



September 9, 2019

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

RE: IRS REG-106282-18 - Guidance Related to Section 245A(e) (Limitation on Deduction for Dividends Received from Certain Foreign Corporations and Amounts Eligible for Section 954 Look-Through Exception)

Dear Commissioner Rettig:

USCIB¹ is pleased to provide comments on the proposed and temporary regulations regarding guidance related to rules regarding the limitation on deduction for dividends received from certain foreign corporations and amounts eligible for section 954 look-through exception (IRS REG-106282-18).

Summary of Comments

USCIB believes that the proposed and temporary regulations should be withdrawn because they exceed the government's authority and violate the provisions of the Administrative Procedures Act ("APA"). The government does not have the authority to override the unambiguous terms of the statute.

Treasury's attempt to apply the regulations retroactively and with immediate effect is not permissible under the Administrative Procedures Act ("APA").

The Treasury and the IRS should adopt regulations affirming the Internal Revenue Code section² 245A dividend received deduction ("DRD") applies to dividend income received by a controlled foreign corporation ("CFC") from a lower-tier specified 10% owned foreign corporation ("SFC") (or a CFC if Section 954(c)(6) is not extended) that is otherwise Subpart F income to the CFC.

¹ USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

² All Section references herein are to the current Internal Revenue Code of 1986 as amended by the Tax Cuts and Jobs Act.

Specific Comments

The regulations exceed the government's authority

The requirements to obtain the deduction provided for in Section 245A are unambiguous.

There are three conditions for the application of sections 245A:

- A dividend from a specified 10-percent owned foreign corporation;
- Received by a domestic corporation that is a US shareholder with respect to that foreign corporation; and
- The dividend is attributable to the foreign source portion.

These terms are all clearly defined either within section 245A (specified 10-percent owned foreign corporation or foreign source portion) or elsewhere (US shareholder).

Thus, there is nothing in the statute that would support the limiting the section 245A deduction to the portion of the dividend not constituting the “ineligible amount.”

Congress also knows how to write exceptions as is clear from the exception provided for hybrid dividends.³

The Ways and Means Committee has also considered a technical correction⁴ that would achieve a similar result to that sought by the administration, which indicates that such a result cannot be achieved without a technical correction. The Bluebook to the TCJA also indicates that a technical correction may be necessary to achieve this result.⁵

The preamble to the temporary regulations acknowledges that “in certain atypical circumstances, a literal application of section 245A (read in isolation) could result in the section 245A deduction applying to earnings and profits of a CFC attributable to the types of income addressed by the subpart F or GILTI regimes”.⁶

While subsection 245A(g) provides some regulatory authority, in addition to the general regulatory authority of subsection 7805(a) to provide all needful rules, that authority only explicitly mentions application of the regulations to partnerships. Thus, it should not be considered to provide any authority for the proposed and temporary regulations.

³ Section 245A (e).

⁴ https://republicans-waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf section 4(A)(4).

⁵ <https://www.taxreformlaw.com/wp-content/uploads/2018/12/General-Explanation-Of-Public-Law-115-97.pdf> at page 349, footnote 1653.

⁶ Temporary Regulations, **Federal Register** / Vol. 84, No. 117 / Tuesday, June 18, 2019 / Rules and Regulations, page 28400.

Authority under section 7805(a) does not extend to an authority to impose a tax. That authority rests with Congress.

The regulations violate the APA

Subsection (b) of section 553 of the APA requires that agencies publish a notice of proposed rulemaking, allowing comment (subsection (c)), with an effective date no earlier than 30 days after the publication of the notice (subsection (d)). The regulations were immediately effective (June 18, 2019) and apply to distributions occurring after December 31, 2017.⁷

Subsections (b)(3) and (d) of section 553 provide three exceptions to the notice and 30-day effective date rules, which are not applicable here. The three exceptions are:

- Regulations that grant exceptions or remove restrictions;
- Interpretative rules or statements of public policy; or
- Regulations for which the agency finds good cause and provides support for that finding.

The regulations under section 245A cannot be considered interpretative because they are inconsistent with a literal interpretation of the statute and, therefore, must be considered legislative in nature. It does not appear that the government considers the regulations interpretative. Therefore, USCIB will not consider this further. That leaves only the exception for good cause.

