SULLIVAN & CROMWELL LLP

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Treasury and IRS Release Proposed Regulations on Passive Foreign Investment Companies

New Guidance is Likely to Provide Greater Certainty for the Application of Existing Rules

SUMMARY

On July 10, the IRS and the Treasury Department issued proposed regulations ("Proposed Regulations") under the passive foreign investment company ("PFIC") rules of the Internal Revenue Code ("Code"), addressing, among other things, the PFIC insurance exception as amended by the Tax Cuts and Jobs Act of 2017 (the "Act").[1] The guidance offered by the Proposed Regulations consists of technical provisions that clarify how the PFIC rules would apply to particular circumstances or taxpayers in certain industries (including real estate, financial services, and insurance), but also includes rules of broader application, including narrowing the scope of certain rules under which taxpayers could be treated as indirectly owning stock in a PFIC and clarifying how a corporation treats partnership interests in determining whether it is a PFIC.

The Proposed Regulations would limit circumstances in which a taxpayer could be treated as owning stock of a PFIC and expand circumstances in which a corporation's direct activities could be treated as active. On the other hand, the Proposed Regulations could increase the likelihood that certain foreign corporations would be classified as PFICs (*e.g.*, by limiting the ability to treat the activities conducted in a partnership as activities of a foreign corporate partner in the partnership).

BACKGROUND

A. THE PFIC RULES

A foreign corporation is generally treated as a PFIC if either: (i) 75% or more of its income is "passive income" (the "Income Test") or (ii) 50% or more of its assets are treated as "passive assets" (that is, assets held for the production of passive income) (the "Asset Test").[2] In general, "passive income" is income that would be treated as foreign personal holding company income under Section 954(c) of the Code, although various special rules can modify this definition. For purposes of the Income Test and Asset Test, a foreign corporation that owns at least 25% of the stock (by value) of another corporation (a "Look-Through Subsidiary") will be treated as owning a proportionate share of the Look-Through Subsidiary's assets and receiving a proportionate share of the Look-Through Subsidiary's income.[3]

U.S. owners of PFICs are subject to special rules under the Code.[4] In general, the PFIC rules require U.S. owners of a PFIC either to: (i) treat all gain recognized with respect to the PFIC stock as ordinary income and subject to a deferral charge[5] or (ii) include in income on a current basis their share of the PFIC's earnings (either directly, through a "qualified electing fund" election, or indirectly, by making a "mark-to-market" election for an eligible PFIC). Certain constructive ownership rules apply in determining whether a U.S. person is treated as owning stock in a PFIC. In particular, in the case of a person owning at least 50% (by value) of a foreign corporation that is not a PFIC, such person is generally considered to own any stock owned directly or indirectly by the foreign corporation in proportion to the person's ownership of the foreign corporation. Partners in a partnership are considered to own a ratable share of stock directly or indirectly owned by the partnership.

B. INSURANCE COMPANIES

Insurance companies often earn substantial amounts of dividends and interest, which are generally treated as "passive" for purposes of the Income Test.[6] However, under a special exception for insurance companies (the "Insurance Exception"), income that would otherwise be considered "passive" is not treated as passive income if certain conditions are met.

Prior to the Act, passive income did not include income derived in the active conduct of an insurance business by a corporation predominantly engaged in an insurance business and that would be subject to tax under "subchapter L" of the Code (the provisions of the Code applicable to U.S. insurance companies) if it were a domestic corporation.[7] In response to Congressional concerns that hedge funds were inappropriately avoiding or deferring tax by organizing offshore insurance companies with limited insurance risk or operations whose assets were then invested in the funds, the IRS and Treasury department issued proposed regulations under the former Insurance Exception (the "2015 proposed regulations"). The 2015 proposed regulations would have addressed the circumstances under which a foreign insurance company's income and assets could be treated as "active" by providing guidance on the meaning of "active conduct" and defining "insurance business" for purposes of the Insurance Exception.

The Act revised the Insurance Exception by adding a requirement that an insurance company have a minimum amount of certain insurance liabilities, generally constituting more than 25% of the insurance company's total assets (the "25% test"), subject to certain exceptions. An insurance company that satisfies these requirements would be a "qualified insurance corporation", or "QIC". A U.S. person owning stock in a foreign insurance company that does not satisfy the 25% test may be able to elect to treat the insurance company as a QIC, provided that the insurance company is predominately engaged in an insurance business and certain other requirements are met.

