax expenditure for fiscal years 2008 to 2012 associated with the deferral of U.S. tax on earnings of foreign corporate subsidiaries is almost $63 billion.[1] Perhaps in light of this revenue cost, a number of lawmakers have proposed additional limitations on deferral to fund other legislative priorities or to address perceived "loopholes" associated with the current subpart F rules.[2] Furthermore, President Obama's budget "blueprint" included an international tax reform line item that includes reforming deferral, without providing any further detail.[3] Given this budgetary and political environment, it seems likely that subpart F will be "in play" in the 111th Congress. The purpose of this article is to provide some context so that any discussion or debate of subpart F proposals has the benefit of recent legislative history.

Subpart F—Enactment and General Changes from 1962 to 1996

Initial Enactment

The policies underlying the enactment of subpart F, as well as the significant subsequent legislative modifications since its enactment, are well chronicled.[4]

President Kennedy proposed an elimination of deferral from U.S. tax of income earned by U.S. controlled foreign corporations (CFCs) in developed countries to address international balance of payment issues, and an elimination of deferral for CFCs in all countries for activities conducted through "tax haven methods of operation."[5] This proposal elicited substantial criticism, principally on the grounds that such a regime would put U.S.-based multinationals at a competitive disadvantage *vis-à-vis* local competitors or foreign-based multinationals.

The legislation enacted in 1962 was substantially narrower than President Kennedy's proposal, imposing current U.S. tax on U.S. shareholders of CFCs on enumerated categories of income that were thought to involve tax haven arrangements, including income from the insurance of U.S. risks and "foreign base company income" (which included foreign personal holding company income, foreign base company sales income and foreign base company services income). Broad exceptions from foreign base company treatment were provided for CFCs not availed of to reduce taxes, for CFCs where less than 30 percent of their gross income was foreign base company income, for certain investments in less developed countries, for shipping income and for certain export trade income. Exceptions from foreign personal holding company income were provided for business income such as rents or royalties earned from third parties in an active trade or business, and for dividends, interest and certain gains derived in the conduct of a banking or insurance business. Exceptions from foreign personal holding company income also were provided for certain payments between related parties incorporated in the same country. The subpart F rules also imposed U.S. tax on a U.S. shareholder's share of its CFC investment of earnings in certain U.S. property, on the theory that such an investment constituted an effective repatriation of earnings.[6]

Expansion of the Subpart F Regime–1962–1996

The basic framework provided by the rules adopted in 1962 still survives today. However, numerous legislative changes were made to the scope of the rules in the subsequent 40 years. In basic outline, from 1962 until 1996, the scope of the subpart F rules generally was broadened by expanding the definition and scope of subpart F income and by the elimination or narrowing of certain exceptions from subpart F income. New categories of income, such as certain shipping income,[7] certain income related to the insurance of foreign risks,[8] related-party factoring income,[9] certain oil-related income[10] and gains from certain commodities, foreign currency and other transactions,[11] were added to the scope and definition of subpart F income. Further, certain exceptions, such as the banking exception,[12] the exception for investments in less-developed countries[13] and the exception for income earned by CFCs not availed of to reduce taxes, were eliminated or (in the case of the original 30-percent *de minimis* rule)[14] substantially narrowed. U.S. shareholders of CFCs that were also subject to the passive foreign investment company regime, enacted in 1986, were effectively subject to a full inclusion regime notwithstanding the limits in the subpart F rules.[15] Finally, although the scope of the investment in U.S. property rules was narrowed at the margin to exclude enumerated classes of property related to a CFC's business, the ability to make short-term investments was substantially curtailed,[16] and new rules were added that taxed a U.S. shareholder on its share of a CFC's investment of earnings in "excess passive assets."[17]

Subpart F Modifications in the Modern Era—1997–2008

Enactment and Extension of the Active Financing Exception

The Taxpayer Relief Act of 1997 provided a temporary one-year exception from subpart F for certain income that is derived in the active conduct of a banking, financing or similar business, as a securities dealer, or in the conduct of an insurance business (the so-called "active financing exception").[18] The active financing exception was modified substantially in 1998, and then subject to a series of further temporary extensions through tax years beginning before 2010.[19]

The American Jobs Creation Act of 2004

The American Jobs Creation Act of 2004 (the "Jobs Act") made several modifications to the subpart F rules.[20] These modifications included (1) repeal of the foreign base company shipping income rules,[21] (2) expansion of the exception for active aircraft and vessel leasing income,[22] (3) expansion of the exceptions for active commodities income,[23] (4) providing a look-through rule for gain from the sale by a CFC of an interest in a partnership,[24] and (5) certain modifications to the active financing exception.[25]