An agency may base its good cause finding on a determination that the notice and comment are impracticable, unnecessary or contrary to the public interest.⁸

The Attorney General's Manual⁹ interpreting the administrative procedures act provides an explanation of these three terms.¹⁰ Notice and comment would be considered "'impracticable' when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required in section 4(a). For example, the Civil Aeronautics Board may learn, from an accident investigation, that certain rules as to air safety should be issued or amended without delay; with the safety of the traveling public at stake, the Board could find that notice and public rule making procedures would be "impracticable", and issue it rules immediately."¹¹

"'Unnecessary' refers to the issuance of a minor rule in which the public is not particularly interested."¹² That is clearly not the case here.

⁷ Treas. Reg. §1.245A-5T(k).

⁸ APA section 553(b)(3)(B).

⁹ <https://archive.org/details/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947> (hereinafter AG Manual or Manual).

¹⁰ IBID at 30.

¹¹ IBID at 30-31.

¹² IBID at 31.

“Public interest’ connotes a situation in which the interest of the public would be defeated by any requirement of advance notice. For example, an agency may contemplate the issuance of financial controls under such circumstances that advance notice of such rules would tend to defeat their purpose; in such circumstances, the “public interest” might well justify the omission of the notice and public rule making procedures.¹³

Section 553 has also been interpreted by the courts. Multiple courts have held “that the good cause exception is be ‘narrowly construed and only reluctantly countenanced.’”¹⁴ A Court has held this even in the case of registration requirements for sex offenders.¹⁵

In determining whether these exceptions may apply, section 7805(b) must also be considered. One of the reasons that the regulation was made effective on date of issuance was to fit within the exception of section 7805(b)(2). Generally, section 7805(b)(1) requires that regulations be prospectively effective. The regulations were published in the Federal Register on June 18, 2019. If the 30-day effective date rule applied, then the regulations would be effective from July 18, 2019. The Tax Cuts and Jobs Act was signed into law on December 22, 2017. Section 7805(b)(2) provides that regulations are permitted to be retroactively effective “if they are “filed or issued within 18 months of the date of the enactment if the statutory provision to which the regulation relates.” The preamble to the temporary regulations states that “to qualify for retroactivity under section 7805(b)(2), a regulation retroactive to the effective date of these provisions must be effective no later than June 22, 2019.” If the regulations were effective following the 30-day statutory period, they could not be retroactive under section 7805(b)(2). While the preamble to the temporary regulations indicates that “good cause is supported where regulations are required to be issued and effective by a certain statutory deadline, and in light of the circumstances affecting the agency and its functions leading up to that statutory deadline, the agency is unable during that timeframe to conduct a timely and fulsome notice-and-comment process,” courts have also held that good cause does not exist because of need to comply with a statutory deadline.¹⁶ A third case found good cause based on the statutory deadline.¹⁷

The Congressional Research Service has provided guidance on the interpretation of the good cause standard.¹⁸ In discussing the good cause exigency standard that guidance provides:

However, the “mere existence” of a deadline is usually insufficient to establish good cause. Courts have generally rejected good cause exemptions when agencies argue that

¹³ IBID at 31.

¹⁴ Utility Solid Waste Activities Group, et al., v. Environmental Protection Agency, 236 F. 3d 749 (D.C. Cir. 2001); Tennessee Gas Pipeline Co. V. F.E.R.C. 969 F.2d 1141 (D.C. Cir. 1992);

¹⁵ United States v. Cain (583 F.3d 408) (6th Cir. 2009).

¹⁶ Sharon Steel Corp. v. Environmental Protection Agency, 597 F.2d 377 (3rd Cir. 1979); United States Steel Corp. v. Environmental Protection Agency, 595 F.2d 2017 (5th Cir. 1979).

¹⁷ United States Steel Corp v. Environmental Protection Agency, 605 F.2d 283 (7th Cir.1979). Cert denied.

¹⁸ The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action, Jared P. Cole, Legislative Attorney, January 29, 2016. <https://fas.org/sgp/crs/misc/R44356.pdf>

statutory deadlines alone justify bypassing notice and comment procedures or the 30-day publication requirement. Instead, some “exigency” is required, independent of the deadline itself, which merits dispensing with Section 553’s requirements. Importantly, courts have precluded efficiency goals and concern for agency convenience from qualifying as exigencies.¹⁹

Importantly, those cases concerning the existence of a deadline relate to explicit deadlines within the statutory framework. There is no deadline in section 245A. Consequently, we believe the cases that resolve this issue in favor of the government are inapposite.

To state this in plain terms, there is no reason why Treasury could not have published a proposed regulation subject to notice and comment. Indeed, with the year and a half following the enactment of TCJA, Treasury has published numerous proposed regulations [and notices] apprising taxpayers of the government’s interpretation of TCJA so that taxpayers could plan affairs accordingly. The fact that the government has been busy with other TCJA projects is not enough to constitute “exigency” under the good cause standard.