DISCUSSION

A. QUALIFIED INSURANCE COMPANIES

1. Applicable insurance liabilities

Whether a foreign insurance company qualifies as a QIC is generally based in part on the ratio of the company's insurance liabilities to its total assets. The Proposed Regulations contain rules intended to prevent a foreign insurance company from inflating its insurance liabilities in order to qualify as a QIC.

The Code provides that the amount of a foreign insurance company's insurance liabilities is determined based on the company's financial reporting according to U.S. GAAP, IFRS, or a statement required to be filed with an insurance regulatory body.[8] The Proposed Regulations provide that if a foreign insurance company does not have a statement prepared according to U.S. GAAP or IFRS for financial reporting purposes, the company's insurance liabilities would be determined based on an annual statement filed with an applicable insurance regulatory body only if the statement provides complete information about the company's operations and financial conditions.[9] In cases where financial statements are not prepared under U.S. GAAP or IFRS, the Proposed Regulations would also apply special rules to reduce applicable insurance liabilities to the extent a foreign insurance company's financial statement does not discount losses on an economically reasonable basis.[10]

If a foreign corporation ceases to prepare its financial statements under U.S. GAAP or IFRS without a non-federal tax business purpose for making the change, the Proposed Regulations would treat the foreign corporation as having no insurance liabilities with the result that it would likely be treated as a PFIC.[11]

2. Employee activities and expenses

Certain income of a QIC derived in the active conduct of an insurance business is excluded from passive income. Under the 2015 proposed regulations, a foreign corporation's active conduct of its insurance business only included activities performed by the corporation's own officers and employees. The Proposed Regulations would provide that a foreign insurance company's officers and employees must carry out substantial managerial and operational activities and that, without taking into account ceding commissions, at least 50% of a foreign insurance company's total expenses paid for services rendered in connection with the production or acquisition of premiums and investment income be paid to officers and employees of the QIC or a related person, provided the QIC exercises regular oversight and supervision over any services and bears the compensation expense provided by officers and employees of such related person.[12]

3. Subsidiaries and look-through rules

If the assets and liabilities of a Look-Through Subsidiary or Look-Through Partnership, as defined below, are included in a QIC's financial statement for purposes of the Insurance Exception, under the Proposed Regulations the income and assets of the Look-Through Subsidiary or Look-Through Partnership may be treated as income or assets of the QIC.[13] As a result, such income or assets may be treated as active in the hands of the QIC, notwithstanding that those items of income or assets would be treated as passive in the hands of the Look-Through Subsidiary or Look-Through Partnership.

In cases where a foreign insurance company owns a domestic insurance corporation, the Proposed Regulations generally would treat as active the income and assets of a U.S. corporation that is subject to federal income tax on its net income as an insurance company.[14]

4. Election to apply alternative facts and circumstances

If a foreign insurance company does not qualify as a QIC because it does not satisfy the 25% test but has insurance liabilities that are at least 10% of its total assets, a U.S. owner may elect to treat the company as a QIC if the company is predominantly engaged in an insurance business and the failure to have sufficient liabilities is due to runoff-related or rating-related circumstances (the "Alternate Facts and Circumstances Test"). The Proposed Regulations would provide a facts and circumstances test for determining whether a foreign insurance company is predominantly engaged in an insurance business. Such facts and circumstances to consider would include claims payment patterns, loss exposure, percentage of gross receipts constituting premiums, and the number and size of insurance contracts issued or taken on through reinsurance by the foreign corporation.[15]

B. PARTNERSHIPS

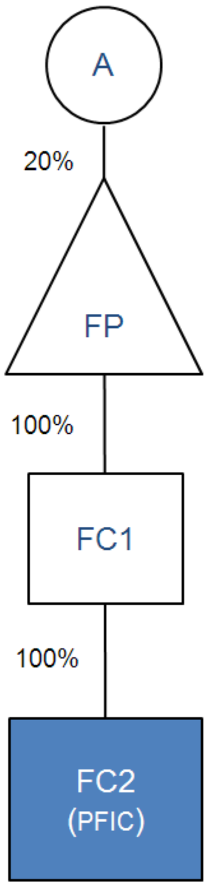
The Proposed Regulations address the application of the PFIC rules to the ownership of PFIC stock through partnerships and the treatment by a PFIC of partnership interests under the Income Test and the Asset Test.