The modifications enacted by the Jobs Act were marginal in comparison to the more significant subpart F reform proposals contained in the prior House and Senate versions of the Jobs Act but not included in the enacted legislation. These reforms included (1) repeal of the foreign base company sales and services income rules,[26] (2) treatment of the European Union as a single country for purposes of the foreign base company sales and services income rules,[27] (3) the so-called "CFC look-through rule," as described in greater detail below,[28] and (4) a modest liberalization in the *de minimis* rule.[29] It is interesting to note that these proposals appear to have been rejected because of revenue constraints rather than on policy grounds.[30] Thus, these proposals were considered as likely targets for future international tax reform subsequent to the Jobs Act.[31]

The Tax Increase Prevention and Reconciliation Act of 2005

The Tax Increase Prevention and Reconciliation Act of 2005 ("TIPRA") was the first viable legislative vehicle for corporate and international tax provisions subsequent to the Jobs Act.[32] As such, policymakers and practitioners viewed it as an opportunity for enacting a number of significant subpart F reform proposals omitted from the Jobs Act. Once again, however, the ability of Congress to include these proposals was limited by revenue constraints.[33] Nevertheless, TIPRA did include two significant pieces of subpart F legislation, albeit on a temporary basis. First, TIPRA contained a two-year extension of the active financing exception through 2008, continuing a trend discussed above by which the provision has been subject to a number of temporary extensions since 1998.[34] Second, TIPRA contained the enactment (on a temporary three-year basis) of the CFC look-through rule as Code Sec. 954(c)(6).[35]

The CFC look-through rule generally allows U.S.-based multinational corporations to redeploy their active foreign earnings among CFCs without generating subpart F inclusions.[36] Specifically, the rule provides that dividends, interest, rents and royalties received by one CFC from a related CFC are not foreign personal holding company income to the extent attributable or properly allocable to non-subpart F income or effectively connected income of the payor. As noted in the TIPRA legislative history, the purpose of the CFC look-through rules is to enhance the competiveness of U.S.-based multinational corporations:

> Most countries allow their companies to redeploy active foreign earnings with no additional tax burden. The Committee believes that this provision will make U.S. companies and U.S. workers more competitive with respect to such countries. By allowing U.S. companies to reinvest their active foreign earnings where they are most needed without incurring the immediate additional tax that companies based in many other countries never incur, the Committee believes that the provision will enable U.S. companies to make more sales overseas, and thus produce more goods in the United States.[37]

Thus, the CFC look-through rule provides U.S.-based multinational corporations with the flexibility to move cash among its CFCs without triggering current U.S. tax under subpart F, allowing such corporations to compete with companies based in foreign jurisdictions that similarly allow the tax-free redeployment of funds.

Extensions in the Emergency Economic Stabilization Act of 2008

Despite efforts to extend both the active financing exception and the CFC look-through rule on a permanent basis,[38] revenue constraints once again resulted in the temporary extension of both provisions. The Emergency Economic Stabilization Act of 2008 contained one-year extensions of both provisions through 2009 (*i.e.*, tax years beginning before January 1, 2010).[39]

Proposals Introduced in the 110th Congress

A significant number of proposals were introduced in the 110th Congress that would repeal, or significantly limit, deferral. Although these proposals have not been enacted, they provide significant insight into the views of some policymakers as to future legislation in the subpart F area.

S. 96, The Export Products Not Jobs Act. S. 96, the Export Products Not Jobs Act, essentially would repeal deferral with one limited exception.[40] The legislation would treat the gross income of a CFC as subpart F income with the exception of so-called "active home country income," which is defined as income derived by a CFC from the active and regular conduct of one or more trades or businesses within the CFC's home country, provided products or services are used or consumed within such home country. An additional exception applies to certain U.S.-source effectively connected income.