CFCs should be permitted the Section 245A DRD

The preamble to the temporary regulations provides that: “The Treasury Department and the IRS continue to study whether, and to what extent, proposed regulations should be issued that provide that dividends received by a CFC are eligible for a section 245A deduction.” The temporary regulations do not provide any guidance on this specific issue, and we understand guidance will be forthcoming in a separate regulation package. USCIB supports regulations that, consistent with Congressional intent, would permit a Section 245A DRD for a dividend received by a CFC from a lower-tier SFC.

Treasury should issue regulations affirming the Internal Revenue Code section 245A DRD applies to dividend income received by a CFC from a lower-tier SFC (or a CFC if Section 954(c)(6) is not extended) that is otherwise Subpart F income to the CFC. The statutory text of Section 245A(a) facilitates a DRD for the foreign-source portion of a dividend received by a domestic corporation from a SFC. The issue is the reference to “domestic corporation” in the statute, which raises questions about the application of the Section 245A DRD to dividends received *by CFCs* from SFCs.

The legislative history is clear that Congress intended for Section 245A to apply to dividend income received by a CFC from a lower-tier SFC. First, the statutory language of Section 245A relies on the definition of a *United States shareholder*,²⁰ a tax term of art that includes *indirect* ownership in foreign corporations. Use of the term *United States shareholder* is indicative that Section 245A can apply to indirect dividends, i.e. dividends received by a CFC from lower-tier

¹⁹ IBID at 5.

²⁰ See Section 951(b).

SFCs. The Conference Report²¹ leaves no uncertainty about Congressional intent, it states “a CFC receiving a dividend from a 10-percent owned foreign corporation that constitutes Subpart F income may be eligible for the DRD with respect to such income.”²² The Conference Report elaborates that Section 245A should be interpreted broadly, and includes a specific example applying Section 245A in a tiered ownership structure.²³ Further, applying Section 245A to only dividends received by domestic corporations results in irreconcilable differences in the treatment of dividends in flat and tiered structures, with no policy basis for differentiation.

Treasury may issue regulations resolving the statutory ambiguity, and consistent with Congressional intent, apply the Section 245A DRD to dividends received by CFCs from lower-tier SFCs. Treasury can exercise this authority by permitting the Section 245A DRD at the level of the CFC or the United States shareholder. Section 245A(g) states, “The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section [...]” Treasury is also granted authority to issue regulations clarifying the calculation of earnings and profits of a foreign corporation for purposes of Subpart F in a similar manner to a domestic corporation.²⁴ Using these two separate grants of authority, Treasury can issue regulations allowing the Section 245A DRD to a CFC in the calculation of the CFC’s Subpart F income. From a mechanical standpoint, Treasury could also apply the Section 245A DRD at the level of the United States shareholder. The House Bill makes it clear Treasury is empowered with authority to treat a Subpart F inclusion directly attributable to a dividend received by a CFC as a “dividend received” for purposes of Section 245A.²⁵ Reading this language in conjunction with Section 245A(g) provides clear authority for Treasury to treat a Subpart F inclusion directly attributable to a CFC’s receipt of a dividend from an SFC as a “dividend received,” which qualifies for the Section 245A DRD.

Finally, Treasury and IRS should issue regulations clarifying that the Section 245A DRD applies to dividends received by a CFC from lower-tier SFCs. Without such guidance, dividends received by CFCs from lower-tier SFCs that do not get look-through treatment under Section 954(c)(6) and do not qualify for the same country exception under Section 954(c)(3) could be taxable at the full United States corporate rate. Further, if Section 954(c)(6) is not extended, most dividends received by CFCs from lower-tier CFCs would also be taxable at the full United States corporate rate. Such treatment would be inconsistent with the policy goals of Congress and arbitrarily favor SFCs held directly by a domestic corporation as compared with those held indirectly through CFCs.

²¹ Conference Report to Accompany H.R. 1, 115th Congress, 1st Session, Report 115–466 (December 15, 2017), (hereinafter “The Conference Report”).

²² The Conference Report, page 599, Footnote 1486.

²³ The Conference Report, page 599 (Congress describes a domestic corporation that indirectly owns stock in an SFC through a partnership. The Conference Report states that under Section 245A the domestic corporation would be allowed a DRD with respect to its distributive share of the partnership’s dividend income).

²⁴ Section 964(a).

²⁵ The Conference Report, page 595.

USCIB is available to discuss these comments further, if that would be helpful to the Treasury and the IRS.

Sincerely,

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