

Reproduced with permission from Tax Management International Journal, 52 TMIJ No. 1 (Jan. 6, 2023), 01/06/2023. Copyright © 2023 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Treasury Takes Another Bite Out of §951(a)(2)(B) in Prop. Reg. §1.1502-80(j)

By *Ethan Kroll and Sam Pollack**
Baker McKenzie LLP
Los Angeles and Chicago

INTRODUCTION

On December 9, 2022, Treasury issued proposed regulations under Section 1502 that would treat all members of a U.S. consolidated group as a single U.S. shareholder for purposes of applying Section 951(a)(2)(B) when the dividend triggering the application of Section 951(a)(2)(B) is a distribution of previously taxed earnings and profits (“PTEP”) described in Section 959(b). In this column, we provide background on arrangements that motivated the proposed regulations, discuss the proposed regulations and Treasury’s stated rationale for issuing them, and consider their implications for taxpayers.

BACKGROUND

A U.S. shareholder with a direct or indirect interest in a CFC (a “Section 958(a) Shareholder”) on the last day of the CFC’s taxable year is allocated its pro rata

share of the CFC’s subpart F and tested income.¹ Subpart F income is taken into account as gross income of the U.S. shareholder, and tested income is taken into account to determine the U.S. shareholder’s GILTI inclusion. The Section 958(a) Shareholder takes into account its pro rata share of subpart F income and tested income attributable to the Section 958(a) Shareholder’s direct or indirect interest in the CFC, even when the Section 958(a) Shareholder was not a Section 958(a) Shareholder with respect to the CFC for the entire taxable year, unless Section 951(a)(2)(B) applies.

Under Section 951(a)(2)(B), a Section 958(a) Shareholder’s pro rata share of the subpart F and tested income of a CFC is reduced when three conditions are satisfied. First, the Section 958(a) Shareholder must not have been the Section 958(a) Shareholder (with respect to the relevant shares) for the entire taxable year of the CFC. Second, the CFC must make a dividend distribution during its taxable year. Third, the CFC’s dividend must be to a person other than the Section 958(a) Shareholder in question.

The Section 951(a)(2)(B) pro rata share reduction is computed separately for subpart F income and tested income, and each computation turns on two amounts.² For computing the reduction to a U.S. shareholder’s pro rata share of subpart F income, the first amount is the amount of dividends the CFC distributed to other persons (i.e., persons other than the final Section 958(a) Shareholder) multiplied by a fraction, the numerator of which is the CFC’s subpart F income, and the denominator of which is the sum of the CFC’s subpart F income and tested income. The second amount is computed as follows. The Section 958(a) Shareholder determines the dividend that would have

* Ethan Kroll is a partner in Baker McKenzie’s Los Angeles office. Sam Pollack is a partner in Baker McKenzie’s Chicago office.

This article may be cited as Ethan Kroll and Sam Pollack, *Treasury Takes Another Bite Out of §951(a)(2)(B) in Prop. Reg. §1.1502-80(j)*, 52 Tax Mgmt. Int’l J. No. 2 (Jan. 6, 2023).

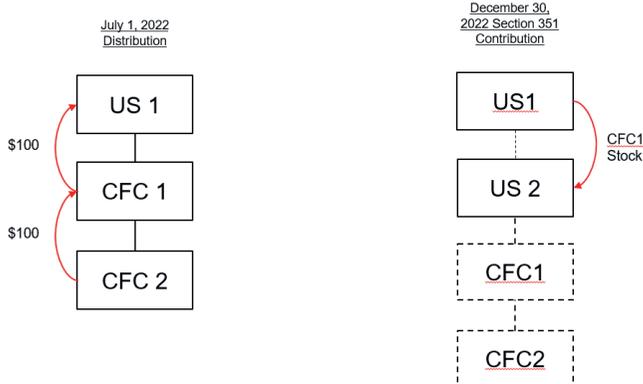
¹ §951(a)(1). All section references are to the Internal Revenue Code and the Treasury regulations thereunder, unless otherwise specified.