S. 396. S. 396 would treat CFCs established in certain specified "tax havens" as domestic corporations.[41] Specifically, a CFC created or organized under the laws of a "tax haven county" would be treated as a U.S corporation unless substantially all of the CFC's income is derived from the active conduct of a trade or business within its country of creation or organization. The legislation contains an initial list of 40 "tax haven countries" and provides the Treasury with regulatory authority to add or remove countries from the list.[42]

S. 1284. S. 1284 would subject to current U.S. tax income of CFCs attributable to imported property.[43] In this regard, the legislation would expand the definition of "foreign base company income" to include so-called "imported property income," which is defined as income from the manufacture, sale, exchange, lease, rental or licensing of property imported into the United States by a CFC, a related person or certain unrelated persons. The legislation provides an exception for certain property that is subsequently exported after being imported into the United States, as well as an exception for certain agricultural commodities.[44]

H.R. 3970, The Tax Reduction and Reform Act of 2007. H.R. 3970, the Tax Reduction and Reform Act of 2007, contains sweeping proposed changes to the U.S. taxation of U.S.-based multinationals that would reduce or eliminate the benefits of deferral for some taxpayers. Specifically, the bill provides for (1) the deferral of deductions otherwise allowable to a U.S. taxpayer to the extent such deductions are allocable to un-repatriated income earned by the taxpayer's CFCs, and (2) a limitation on foreign tax credits based on an average foreign tax rate imposed on the sum of the foreign source income of the taxpayer and the un-repatriated income earned by the taxpayer's CFCs.[45] The authors have noted that the proposal, if enacted, would reduce or eliminate the benefits of deferral for many taxpayers that would be incentivized to repatriate foreign earnings in order to access otherwise allowable deductions and foreign tax credit limitation.[46]

Proposals to Repeal Deferral to Fund Unrelated Spending Proposals. A number of proposals were introduced in the 110th Congress that would repeal deferral in order to fund unrelated spending proposals. For example, S. 334, the Healthy Americans Act, would repeal deferral in order to fund a fundamental health care reform proposal advanced by Senator Ron Wyden (D-OR).[47] Similarly, Senator Jim Webb (D-VA) offered an amendment to H.R. 976, the Children's Health Insurance Program Reauthorization Act of 2007, to eliminate deferral in order to fund the State Children's Health Insurance Program ("SCHIP"), which provides funds to states in order to provide health insurance to low-income families with children.[48]

S. 3162, The MADE in the USA Tax Act. S. 3162, the MADE in the USA Tax Act, includes a provision treating single-member business entities organized under foreign law as corporations for U.S. federal income tax purposes, eliminating the use of hybrid branch arrangements and other planning techniques available under the "check the box" regulations.[49] This proposal was presumably based on a similar proposal made by the Staff of the Joint Committee on Taxation in January of 2005 in response to a request from Senators Charles Grassley and Max Baucus, to the Staff of the Joint Committee on Taxation for options to improve tax compliance and improve tax expenditures.[50]

Suggested Guidelines for Consideration of Subpart F Legislation in the 111th Congress

As noted above, given the current budgetary and political environment it seems likely that legislation modifying subpart F will be considered in the 111th Congress. The authors respectfully offer the following suggested guidelines for assessing such legislation.

Changes Should Be Driven by Tax Policy Considerations, Not Revenue Needs

The subpart F regime is a significant aspect of the U.S. tax system for U.S.-based multinationals. It is important that changes to these rules are driven by tax policy considerations, rather than revenue needs, for several reasons.

First, and most obviously, a focus on tax policy considerations will lead to the development of better rules. This is not to say that policymakers focused on tax policy do not make mistakes or that they always agree on the relative merits of different proposals. However, it does seem self evident that the legislative process would lead to better and more coherent outcomes if proposals were made, assessed and ultimately enacted based on tax policy considerations rather than other considerations.

Second, a focus on the tax policy merits of various proposals could lead to more stability in the rules. If changes are not grounded in policy, they will themselves be vulnerable to amendment in the future as revenue concerns or other economic policy priorities change. This dynamic has repeated itself throughout the history of subpart F. For example, the longstanding exception for certain banking income was repealed in 1986 to help fund broad tax reform efforts, only to be resurrected in modified form beginning in 1997. The old saying that the only good tax is an old tax applies with great force in this area, as U.S.-based multinationals make investment decisions based on the likely tax impact of such decisions into the future. Thus, for example, serious consideration should be given to making permanent the temporary active financing exception and the CFC look-through rule. To the extent these rules are sensible on a temporary basis, they are sensible on a permanent basis. Making such rules permanent would allow companies to make multi-year investment decisions with some level of certainty as to what the U.S. tax law applicable to the investment is likely to be.