1. "Top-down" Attribution for Determining PFIC Ownership

Under the rules for determining PFIC ownership, if a person directly or indirectly owns at least 50% of the stock (by value) of a foreign corporation that is not a PFIC, that person is considered to own a proportionate amount (by value) of any stock owned directly by such foreign corporation.[16] In the case of a foreign or domestic partnership directly or indirectly owning stock, current regulations provide that partners of the partnership are considered to own such stock in proportion to their ownership interests in the partnership.[17] The current regulations do not, however, address whether these attribution rules are to be applied on a "top-down" or "bottom-up" basis.

A "bottom-up" approach (*i.e.*, beginning with a PFIC and attributing ownership of its stock upwards) could result in PFIC ownership in some non-intuitive cases. For example, A, a U.S. person, owns 20% of an interest in a foreign partnership ("FP"). Assume FP owns 100% of FC1, a foreign corporation that is not a PFIC, and that FC1 owns 100% of FC2, a foreign corporation that is a PFIC. See figure:

Figure



On a "bottom-up" basis, FP could be treated as indirectly owning 100% of the stock of FC2 (through its 100% interest in FC1). Consequently, as a 20% partner of FP, A could be treated as indirectly owning 20% of the stock of FC2. On the other hand, under a "top-down" approach (*i.e.*, starting with A and determining its proportionate ownership in each lower tier entity) A would be treated as owning 20% of the stock of FC1. In that case, A would not be treated as owning any shares of FC2 and would not be treated as owning shares in a PFIC.

The Proposed Regulations adopt a "top-down" approach for attribution. Similar rules under the Proposed Regulations would apply such "top-down" approach for stock owned by an S Corporation, estate or nongrantor trust.

2. Assets and Income of Look-Through Partnerships

In determining whether a foreign corporation is a PFIC, the Proposed Regulations would allow a foreign corporation to look through a partnership—and be treated as earning directly the income and as owning directly the assets of the partnership—only if the foreign corporation's interests in the partnership represented at least a 25% interest (by value) in the partnership (such a partnership, a "Look-Through Partnership"). The status of the income and assets as passive or active would, however, be determined at the partnership level, taking into account only the activities of the partnership, subject to certain attribution rules under the Active Rents and Royalties Exception, discussed below, and the Insurance Exception, discussed above.[18]

If a foreign corporation owns less than 25% of the value of a partnership, the Proposed Regulations would treat the partnership interest entirely as a passive asset and the foreign corporation's share of the partnership's income entirely as passive income, even when the partnership is engaged in an active business.[19] The preamble to the Proposed Regulations requests comments as to whether a 25% threshold is the appropriate threshold, and whether different rules should apply with respect to partners in general partnerships than with respect to partners in limited partnerships, or with respect to partners that materially participate in the activities of the partnership.

C. DISPOSITIONS OF A LOOK-THROUGH SUBSIDIARY OR LOOK-THROUGH PARTNERSHIP

The Proposed Regulations would establish that for purposes of the Income Test, a foreign corporation's gain from the disposition of Look-Through Subsidiary stock would be reduced (but not below zero) by the amount of unremitted income attributed to the foreign corporation from the Look-Through Subsidiary (meaning the amount of income taken into account by the foreign corporation for purposes of the Income Test that exceeds the aggregate dividends received by the foreign corporation from the Look-Through Subsidiary with respect to the disposed-of stock).[20] Under the Proposed Regulations, such gain would be treated as active or passive in proportion to the active and passive assets of the Look-Through Subsidiary on the date of the disposition.[21]

In the case of a foreign corporation's disposition of an interest in a Look-Through Partnership, the Proposed Regulations would treat such foreign corporation as selling its proportionate share of the Look-Through Partnership's assets.[22]

These rules under the Proposed Regulations would provide welcome relief, particularly for foreign corporations concerned with becoming PFICs for any year in which a foreign corporation has a substantial business divestiture.

D. RELATED PARTY AMOUNTS

The PFIC rules exclude from passive income certain interest, dividends, rents or royalties received from a related person to the extent allocable to income of the related person that is active income (the "Related Party Exception").[23] The Proposed Regulations would provide guidance on how to allocate such related party amounts to passive income and how to determine relatedness.