² Reg. §1.951-1(b)(1).

been received by other persons if, instead of receiving the dividend, they received a hypothetical dividend of an amount equal to the CFC's subpart F income. This hypothetical dividend amount is multiplied by a fraction, the numerator of which is the number of days the Section 958(a) Shareholder (as of the end of the CFC's taxable year) was not a Section 958(a) Shareholder with respect to relevant CFC shares, and the denominator of which is the total number of days in the CFC's taxable year. The Section 958(a) Shareholder reduces its pro rata share of the subpart F income of the CFC by the lesser of the two amounts. The same process is then repeated to reduce the Section 958(a) Shareholder's pro rata share of the tested income of the CFC, replacing "subpart F income" with "tested income" in the computations referenced above, except with respect to the denominator used in computing the first amount.³

We illustrate the operation of Section 951(a)(2)(B) as follows. US 1, a U.S. corporation, owns CFC 1, a CFC, and CFC 1 owns CFC 2. All of the entities in this example use the calendar year as their taxable year. At the beginning of its 2022 taxable year, CFC 2 has no earnings and profits ("E&P") and no PTEP. As of the end of its 2022 taxable year, CFC 2 has \$110x of E&P, \$20 of subpart F income and \$90 of tested income. On July 1, 2022, CFC 2 distributes a \$100 dividend to CFC 1, which CFC 1 distributes, in turn, to US 1. On December 30, 2022, US 1 contributes all of the stock of CFC 1 to US 2, a US corporation, in exchange for shares of US 2 in a Section 351 transaction.

The following diagrams illustrate the example above:



In the above example, Section 951(a)(2)(B) applies because: (i) US 2 was not the Section 958(a) Shareholder with respect to the stock of CFC 2 for all of 2022, (ii) CFC 2 distributed a dividend, and (iii) the recipient of the dividend was not US 2. US 2's pro rata share of the subpart F income of CFC 2 is reduced by \$18.18 because $\$100 \times (\$20/\$110)$ is \$18.18

³ Reg. §1.951A-1(d)(2)(i).

and \$18.18 is less than $\$20 \times (364/365)$.⁴ US 2's pro rata share of the tested income of CFC 2 is reduced by \$81.82 because $\$100 \times \$90/\$110$ is \$81.82 and \$81.82 is less than $\$90 \times (364/365)$.⁵ Thus, by applying Section 951(a)(2)(B), US 2's pro rata share of CFC 2's subpart F income is \$1.82 and US 2's pro rata share of CFC 2's tested income is \$8.18.

Additionally, absent regulations to the contrary, US 2 would not have an income inclusion with respect to CFC 2's dividend to CFC 1, as the dividend would not be treated as foreign personal holding company income under Section 954(c)(6). However, Treasury was unhappy with this result and, in response, issued controversial regulations under Section 245A,⁶ according to which Section 954(c)(6) does not apply to CFC 1's receipt of CFC 2's \$100 dividend. These regulations refer to US 1's indirect transfer of CFC 2 to US 2 as an "extraordinary reduction" and generally provide that, as a result of this extraordinary reduction, Section 954(c)(6) does not apply to CFC 2's dividend to the extent the sum of CFC 2's subpart F and tested income exceeds US 2's pro rata share of CFC 2's subpart F and tested income (here, $\$110 - \$1.82 - \$8.18 = \100 of excess).⁷ The regulations under Section 245A provide for a similar result if the Section 245A dividends received deduction ("DRD") would apply to the dividend triggering Section 951(a)(2)(B). In that case, the regulations generally reduce the Section 245A DRD by the amount Section 951(a)(2)(B) reduces a U.S. shareholder's pro rata share of a CFC's subpart F and tested income.⁸

This result is particularly draconian for U.S. corporate taxpayers when considering that Section

⁴ The first amount, as explained above, is CFC 2's \$100 dividend multiplied by a fraction, the numerator of which is \$20, CFC 2's subpart F income, and the denominator of which is \$110, CFC 2's \$20 of subpart F income plus its \$90 of tested income. The second amount, as explained above, is \$20, CFC 2's subpart F income, all of which could hypothetically have been distributed to CFC 1, multiplied by a fraction, the numerator of which is 364, the number of days in CFC 2's taxable year that US 2 was not a Section 958(a) Shareholder, and the denominator of which is 365, all of the days in CFC 2's taxable year.