To the extent that Congress does consider legislation that would repeal or limit deferral, one signal as to whether such proposed changes are motivated by tax policy considerations or other considerations is the use of the revenue generated by such legislation. As discussed above, a trend in the 110th Congress was the introduction of proposals to repeal or limit deferral in order to fund unrelated legislation, such as health care reform. To the extent that Congress does in fact consider legislation that would repeal or limit deferral, the revenue generated by such legislation could be usefully used to fund related corporate or international tax reform. For example, to the extent U.S.-based multinationals are disadvantaged by such legislation, it might be appropriate for the resulting revenue to be used to fund a significant reduction in the U.S. corporate tax rate (whether in general or as applied to foreign business income) in an effort to maintain or enhance the competitiveness of such multinationals.[51] Such legislation would thus potentially be revenue neutral as to the corporate sector overall, but reflect different tax policy conclusions as to the relative level and timing of U.S. taxation on U.S. and international business activities.

The Collateral Impact on Other Rules Should Be Considered

While the framework of the subpart F rules has remained largely unchanged for over 40 years, the other U.S. international tax rules have gone through significant changes. Any changes to the subpart F rules should be considered in this context. For example, the foreign base company sales and services rules were enacted largely as a backstop to the potential for transfer pricing abuses in the context of transfers of goods or services. The need for such rules in the context of longstanding and robust transfer pricing rules for goods, and recent changes in the transfer pricing rules for services, should be reassessed.

> Although it is difficult to compare anti-deferral regimes across jurisdictions, it is fair to observe that the United States currently subjects U.S.-based multinationals to among the most onerous anti-deferral regime of all of the OECD countries and other major trading partners.

Further, any changes to the subpart F rules should be assessed for collateral impacts on other rules. For example, as discussed above, H.R. 3970 proposes the deferral of deductions otherwise allowable to a U.S. taxpayer to the extent such deductions are allocable to un-repatriated income earned by the taxpayer's CFCs. This proposal necessarily relies on the expense allocation rules, which were not designed to operate in this context. Because the application of these rules often results in an over-allocation of expenses to foreign sources, the practical application of these rules in the context of the proposal would result in a dollar-for-dollar denial of otherwise allowable deductions. As a result, taxpayers may be motivated to shift those expenses—and the economic activities that generate those expenses—into foreign jurisdictions.[52] A failure to assess this impact could lead to an outcome that is at odds with the intended outcome of H.R. 3970, which appears to be to advantage U.S.-based activities and job creation.

Finally, from a tax policy and tax administration perspective, it is important that rules applicable to subpart F have some coherence. Therefore, any legislation considered in the 111th Congress should be consistent conceptually with the rules of the existing subpart F regime or, alternatively, make collateral changes to the existing subpart F regime to ensure such consistency. For example, the proposal contained in H.R. 3970 would effectively aggregate all foreign income earned by a U.S. taxpayer directly and indirectly through all of its CFCs for purposes of deferring deductions or foreign tax credits in certain circumstances. If the Congress were to consider implementing this "consolidated CFC" theory for purposes of delaying deductions or foreign tax credits, such theory should be considered for purposes of determining whether income is subpart F income to begin with. The consolidated CFC theory would suggest not only the permanent extension of the CFC look-through rule, but repeal of the foreign base company sales and services income rules as contemplated during the Jobs Act.[53] Furthermore, it has been noted that the "consolidated CFC" theory of H.R. 3970 is inconsistent with the recent delay of, as well as efforts to repeal, the worldwide interest expense allocation rules of Code Sec. 864(f), which suggests that that provision should be reinstated if H.R. 3970 were to be adopted.[54] As noted above, the expense allocation rules, including the interest expense allocation rules, are critical to the practical application of international tax proposals of H.R. 3970.

The Competitive Position of U.S.-Based Multinationals, and the U.S. Economy, Should Be Considered

Although it is difficult to compare anti-deferral regimes across jurisdictions, it is fair to observe that the United States currently subjects U.S.-based multinationals to among the most onerous anti-deferral regime of all of the OECD countries and other major trading partners.[55] The U.S. regime is without doubt the most complex. In this regard, U.S.-based multinationals already operate under a competitive disadvantage under current law in terms of home-country taxation of international activities. As a result, the Treasury recently recommended changes to subpart F to enhance the competitiveness of U.S.-based multinationals as they compete in the integrated global economy with non-U.S.-based multinationals:

> In addition, in an environment where the most relevant competitors of U.S. multinational corporations are non-U.S. multinational corporations rather than other U.S. multinational corporations, U.S. international tax policy must take into account how non-U.S. multinational corporations operate and are taxed. Growing cross-border trade and investment have increased the legitimate need for multinational groups to manage their overseas activities through regional management and finance centers, and to move products, services, and funds across a global structure in a coordinated and efficient manner. Moreover, 1960s-era concerns about deflection of income from other high-tax countries to low-tax countries may now be less relevant for U.S. tax policy both because of the increased use by other countries of measures to combat income deflection and because of the increased competition U.S.-based multinational corporations face from non-U.S. multinational firms. Thus, it may be desirable to modify the subpart F rules so that U.S. companies may compete more effectively with foreign-based multinational corporations in the global economy.[56]