1. Allocation to passive income

Under the rules for controlled foreign corporations ("CFCs"), interest paid to a related person is first treated as passive income to the extent the payor has passive income (the "cream-skimming rule").[24] For many years, taxpayers have been concerned about whether the cream-skimming rule applies in the PFIC context. The Proposed Regulations provide helpful clarity by not adopting the cream-skimming rule for the Related Party Exception. Instead, the Proposed Regulations would provide that under the PFIC rules, related-party payments of a type otherwise considered to be passive (*i.e.*, interest, dividends, rents and royalties) would be treated as active income to the recipient generally based on the relative portion of the payor's active income, current-year earnings, or deductions allocated to active income (as applicable to interest, dividends, or rents and royalties, respectively).[25] The Proposed Regulations would thus generally treat a smaller portion of some related-party payments as passive income to the recipient relative to the cream-skimming rule under the CFC regime.

2. Determining relatedness

Parties are generally treated as related under the Related Party Exception if each is controlled by the same person, or if one party controls the other. For purposes of this rule, control means ownership of more than 50% by vote or value with respect to corporations, and by value with respect to partnerships.[26] In cases when amounts are paid to a Look-Through Subsidiary or Look-Through Partnership, the Proposed Regulations would determine relatedness at the level of the Look-Through Subsidiary or Look-Through Partnership.[27]

E. "ACTIVE" INCOME

Although the PFIC rules reference the CFC regime for determining whether income is treated as passive for PFIC purposes, there is uncertainty regarding whether certain specific exceptions under the CFC rules also apply or would apply differently under the PFIC rules. The Proposed Regulations would clarify how these exceptions would apply in the PFIC context and which rules would, and would not, be adopted from the CFC regime to treat certain types of otherwise passive income as active. Further, the Proposed Regulations would clarify that any foreign corporation, *i.e.*, not only CFCs, would be eligible for such exceptions incorporated into the PFIC regime by reference.[28]

1. Rent and royalty income

In general, the Proposed Regulations would adopt the CFC rules that exclude from passive income certain rents and royalties derived in the active conduct of a trade or business and which are received from a non-related person (the "Active Rents and Royalties Exception").[29] However, as opposed to the CFC regime, which generally requires that, in order for a foreign corporation's rents or royalties to be treated as active, activities in respect of such income must be conducted by the foreign corporation's own officers and employees,[30] the Proposed Regulations would clarify that when applied in the PFIC context, these rules are applied by taking into account the activities of the officers and employees of any Look-Through Subsidiary or Look-Through Partnership, in either case, in which the foreign corporation owns more than 50% by value.[31] Accordingly, if adopted, the Proposed Regulations would allow certain foreign corporations to exclude rents and royalties from passive income, even in cases where the foreign corporation does not itself have officers or employees engaged in the active conduct of a trade or business (*e.g.*, if rental real estate is held by a foreign corporation through a "PropCo" subsidiary while the personnel responsible for active operations are employed by an "OpCo" subsidiary or a central management entity).[32]

2. Banking and financing income

The PFIC rules exclude from passive income any income derived by a licensed bank in the active conduct of a banking business (the "PFIC Active Bank Exception").[33] A notice issued in 1989 specifies that the PFIC Active Banking Exception applies only if detailed requirements for deposit-taking, lending, bank affiliates, and licensing are satisfied, and proposed regulations issued in 1995, would, if adopted, codify similar rules into regulations.[34] At times, these rules could be challenging for foreign banks to apply because they reflected a relatively rigid view of the business model that a bank must employ in order to earn "active" income. In addition, the PFIC Active Bank Exception generally does not apply to non-banking financing companies (*e.g*., entities that otherwise "actively" make loans to customers but rely entirely on their own capital, rather than deposits, for funding).

As an addition to the PFIC Active Bank Exception, the Proposed Regulations would adopt rules from the CFC regime addressing certain types of income derived in the active conduct of banking or financing business (the "CFC Active Financing Exception").[35] In cases where a foreign bank or financing company does not satisfy the PFIC Active Bank Exception (because, *e.g.*, the foreign bank does not take deposits), the Proposed Regulations would provide the foreign bank another avenue for treating its income as active under the CFC Active Financing Exception.