⁵ The first amount, as explained above, is CFC 2's \$100 dividend multiplied by a fraction, the numerator of which is \$90, CFC 2's tested income, and the denominator of which is \$110, CFC 2's \$20 of subpart F income plus its \$90 of tested income. The second amount, as explained above, is \$90, CFC 2's tested income, all of which could hypothetically have been distributed to CFC 1, multiplied by a fraction, the numerator of which is 364, the number of days in CFC 2's taxable year that US 2 was not a Section 958(a) Shareholder, and the denominator of which is 365, all of the days in CFC 2's taxable year.

⁶ Treasury issued Temporary Regulations in 2019 that were finalized in 2020. Reg. §1.245A-5T (2019); Reg. §1.245A-5 (2020).

⁷ Reg. §1.245A-5(e)(2)(1); Reg. §1.245A-5(f).

⁸ Reg. §1.245A-5(e).

951(a)(2)(B) reduces a U.S. shareholder's pro rata share of tested income, which is generally subject to U.S. federal income tax at a statutory rate of 10.5%, and which is ostensibly designed to be taxed at an even lower effective rate when taking into account a U.S. shareholder's share of tested losses, QBAI, and Section 960(d) foreign tax credits. An equally draconian result follows when a CFC's subpart F income is subject to a material amount of foreign income tax that is creditable under Section 960(a). In either circumstance, the relevant U.S. shareholder's pro rata share of the CFC's subpart F income and/or tested income is reduced under Section 951(a)(2)(B), which may result in little to no U.S. tax benefit, yet the U.S. shareholder is still required to include dividend income, which is taxed at 21% and does not carry with it the relevant CFC's Section 960(a) and 960(d) foreign taxes or benefit from QBAI or tested losses.

The extraordinary reduction regulations provide U.S. shareholders with a mechanism to avoid the draconian results described above — if, that is, they give up the benefit of Section 951(a)(2)(B). Specifically, the extraordinary reduction regulations allow a U.S. shareholder to elect to close the tax year of a CFC prior to an extraordinary reduction. That election also allows for the allocation of foreign taxes between the CFC's artificially closed tax year and the short taxable year that ends with the CFC's natural year end.⁹ If a U.S. shareholder makes this election, Section 951(a)(2)(B) does not apply to reduce the CFC's income because the original U.S. shareholder is the Section 958(a) Shareholder as of the close of the CFC's year. Depending on one's perspective, this election either shows Treasury's compassion for taxpayers that unwittingly fall into the clutches of the extraordinary reduction regulations or reflects Treasury's hope for the regulations not to be held invalid. We do not speculate further here.

Now, let us change one fact in our example to a fact that is far more commonplace in the current environment. Specifically, instead of CFC 2 having no E&P at the beginning of 2022, CFC 2 instead has \$100 of E&P that is PTEP from prior year subpart F and GILTI inclusions. Taking into account this change, the application of Section 951(a)(2)(B) is exactly the same: US 2's pro rata share of CFC 2's subpart F income is \$1.82 and US 2's pro rata share of CFC 2's tested income is \$8.18. There is an extraordinary reduction, and Section 954(c)(6) does not apply to CFC 2's dividend. However, CFC 1 does not have subpart F income with respect to CFC 2's dividend because Section 959(b) applies, and the extraordinary reduction regulations do not turn off the application of Sec-

tion 959(b). Although distributions of PTEP from a CFC to its U.S. shareholder are not treated as dividends under Section 959(d), and thus distributions of this sort would not trigger Section 951(a)(2)(B), Section 959(d) does not say anything about CFC-to-CFC distributions under Section 959(b). Section 959(b) itself only says that PTEP distributed to a CFC is not treated as subpart F income of the distributee. That is where the proposed regulations come in.

OVERVIEW OF PROP. REG. §1.1502-80(J)

The proposed Section 1502 regulations specifically (and only) address a Section 951(a)(2)(B) pro rata share reduction resulting from Section 959(b) distributions of PTEP. The proposed Section 1502 regulations fall under Reg. §1.1502-80, "Applicability of other provisions of law." Under Reg. §1.1502-80(a), as a general rule, "[t]he Internal Revenue Code (Code), or other law, shall be applicable to the [U.S. consolidated] group to the extent the regulations do not exclude its application."¹⁰ Reg. §1.1502-80 includes a number of exceptions to this general rule — for example, Section 304 does not apply to sales of stock between members of a U.S. consolidated group — and Prop. Reg. §1.1502-80(j) proposes to add "[s]pecial rules for [the] application of Section 951(a)(2)(B) to distributions to which Section 959(b) applies" to those exceptions.