In pursuit of the stated goal of modifying subpart F to enhance the competitiveness of U.S.-based multinationals, the Treasury recommended (1) amending the foreign base company sales and services income rules to exclude income from transactions between a CFC and a foreign related party to "allow U.S. multinational corporations to structure their overseas service and distribution networks more efficiently," (2) permanently extending the CFC look-through rule to "allow ... U.S. multinational corporations to fund and to operate their overseas groups more efficiently," and (3) permanently extending the active financing exception to provide "U.S. financial services companies needed certainty."[57]

More broadly, the relatively high U.S. corporate tax rate[58] puts tremendous pressure on the subpart F rules that did not exist in earlier years. The benefits of deferral increase to the extent the residual U.S. tax rate exceeds the local tax rate applicable to the investment or activity; thus, over time, the benefits of deferral have expanded from activities that were subject to no or low local tax to activities in most of the major trading partners of the United States. Most of our major trading partners can be regarded as "tax havens" with reference to the so-called high tax exception, which excepts income from the subpart F rules to the extent it is subject to an effective rate of local tax greater than 90 percent of the U.S. rate.[59] In this regard, it would be welcome for Congress to consider the tax policies of our major trading partners, including policies related to deferral and corporate tax rates, as they formulate U.S. tax policy. The policies of our trading partners have been driven by many of the same economic factors that should inform U.S. policy, including the advent of regional and global supply chains, the ability to perform services in regional or global centers for customers in other countries, and the competition for new capital investment among countries.

Conclusion

As discussed, recent subpart F proposals would repeal, or significantly limit, deferral. To the extent that the 111th Congress considers these or similar proposals, it is important that they be evaluated on their tax policy merits, rather than on the revenue that they would generate, and that the collateral impact of these proposals be carefully considered. Further, these proposals need to be evaluated with respect to their potential impact on the competitiveness of U.S.-based multinationals and, more generally, on the overall U.S. economy. Indeed, an objective evaluation of the competitiveness factor alone should give the 111th Congress pause before seriously considering those proposals that would repeal, or significantly limit, deferral in favor of those proposals (such as those considered during the Jobs Act) that would, in fact, enhance deferral in appropriate situations.[60]

ENDNOTES

1 Staff of Joint Comm. on Tax'n, 110th Cong., Estimates of Federal Tax Expenditures For Fiscal Years 2008-2012, 74 (JCS-2-08) (Oct. 31, 2008). *See also* Joint Comm. on Tax'n, 110th Cong., Economic Efficiency and Structural Analyses of Alternative U.S. Tax Policies for Foreign Direct Investment (JCX-55-08), (June 25, 2008); Joint Comm. on Tax'n, 110th Cong., The Impact of International Tax Reform: Background and Selected Issues Relating to U.S. International Tax Rules and the Competitiveness of U.S Businesses (JCX-22-06) (June 21, 2006).

2 The "subpart F" rules refer to the set of rules applicable to the U.S. shareholders of controlled foreign corporations found in Code Secs. 951–965, so named because they are found in subpart F of Part III of subchapter N of the Internal Revenue Code. The subpart F rules are the principal anti-deferral rules applicable to U.S. shareholders of foreign corporations.

3 Office of Management and Budget, A New Era of Responsibility: Renewing America's Promise, at 122 (2009); *see also* Barack Obama's Comprehensive Tax Plan at 3, 4, *www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf* (last visited Apr. 15, 2009).

4 *See* U.S. Department of the Treasury, Office of Tax Policy, *The Deferral of Income Earned Through U.S. Controlled Foreign Corporations: A Policy Study* (Dec. 2000) (hereinafter "2000 Treasury Study"); Lowell D. Yoder, *Subpart F – General*, 926-2d Tax Management Portfolio (BNA), at A1-A22 (2007).

5 Message from the President of the United States Relative to Our Federal Tax System, H.R. Doc. No. 87-140, at 8–10 (1961).

6 Revenue Act of 1962 (P.L. 87-834), 76 Stat. 960.

7 Tax Reduction Act of 1975 (P.L. 94-12), 89 Stat. 26.

8 Tax Reform Act of 1984, (P.L. 98-369), 98 Stat. 494; Tax Reform Act of 1986 (P.L. 99-515), 100 Stat. 2085.

9 Tax Reform Act of 1984 (P.L. 98-369), 98 Stat. 494.

10 Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248), 96 Stat. 324.