3. Dealer income

Existing guidance under the PFIC rules allows stock or securities inventory held by a dealer to be treated as active if certain requirements, including identification requirements, are met; however, dividends and interest income generated by such inventory securities are treated as passive under the PFIC rules.[36] In addition to the existing guidance, the Proposed Regulations would adopt the CFC rules for dealers and treat a dealer's income with respect to securities as active if certain requirements are met (the "Dealer Exception"), notwithstanding that dividends and interest from such securities may be passive income.[37] In addition, if dealer property produces income that is active under the Dealer Exception, the Proposed Regulations would characterize the dealer property as active for purposes of the Asset Test, irrespective of rules for dual-character assets.[38] If adopted, the Proposed Regulations would potentially ease administrative burdens currently imposed by existing guidance with respect to the identification as inventory of stock and securities as held for sale to customers in the dealer's books and records.[39]

F. CAPITAL GAINS, COMMODITIES TRANSACTIONS AND FOREIGN CURRENCY GAINS

The PFIC rules generally apply the Income Test on a gross income basis. Under the CFC regime, however, certain categories of income are determined on a net basis (*e.g.*, income from capital gains would generally be determined net of capital losses.[40]) The Proposed Regulations would incorporate netting rules from the CFC regime to allow a foreign corporation to determine certain types of passive income on a net basis.[41] If adopted, this rule would generally allow a foreign corporation to reduce its passive income from capital gains, gains from certain commodities transactions, foreign currency gains, and swap gains by netting gains of each type against losses of such type.

G. ASSET SEGMENTS THAT DO NOT DIRECTLY PRODUCE INCOME

Under the Proposed Regulations, an asset could be treated as two assets (characterized as passive or active based on the income the partial asset produces or is held to produce) if only a portion of the asset directly produces income during a taxable year. For example, if a company owns a building and uses a portion of that building as its headquarters, but also leases out unneeded floors to earn passive rental income, such building may be partially treated as an active asset under the Proposed Regulations even if the part of the building used as its headquarters does not actually produce income. The Proposed Regulations provide that the most reasonable method for bifurcating an asset between passive and active would generally depend on the physical use of the property, but another method could be used if it would most reasonably reflect the use of the property.[42] By treating a portion of such assets as active, even though the assets do not actually produce active income, this rule would allow some foreign corporations to be treated as having a greater amount of active assets.

H. STAPLED ENTITIES

If two stapled entities carry on the same real estate business, and one entity owns the real property while the other provides management services with respect to that property, income received by the property-owning entity might be treated as passive if it were viewed on a stand-alone basis. However, under the Proposed Regulations the same income might be treated as active under the Active Rents and Royalties Exception, discussed above, by taking into account the management services provided by the services entity.

In cases where the equity of two entities are "stapled" such that they cannot be sold separately, the Proposed Regulations would treat stapled entities as a single entity under the PFIC rules.[43]

I. MEASURING ASSETS FOR CERTAIN CFCS THAT ARE PUBLICLY TRADED FOR PART OF THE YEAR

For purposes of the Asset Test, the Code requires a foreign corporation to measure assets by value if it is publicly traded or, if it is a private company, it does not elect to measure assets by their adjusted bases. A CFC that is not publicly traded must also measure assets by their adjusted bases.[44] The statute does not specify how to measure assets (*e.g.*, by value or adjusted bases) of a foreign corporation that is publicly traded during part of the taxable year but for the remainder of the year is a CFC that is not publicly traded.

The Proposed Regulations would direct a CFC that is publicly traded for only part of the taxable year to measure assets by adjusted basis, unless the CFC were publicly traded on the majority of days during the taxable year.[45] Under this rule, certain publicly traded foreign corporations could be more likely to become PFICs in a year in which they either go public or go private. For example, consider FC4, a publicly traded foreign corporation that holds substantial goodwill treated as active for purposes of the Asset Test, and such goodwill has value greatly in excess of its adjusted basis in Year 1. Assume that during the first half of Year 2, a U.S. multinational corporation purchases all the stock of FC4 and, as a result, FC4 becomes a CFC that is not publicly traded. Notwithstanding that the composition of FC4's assets has not changed from Year 1 to Year 2, under the Proposed Regulations it is more likely that FC4 could become a PFIC in Year 2 because FC4 would have fewer active assets when FC4's goodwill is measured by adjusted basis.

J. OTHER PROVISIONS OF THE PROPOSED REGULATIONS

The Proposed Regulations would provide additional guidance on more mechanical (or less frequently applicable) aspects of the PFIC rules, including:

- Methods for measuring assets under the Asset Test,
- Elections for alternative measuring periods under the Income and Asset Tests,
- Dual character assets,
- Anti-double counting rules,
- Non-dividend paying stock of related parties,
- Intercompany dividends amongst members of a U.S. consolidated group, and
- Foreign corporations undergoing a change in business.