Prop. Reg. §1.1502-80(j)(1) contains the proposed regulations' operative rule: "In determining the amount described in Section 951(a)(2)(B) that is attributable to distributions to which Section 959(b) applies, members of a group are treated as a single U.S. shareholder (within the meaning of Section 951(b) (or Section 953(c)(1)(A), if applicable)) for purposes of determining the part of the year during which such shareholder did not own (within the meaning of Section 958(a)) the stock described in Section 951(a)(2)(A)." As we note above, Section 951(a)(2)(B), Reg. §1.951-1(b), and Reg. §1.951A-1(d) require the U.S. shareholder that owns stock in a CFC at the end of the year to reduce its share of the CFC's subpart F and tested income by the amount of dividend distributions that any other person receives with respect to the CFC's stock, to the extent that the dividend amount is less than the ratio of the days the U.S. shareholder did not own stock in the CFC over 365 multiplied by the CFC's subpart F and tested income. Simply put, when a CFC that is indirectly owned by a member of a consolidated group remits a Section 959(b) PTEP distribution to another CFC, and

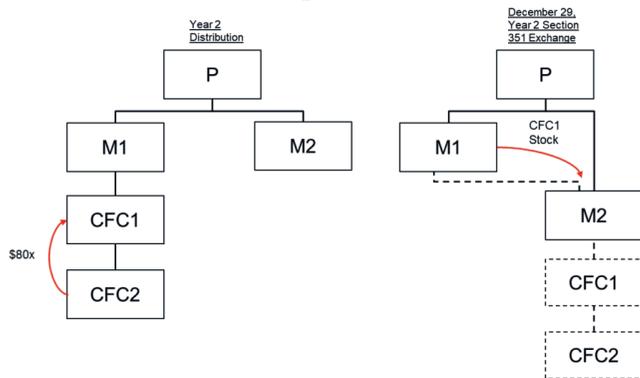
⁹ Reg. §1.245A-5(e)(3)(i)(A).

¹⁰ Reg. §1.1502-80(a).

the member transfers Section 958(a) ownership of the first CFC's stock to another member of the group, Prop. Reg. §1.1502-80(j)(1) treats both members as a single U.S. shareholder for purposes of determining the numerator of the ratio. Thus, when Section 951(a)(2)(B) would be triggered by a dividend subject to Section 959(b) (and only in that circumstance), a transfer from one consolidated group member to another is not viewed as a change in Section 958(a) Shareholder so that Section 951(a)(2)(B) does not apply.

Treasury illustrates the application of Prop. Reg. §1.1502-80(j)(1) with two examples. The first example is very similar to the example we use above. In the first example, U.S. parent, P, wholly owns two U.S. subsidiaries, M1 and M2. M1 owns CFC1, and CFC1 owns CFC2. All of the entities use the calendar year as their U.S. taxable year. In year 1, CFC2 has \$100x of subpart F income, which M1 includes in gross income. In year 2, CFC2 has \$80x of subpart F income but distributes \$80x to CFC1 in a distribution to which Section 959(b) applies. On December 29 of year 2, M1 contributes all the stock of CFC1 to M2 in a Section 351 exchange. But for Prop. Reg. §1.1502-80(j)(1), M2 would reduce its pro rata share of CFC2's \$80x of subpart F income by $363/365 \times \$80x$, or the lesser of \$80x and the product of the ratio of the days M2 did not own CFC2 within the meaning of Section 958(a) over 365 and \$80x. The example concludes that, under Prop. Reg. §1.1502-80(j)(1), the numerator in the ratio is 0, and not 363, because all members of the P group are treated as a single U.S. shareholder, and there was no portion of year 2 during which a member of the P group did not own CFC2.¹¹