11 Tax Reform Act of 1986 (P.L. 99-515), 100 Stat. 2085.

12 *Id.*

13 Tax Reduction Act of 1975 (P.L. 94-12), 89 Stat. 26; Tax Reform Act of 1976 (P.L. 94-455), 90 Stat. 1520.

14 Tax Reform Act of 1986 (P.L. 99-515), 100 Stat. 2085.

15 *Id.*

16 Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), § 13232(a)(2), 107 Stat. 312, 501 (amending Code Sec. 956(a) to measure investments in U.S. property at the end of each quarter rather than at the end of each tax year).

17 Code Secs. 951(a)(1)(C) and 956A, *as added by*, the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66). The excess passive assets rules in Code Secs. 951(a)(1)(C) and 956A were subsequently repealed by the Small Business Job Protection Act of 1996 effective for tax years beginning after December 31, 1996 (P.L. 104-188), 110 Stat. 1755.

18 Taxpayer Relief Act of 1997 (P.L. 105-34), 111 Stat. 788.

19 *See* Tax and Trade Relief Extension Act of 1998 (P.L. 105-277), 112 Stat. 2681-886 (substantial modifications and one-year extension); Tax Relief Extension Act of 1999 (P.L. 106-170), 113 Stat. 1918 (two-year extension); Job Creation and Worker Assistance Act of 2002 (P.L. 107-147), 116 Stat. 21 (five-year extension). *See also* notes 34 and 39.

20 P.L. 108-357 (2004), 118 Stat. 1418; H.R. Rep. No. 108-755 (2004) (Conf. Rep.) (hereinafter "Jobs Act Conference Report"); Joint Comm. on Tax'n, *General Explanation of Tax Legislation Enacted in the 108th Congress* (JCS-5-05) (May 2005) (hereinafter "2005 Blue Book"). *See generally* Lowell D. Yoder, *American Jobs Creation Act of 2004: Amendments to Subpart F*, 34 Tax Mgm't Int'l J. 147 (2005) (hereinafter "Yoder 2005").

21 Jobs Act, § 415(a), 118 Stat. at 1511; Jobs Act Conference Report at 400–04; 2005 Blue Book at 295–98.

22 Code Sec. 954(c)(2)(A), *as enacted by*, Jobs Act, § 415(b), 118 Stat. at 1510-11; Jobs Act Conference Report, at 400–04; 2005 Blue Book, at 295–98.

23 Code Sec. 954(c)(1)(C)(ii), *as enacted by*, Jobs Act, § 414, 118 Stat. at 1510; Jobs Act Conference Report, at 398–00; 2005 Blue Book, at 292–94.

24 Code Sec. 954(c)(4), *as enacted by*, Jobs Act, § 412(a), 118 Stat. at 1505; Jobs Act Conference Report, at 396–97; 2005 Blue Book, at 290–91.

25 Code Sec. 954(h)(3)(E), *as enacted by*, Jobs Act, § 416(a), 118 Stat. at 1511-12; Jobs Act Conference Report, at 404–06; 2005 Blue Book, at 298–00.

Endnotes

[26] H.R. 5095, 107th Cong., § 301 (2002). A subsequent proposal to repeal the foreign base company sales and services income rules was not adopted. *See* H.R. 6288, 109th Cong., § 4 (2006).

[27] H.R. 2896, 108th Cong., § 1071 (2003).

[28] H.R. 4520, 108th Cong., § 311 (2004); S. 1637, 108th Cong., § 222 (2004); Jobs Act Conference Report, at 395–96.

[29] S. 1637, 108th Cong., § 212 (2004). Subsequent proposals to increase the *de minimis* threshold were not adopted. *See* H.R. 6288, 109th Cong., § 10 (2006); S. 2380, 110th Cong., § 2 (2007); Jobs Act Conference Report, at 407–08.

[30] *See, e.g.,* Dustin Stamper, *Senate Finance Committee to Take Hard Look at Territorial Tax System*, 2005 Tax Notes Today 29-3 (Feb. 14, 2005) (noting that the repeal of the repeal of the foreign base company sales and services income rules and the enactment of the CFC look-through rule were not included in the legislation because of revenue constraints); Philip D. Morrison, *International Tax Reform Prospects in 2005 or 2006*, 34 Tax Mgm't Int'l J. 195, 196 (Mar. 2005) (CFC look-through rule not enacted "reportedly for revenue reasons").