K. EFFECTIVE DATE

If finalized, the Proposed Regulations would generally apply to taxable years of U.S. persons that are shareholders in certain foreign corporations beginning on or after the date of publication of the Treasury decision adopting the Proposed Regulations as final in the Federal Register. However, taxpayers may apply the Proposed Regulations, other than those relating to the Insurance Exception, to all open tax years, provided that such taxpayers consistently apply the rules of those Proposed Regulations, and taxpayers may apply the Proposed Regulations relating to the Insurance Exception for taxable years beginning after December 31, 2017, provided that such taxpayers consistently apply the rules of the Proposed Regulations relating to the Insurance Exception. Alternatively, taxpayers may continue to rely on Notice 88-22 until the Proposed Regulations are finalized.

* * *

ENDNOTES

1 References herein to a "Section" are to sections of the Code and the Treasury regulations ("Treasury Regulations" or "Treas. Reg.") promulgated thereunder.

2 Section 1297(a).

3 Section 1297(c).

4 *See generally* Sections 1291 through 1298.

5 Similar rules apply to "excess distributions", which are generally the amounts (if any) of a current year's distribution from a foreign corporation that exceed 125% of the average distributions on the corporation's stock over the prior three years or, if shorter, a stockholder's holding period preceding the year in which the distribution is received.

6 *See* Sections 1297(b)(1) and 954(c)(1)(A).

7 *See* former Section 1297(b)(2)(B).

8 The amount of the company's total assets is likewise determined from the relevant financial statement.

9 Prop. Treas. Reg. § 1.1297-4(f)(1)(iii).

10 Prop. Treas. Reg. § 1.1297-4(e)(3).

11 Prop. Treas. Reg. § 1.1297-4(e)(4).

12 Prop. Treas. Reg. § 1.1297-5(c)(1), (c)(3), (c)(4), (e)(1).

13 Prop. Treas. Reg. § 1.1297-5(f).

14 Prop. Treas. Reg. § 1.1297-5(d)

15 Prop. Treas. Reg. § 1.1297-4(d)(2).

16 Section 1298(a)(2).

17 Treas. Reg. § 1.1291-1(b)(8)(iii)(A).

18 Prop. Treas. Reg. § 1.1297-1(c)(2)(i) and (d)(3)(i).

19 Prop. Treas. Reg. § 1.1297-1(c)(2)(ii) and (d)(3)(ii).

20 Prop. Treas. Reg. § 1.1297-2(f)(1).

21 Prop. Treas. Reg. § 1.1297-2(f)(2).

22 Prop. Treas. Reg. § 1.1297-1(c)(1)(i)(C).

23 Section 1297(b)(2)(C).

24 Section 1.904-5(c)(2)(ii)(C).

25 Prop. Treas. Reg. § 1.1297-1(c)(3)(i)-(iii).

26 Sections 1297(b)(2)(C) and 954(d)(3).

27 Prop. Treas. Reg. § 1.1297-2(d)(1) and -1(c)(2).

28 Prop. Treas. Reg. § 1.1297-1(c)(1)(i). Note, the preamble to the Proposed Regulations explains that the CFC regime's exception for insurance income would not be incorporated by reference into the PFIC regime given the Act's amendments to the Insurance Exception, which has separate statutory requirements for the PFIC rules as discussed above.

29 Prop. Treas. Reg. § 1.1297-1(c)(1)(i)(A).

30 Treas. Reg. § 1.954-2(b)(6), (c) and (d).

ENDNOTES (CONTINUED)

[31] Prop. Treas. Reg. § 1.1297-2(e)(1).

[32] Prop. Treas. Reg. § 1.1297-2(e)(2)(i), example 1.

[33] Section 1297(b)(2)(A); *see also* Notice 89-81, 1989-2 C.B. 399.

[34] Prop. Treas. Reg. § 1.1296-4.

[35] Prop. Treas. Reg. § 1.1297-1(c)(1)(i)(A) and Section 954(h).

[36] Notice 88-22.

[37] Prop. Treas. Reg. § 1.1297-1(c)(1)(i)(A), IRC 954(c)(2)(C).

[38] Prop. Treas. Reg. § 1.1297-1(d)(4).

[39] *See* Notice 88-22.

[40] *See* Section 954(c)(1)(B).

[41] Prop. Treas. Reg. § 1.1297-1(c)(ii).

[42] Prop. Treas. Reg. § 1.1297-1(d)(2)(ii).

[43] Prop. Treas. Reg. § 1.1297-1(e).

[44] Section 1297(e).

[45] Prop. Treas. Reg. § 1.1297-1(d)(1)(v).

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