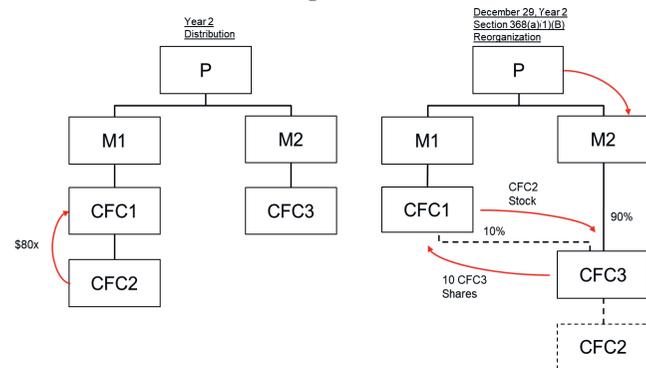
We illustrate the example below:



The facts of Example 2 are the same as those of Example 1, except that now M2 owns all of the 90 outstanding shares of a third CFC, CFC3. Instead of M1 contributing CFC1 to M2 in a Section 351 exchange, on December 29 of year 2, CFC3 issues 10 shares to

CFC1 for all the issued and outstanding shares of CFC2 in a Section 368(a)(1)(B) reorganization. The Example states, "As a result, on December 31, Year 2, M1 owns 10% of the stock of CFC2, and M2 owns 90% of the stock of CFC2." That result follows because CFC1 owns 10 shares of CFC3, and M2 owns 90 shares of CFC3. Thus, M2 indirectly owns 90% of CFC2, and M1 indirectly owns 10% of CFC2. M2's pro rata share of CFC2's \$80x subpart F income is \$72x (90% of \$80x). The example suggests that but for Prop. Reg. §1.1502-80(j)(1), M2 would reduce this pro rata share by the lesser of \$80x or $363/365 \times \$80x$. As in Example 1, Example 2 concludes that the numerator in the ratio is 0, and not 363, because all members of the P group are treated as a single U.S. shareholder, and there was no portion of year 2 during which a member of the P group did not own CFC2.¹²

We illustrate the example below:



Prop. Reg. §1.1502-80(j)(3) provides that Prop. Reg. §1.1502-80(j) applies "to taxable years for which the original consolidated Federal income tax return is due (without extensions) after the date of a Treasury decision adopting these rules as final regulations is published in the *Federal Register*." An original consolidated Federal income tax return is due on the 15th day of the fourth month following the close of the taxable year.¹³ If, for example, a calendar-year taxpayer were to have engaged in a transaction similar to the example with which this column begins (modified to make the distribution fall under Section 959(b)), or Examples 1 or 2 in the proposed regulations, in 2022, and Treasury were to publish the regulations as final in the *Federal Register* before April 15, 2023, the regulations would apply to treat all members of the taxpayer's consolidated group as a single U.S. shareholder for purposes of the Section 951(a)(2)(B) ownership rule starting with the taxpayer's 2022 taxable year.

¹² See Prop. Reg. §1.1502-80(j)(2), Ex. 2.

¹³ Reg. §1.6072-2(1)(i).

¹¹ See Prop. Reg. §1.1502-80(j)(2), Ex. 1.

RATIONALE FOR PROP. REG. §1.1502-80(J)

Section 1502 provides Treasury with a broad grant of authority to promulgate regulations to “clearly reflect the income tax liability” of a consolidated group. Treasury echoes this grant of authority in Prop. Reg. §1.1502-80(j)(1), noting that the regulation’s purpose is “to facilitate the clear reflection of income of a consolidated group by ensuring that the location of ownership of stock of a foreign corporation within the group does not affect the amount of the group’s income by reason of Sections 951(a)(1)(A) and 951A.” In the preamble to the proposed regulations, Treasury asserts that a consolidated group’s aggregate subpart F income and GILTI inclusions “should not be affected when ownership of the CFC stock moves within the group.” The problem with this assertion, and the articulation of the regulation’s purpose in Prop. Reg. §1.1502-80(j)(1), is that Treasury does not explain *why* following the letter of Section 951(a)(2)(B) and Section 959(b) fails to “clearly reflect the income tax liability” of a consolidated group. That explanation is necessary because the regulations under Section 1502 generally respect group members as separate entities. It is certainly possible to conceive of different approaches to computing consolidated taxable income — for instance, all transactions between members of a group could be disregarded, as if they did in fact occur between divisions of a single corporation — but the approach in Prop. Reg. §1.1502-80(j) is not the approach that the regulations generally take today.