[31] Philip D. Morrison, *Impact of AJCA of 2004 on the Prospects for Further International Tax Reform*, 34 Tax Mgm't Int'l J. 237, 238 (Apr. 2005) (hereinafter "Morrison") ("Subpart F should become the focus on any international tax reform debate. The 2004 Act, of course, failed to enact any major reform to Subpart F, despite some major changes included in both the House and Senate bills making it all the way to Conference. Subpart F, therefore, remains a fertile field for debate and reform during any action related to corporate tax reform over the next two years."); Yoder 2005, at 176 ("broader and more fundamental reform is necessary to update the Subpart F rules to reflect the significant changes in the worldwide economic environment and in the way multinationals conduct their global business operations that have occurred since Subpart F was enacted more than 40 years ago").

[32] P.L. 109-222, 120 Stat. 345 (2006); H.R. Rep. No. 109-304 (2005) (hereinafter "TIPRA House Report"); Joint Comm. on Tax'n, 109th Cong., *General Explanation of Tax Legislation Enacted in the 109th Congress* (JCS-1-07) (Jan. 17, 2007) (hereinafter "2007 Blue Book").

[33] *See* S. 1159, 109th Cong. (2005) (permanent extension of the active financing exception); H.R. 1417, 109th Cong. (2005) (same); S. 750, 109th Cong. (2005) (permanent enactment of the CFC look-through rule); H.R. 1762, 109th Cong. (2005) (same).

[34] P.L. 109-222, § 103(a), 120 Stat., at 346; TIPRA House Report, at 42–45; 2007 Blue Book, at 264–67. *See* Lisa M. Nadal, *New Analysis: Why is the Active Financing Income Exception Chronically Temporary?* 2008 Tax Notes Today 61-9 (Mar. 28, 2008).

[35] P.L. 109-222, § 103(b), 120 Stat., at 346; TIPRA House Report, at 45–46; 2007 Blue Book, at 267–68. Technical corrections were subsequently made to the CFC look-through rule. *See* Tax Relief and Health Care Act of 2006 (P.L. 109-432), § 426, 120 Stat. 2922, 2974-75 (2006); 2007 Blue Book, at 773–74; Tax Technical Corrections Act of 2007 (P.L. 110-172), §4(a), 121 Stat. 2473, 2475-76 (2007); Joint Comm. on Tax'n, 110th Cong., *Description of the Tax Technical Corrections Act of 2007, as Passed by the House of Representatives* at 4-5 (JCX-119-07) (Dec. 18, 2007). For a general discussion of the technical corrections process, *see* Marc J. Gerson, *Technically Speaking: The Art of Tax Technical Corrections*, 114 Tax Notes 927 (Mar. 2007). In addition, the IRS has issued guidance under the CFC look-through rule. Notice 2007-9, 2007-1 CB 401.

[36] In December 2000, U.S. Treasury suggested the repeal of the foreign-to-foreign related party rules. 2000 Treasury Study, at 92–94. In December 2001, the National Foreign Trade Council recommended the enactment of the CFC look-through rule. National Foreign Trade Council, Inc., II *International Tax Policy for the 21st Century* at 31-34 (Dec. 15, 2001). The National Foreign Trade Council also made a number of other recommendations to reform subpart F, including the repeal of the foreign base company sales and services income rules and permanent extension of the active financing exception. *Id.*, at 34–36, 42–45.

[37] TIPRA House Report at 45. *See also* 2007 Blue Book, at 267.

[38] *See* H.R. 6288, 109th Cong. (2006) (permanent extension of the active financing exception and the CFC look-through rule); S. 940, 110th Cong. (2007) (permanent extension of the active financing exception); H.R. 1509, 110th Cong. (same); S. 1273, 110th Cong. (2007) (permanent extension of the CFC look-through rule); H.R. 3735, 110th Cong. (2007) (same); S. 2380, 110th Cong. (2007) (permanent extension of the active financing exception and the CFC look-through rule).

[39] P.L. 110-343, §§ 303 (active financing exception), 304 (CFC look-through rule), 122 Stat. 3765, 3866-67. Legislation to permanently extend the active financing exception has already been introduced in the 111th Congress as H.R. 1944.

[40] Similar legislation was introduced in the 109th Congress as S. 3777.

[41] This legislation was introduced in multiple bills in the 110th Congress as S. 554 and S. 1508, as well as in the 109th Congress as S. 779 and S. 3607.