The very limited scope of the application of the proposed regulations reflects the dissonance between Treasury’s explanation for the proposed regulations and their reality. If a consolidated group’s aggregate subpart F income and GILTI inclusions “should not be affected when ownership of the CFC stock moves within the group,” then why do the proposed regulations not also apply when the dividend triggering Section 951(a)(2)(B) is a distribution of untaxed E&P from one CFC to another or when the dividend is a dividend to which Section 245A applies? Better yet, when Treasury promulgated the extraordinary reduction regulations under Section 245A, why were extraordinary reductions between consolidated group members not carved out, with a rule similar to the proposed regulations applicable instead?

It seems that the real rationale for Prop. Reg. §1.1502-80(j) is Treasury’s concern that taxpayers are relying on Section 951(a)(2)(B) and Section 959(b) “with increasing frequency in an attempt to significantly reduce their income inclusions under Sections 951(a)(1)(A) and 951A(a).” Thus, Treasury appears to be interpreting the phrase, “clear reflection of income,” as targeting transactions that reduce consoli-

dated taxable income. As we indicate above, if concerns about the clear reflection of income were in fact paramount, Treasury would have modified the extraordinary reduction rule in Reg. §1.245A-5 so that it would not apply in the context of transfers between consolidated group members — or at least Treasury would do so now in tandem with Prop. Reg. §1.1502-80(j).

As we note above, Treasury does not address the question of *why* following the letter of Section 951(a)(2)(B) and Section 959(b) fails to “clearly reflect the income tax liability” of a consolidated group in the preamble. The reason, we believe, is that Treasury’s real concern lies with the interpretation of Sections 951(a)(2)(B) and 959(b), and not with Section 1502. After addressing the “clear reflection of income” principle, Treasury observes that, “[i]n addition, [the position taxpayers have been taking regarding the application of Section 951(a)(2)(B)] is inconsistent with Section 951(a)(2)(B) and the purposes of that provision.” From Treasury’s perspective, the purpose of Section 951(a)(2)(B) is to prevent the same income from being taxed twice. Absent Section 951(a)(2)(B), E&P from a subpart F transaction that a CFC distributes to one U.S. shareholder could also be subject to tax a second time under Section 951 if another U.S. shareholder were to hold the CFC’s stock at the end of the year because subpart F income is determined without taking into account distributions during the year.¹⁴ Ordinarily, if a CFC makes a mid-year dividend distribution to its U.S. shareholder and then has subpart F income that the same shareholder includes in gross income, this rule is not problematic because the mid-year distribution is recharacterized as PTEP to the extent of the subpart F inclusion.¹⁵ Where, however, the recipient of the dividend neither includes the CFC’s subpart F income in gross income nor qualifies as a successor to the U.S. shareholder that includes the CFC’s subpart F income in gross income,¹⁶ absent Section 951(a)(2)(B), nothing prevents both the recipient of the dividend and the final U.S. shareholder from paying tax on the same E&P.

While it is certainly true that Section 951(a)(2)(B) prevents the same E&P from being subject to tax twice, in the 60 years since Congress enacted the statute and Treasury promulgated the underlying regulations, neither Congress nor Treasury has conditioned the application of Section 951(a)(2)(B) on the prevention of double taxation. As we note in the background section above, Section 951(a)(2)(B) operates mechanically based on the plain language of the statute,

¹⁴ Reg. §1.952-1(c).

¹⁵ See *e.g.*, Reg. §1.959-2(b), Ex. para. (b).

¹⁶ See §959(a); Reg. §1.959-1(d).

and, together with the plain language of Section 959, provides unequivocally that PTEP distributions from one CFC to another reduce the transferee U.S. shareholder's pro rata share of the distributing CFC's subpart and/or tested income.

Simply put, the statutory language in Section 951(a)(2)(B) and Section 959 is unambiguous. It does not seem far-fetched to suggest that Treasury is using its regulatory authority under Section 1502 to provide guidance under Sections 951(a)(2)(B) and 959 that the unambiguous statutory language of those provisions would preclude. There is something unseemly about using a grant of regulatory authority under one statutory provision to provide guidance with respect to another provision that the plain language of that provision might obstruct. Treasury took that approach with respect to Section 954(c)(6) in Reg. §1.245A-5, and Treasury seems to be doing so again here. In other words, is the motivation behind Prop. Reg. §1.1502-

80(j) really to ensure the “clear reflection of income” by consolidated groups or to prevent the use of Section 951(a)(2)(B) and Section 959(b) to reduce pro rata shares of subpart F and tested income? The answer seems pretty clear to us.¹⁷

¹⁷ Other sections of the preamble also support the conclusion that Treasury is focused on what it perceives as inappropriate results under Sections 951(a)(2)(B) and 959(b). For one, the preamble expressly states that Prop. Reg. §1.1502-80(j) “do[es] not apply in the context of dividends composed of non-PTEP” and references Reg. §1.245A-5 in support of the statement that “other rules may result in the dividend being . . . included in the gross income of a U.S. shareholder.” In other words, it is only appropriate to treat members of a consolidated group as a single U.S. shareholder in the context of Section 951(a)(2)(B) transactions involving Section 959(b) PTEP distributions because some other rule typically forces an income inclusion in respect of the distribution.

IMPLICATIONS

The preamble cautions that, “[i]n addition to the proposed regulations, other authorities or common law doctrines may apply to recast a transaction or otherwise affect the tax treatment of a transaction. *See, e.g.,* Sections 482 and 7701(o) and §1.701-2 and §1.1502-13(h),” and closes with the following paragraph labeled, “No Inference”:

No inference is intended with regard to the treatment of transactions involving a consolidated group before the applicability date of the proposed regulations, including under §1.1502-13. Additionally, no inference is intended with regard to the treatment of similar transactions not involving a consolidated group, or with regard to whether Section 959(b) distributions are taken into account under Section 951(a)(2)(B). The Treasury Department and the IRS are further considering the interaction of Sections 951(a)(2)(B) and 959(b), and any additional guidance issued relating to those Sections, including guidance to prevent abuse, may be retroactive.

To state the obvious, the preamble makes it clear that Treasury and the IRS do not like Section 951(a)(2)(B) transactions involving Section 959(b) PTEP distributions and intend to use every tool at their disposal to frustrate the use of these provisions to achieve taxpayer-favorable results. That is not news to taxpayers that engaged in affirmative Section 951(a)(2)(B) planning, who almost certainly vetted their transactions thoroughly against the backdrop of the litany of common law and other anti-abuse rules. The IRS has attacked similar transactions in the past, when the transactions seeking to capitalize on Section 951(a)(2)(B) lacked sufficient economic reality.¹⁸ And while Treasury may be considering retroactive guid-

¹⁸ Chief Couns. Adv. 201320014 (May 17, 2013) (applying the economic substance doctrine, and other common law doctrines, to

ance under Sections 951(a)(2)(B) and 959(b), Treasury would be well-advised to reconsider that approach, as any retroactive guidance under Sections 951(a)(2)(B) and 959(b) would likely be met with robust challenges under both *Chevron* and the Administrative Procedure Act.

Finally, it is extremely difficult to see how proposed regulations that specifically and only address Section 959(b) distributions that would trigger Section 951(a)(2)(B) provide no inference about whether Section 959(b) distributions trigger Section 951(a)(2)(B). Whether Treasury likes it or not, these proposed regulations do provide a very strong inference that Section 951(a)(2)(B) applies to transactions such as those exemplified in the proposed regulations occurring in tax years prior to the effective date of the proposed regulations and to similar transactions occurring in tax years after the effective date, when the Section 958(a) Shareholders are not members of a consolidated group.

In sum, Prop. Reg. §1.1502-80(j) reflects Treasury’s effort to curtail a common variant of affirmative Section 951(a)(2)(B) planning without providing guidance under Sections 951(a)(2)(B) and 959(b). When considered together with the extraordinary reduction regulations, this approach confirms our belief that Sections 951(a)(2)(B) and 959(b) are unambiguous, and that changes to the operation of those Sections are rightly left to Congress, and not Treasury. Time will tell whether Treasury has overreached in both Prop. Reg. §1.1502-80(j) and Reg. §1.245A-5.

challenge the benefit claimed by a taxpayer with respect to an internal restructuring transaction, when the restructuring transaction was designed to reduce the taxpayer’s pro rata share of subpart F income under Section 951(a)(2)(B)); Chief Couns. Adv. 201640018 (September 30, 2016) (same).