[42] The initial list of countries appears based on a list contained in a report issued in 2000 by the Organisation for Economic Co-operation and Development. *See* Organisation for Economic Co-operation and Development, *Towards Global Tax Co-operation: Report to the 2000 Ministerial Council Meeting and Recommendations By The Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices,* at 17 (2000), *www.oecd.org/dataoecd/9/61/2090192.pdf.*

[43] This legislation was introduced in multiple bills in the 110th Congress as S. 554 and S. 1508, as well as in the 109th Congress as S. 14, S. 196, S. 872, S. 2357and S. 3607. Similar legislation has already been introduced in the 111th Congress as S. 260.

[44] In addition, S. 1284, 110th Cong. (2007), provides that a separate foreign tax credit limitation would apply to imported property income.

[45] H.R. 3970, § 3201 (2007).

[46] *See generally* Marc J. Gerson and Rocco V. Femia, *Rangel Bill Proposes Sweeping Changes to Taxation of U.S.-Based Multinationals*, Int'l Tax J., Mar.–Apr. 2008, at 65 (hereinafter "Gerson and Femia"); *see also* New York State Bar Association Tax Section, Report on International Provisions in H.R. 3970 and Effects of Reduction in Corporate Tax Rates (Dec. 24, 2008) (hereinafter "NYSBA Report").

[47] S. 334, 110th Cong., § 666(b) (2007). Companion legislation was introduced in the House of Representatives as H.R. 3163, 110th Cong. (2007) and H.R. 6444, 110th Cong. (2008).

[48] S. Amdt. 2618 to S. Amdt. 2530 to H.R. 976 (2007). *See* 153 Cong. Rec. S10588 (daily ed. Aug. 1, 2007) (statement of Sen. Webb) ("My amendment would eliminate this deferral provision in the Tax Code. This critical reform would discourage ... companies from moving American investments and jobs to foreign tax havens and raise the revenue necessary to expand the Children's Health Insurance Program.")

[49] S. 3162, 110th Cong., § 212 (2008). For a description of check-the-box planning in the context of the subpart F rules, *see* 2000 Treasury Study, at 62–64, 68–70, and sources cited therein.

[50] Joint Comm. on Tax'n, 109th Cong., *Options to Improve Tax Compliance and Reform Tax Expenditures,* at 182–85 (JCS-02-05) (Jan. 27, 2005) (hereinafter "Options Report").

[51] *See* Harry Grubert and Rosanne Altshuler, *Corporate Taxes in the World Economy: Reforming the Taxation of Cross-Border Income* (Dec. 12, 2006), *ftp://snde.rutgers.edu/Rutgers/wp/2006-26.pdf* (noting that repeal of deferral without a reduction in U.S. corporate tax rates would reduce the competitiveness of U.S.-based multinational corporations); Crystal Tandon, *Panel of Economists, Government Officials Favors Lowering Corporate Rates, Ending Deferral,* 2008 Tax Notes Today 228-3 (Nov. 25, 2008).

[52] Gerson and Femia, at 67. *See also* NYSBA

Report, at 16–20.

[53] Gerson and Femia, at 70. *See also* 2000 Treasury Study, at 53–54 (expressing some doubt as to whether the foreign-to-foreign rules enhance efficiency or U.S. economic welfare).

[54] James J. Tobin, *Chairman Rangel Consolidates His Thoughts On International Tax Reform*, 37 TAX MGM'T INT'L J. 49 (Jan. 2008). The *Housing and Economic Recovery Act of 2008* delayed the implementation of the worldwide interest expense allocation rules of Code Sec. 864(f) for two years. P.L. 110-289, § 3093, 122 Stat. 2654, 2912. There are numerous proposals to further delay or repeal Code Sec. 864(f). *See, e.g.,* H.R. 3970, 110th Cong., § 3203 (2007) (repeal). *See also* NYSBA Report at 18.

[55] Morrison, at 238.

[56] U.S. Department of the Treasury, Office of Tax Policy, *Approaches to Improve the Competitiveness of the U.S. Business Tax System for the 21st Century,* at 86 (Dec. 20, 2007), *www.treas.gov/press/releases/reports/hp749_approachesstudy.pdf* (hereinafter "Approaches Study").

[57] *Id.,* at 87.

[58] *Id.,* at 3, 6–11.

[59] *See* Code Sec. 954(b)(4).

[60] Approaches Study, at 86 ("it may be desirable to modify the subpart F rules so that U.S. companies may compete more effectively with foreign-based multinational corporations in the global economy").