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December 14, 2004

Mr. Gregory F. Jenner
Acting Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120 MT
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

The Honorable Mark W. Everson
Commissioner
Internal Revenue Service
Room 3000 IR
1111 Constitution Avenue, N.W.
Washington, DC 20224

Dear Acting Assistant Secretary Jenner and Commissioner Everson:

I am writing on behalf of the Tax Section of the New York State Bar Association concerning certain issues relating to permitted uses of repatriated funds and certain other matters under Internal Revenue Code section 965, added to the Code by the American Jobs Creation Act of 2004.

In order to qualify for relief under section 965(a), "the amount of the dividend" received by a United States shareholder (within the meaning of section 951(b) as modified by section 965(c)(5)(A), "U.S. shareholder") must be "invested in the United States pursuant to a domestic reinvestment plan." IRC § 965(b)(4). The plan must provide for "the reinvestment of such dividend in the United States (other than as payment for executive compensation), including as a source for the funding of worker hiring and training, infrastructure, research and development, capital investments, or the financial stabilization of the corporation for the purposes of job retention or creation." IRC § 965(b)(4)(B). The Conference Report confirms that the recited list of permissible uses is not intended to be exclusive.¹

¹ Conf. Rep. at 67.

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Taxpayer's right to trace qualified dividend uses without regard to other cash needs/uses

We start from the following observations:²

1. The statute on its face does not require
 - an incremental U.S. investment or net increase in U.S. assets or net worth
 - that the use of funds be a newly identified need
 - that other funds not be available for the permitted use³
 - that other funds not be displaced and used for non-permitted investments
 - that other funds not be borrowed and used for a non-permitted use
 - that there be no incremental non-permitted use.⁴

In short, other than in respect of related party indebtedness, on its face the statute does not make any acknowledgement of the fungibility of cash principle. We discuss this further below.

2. The statute, however, does require more than simply that an amount of expenditures for permitted uses be incurred during a specified time period and, in fact, provides that the "dividend" be used for the permitted purpose identified in the domestic reinvestment plan (from which it follows that it may not be used for a non-permitted purpose).

From this premise, it follows that some ability to monitor the use of funds is required. A taxpayer is both permitted and required to trace the funds, in a broad sense, from their receipt as a dividend from a CFC through to the identified permitted use. Tracing in this sense does not, in our view, require that funds be fully segregated and not, for example, commingled in a bank account. We also believe flexibility is needed to permit taxpayers to invest the amount of the dividend for a reasonable period

² We are not addressing here a situation in which the non-permitted use would include a transfer of cash to a controlled foreign corporation (CFC), which might be considered to result in "roundtripping" of cash.

³ As discussed below, this concept might be qualified in certain cases in which the use of the dividended funds is to repay recently created indebtedness.

⁴ A significant exception is the related party indebtedness rule, as proposed to be amplified by the pending Technical Corrections Bill.

of time pending their application towards a permitted use. Such temporary investment may also take the form of a repurchase of debt, regardless of its term. We therefore believe that all that is required is enough tracing to ensure that the dividend is not used for a non-permitted use. Loss of control over the funds through, for example, a repurchase of debt should not be inconsistent with tracing in this sense, nor should mere commingling of the funds in an account. Use of the funds, even on an interim basis, for statutorily proscribed purposes, however, would seem both inconsistent with the terms of the statute and its purpose. A rule could be adopted that, to the extent an account has other funds available, those other funds would be deemed used first for any use other than a permitted use or temporary permitted use.

We recognize that there are more substance-based alternatives to a tracing regime that might conceivably be applicable to section 965. For example, certain precedents exist for interpretive regulations restricting the ability to arbitrarily trace funds.⁵ Applying a standard as found in those contexts in the context of section 965, however, would be unworkable in the sense that the resulting uncertainty would make the provision of no interest to many taxpayers for whom it was intended. Another approach that would have put teeth into the permitted use provision and for which there have been statutory analogues including in section 965 itself⁶ – a requirement of incremental investment – was a key provision in a proposed amendment that was expressly rejected in the Senate,⁷ and the legislative history does not suggest any other restrictions. Under the circumstances, we find ourselves addressing a provision that on its face has a variety of rules and safeguards (identified uses, domestic reinvestment plan approval at the highest levels of a company, etc.), but that we recognize permits little ability to prevent what under typical federal income tax principles would be considered to be indirectly using funds for impermissible purposes (other than in respect of “roundtrip” transfers to the taxpayer’s CFCs or transactions that may undercut a purpose of “financial stabilization for the purposes of job retention or creation”). However, we believe that, on balance and in general, tracing (in a loose form) is all that the statute requires.

⁵ For example, section 279(b)(1) refers to an obligation “issued to provide consideration for the acquisition,” which the regulations (Treas. Reg. § 1.279-3(a)) interpret as “issued to provide consideration directly or indirectly for the acquisition.” (Emphasis added.) Under that provision, indirect use for the prohibited purpose occurs where an obligation is actually issued for a different purpose but “future economic needs” reasonably foreseeable at the time of acquisition could not be satisfied absent the issuance, or where the acquisition itself was anticipated and the obligation would not have been issued but for the acquisition. Treas. Reg. § 1.279-3(b)(2). This aspect of section 279, however, has not been administrable and in effect is a dead letter.

⁶ IRC § 965(b)(2), (b)(3). See also, e.g., IRC § 41 (research credit).

⁷ The Breaux-Feinstein amendment would have limited permitted uses to just four categories, required these permitted expenditures to be incremental increases over the taxpayer’s historic spending in such areas, and limited expenditures to a three year time frame. The Breaux-Feinstein amendment was debated as Amendment No. 3117 during Senate consideration of S.1637, the JOBS Act, and voted down. See Cong. Rec. S4861-68, S4884-85 (May 5, 2004).

One limitation that might be considered appropriate and within the intent of the statute is that the taxpayer act in good faith in investing funds in the United States. This could have application in connection with whether the repatriation was so closely connected with an extraordinary and inconsistent transaction, such as a contemporaneous major reinvestment overseas not occasioned by intervening events,⁸ dividend of unusual size, or other major impermissible use that the domestic reinvestment plan might be considered invalid. A safe harbor might provide that even such a transaction would not be considered inconsistent with the plan if the budgeted U.S. investment had actually increased incrementally for some period.

Time limit to deploy funds

In commenting on what should be a permitted use of funds, we are cognizant of the fact that the structural aspects of the statute referred to above heavily undercut the significance of the use limitations. We believe that issue is amplified to the extent that the investment period is longer rather than shorter, inasmuch as the amount of pre-existing uses for which funds can be displaced would tend to increase with the passage of time. On the other hand, certain types of investments by their nature cannot be completed within a predictable period or cannot be completed within a relatively short period, and yet should be permitted. For example, the timing and size of an acquisition of a business may be outside of the control of the taxpayer, and development of a new product may require years. At some point, however, the length of time funds are held in passive investments would seem to become inconsistent with the purpose and even the letter of the statute.⁹ A rule of reason seems appropriate, perhaps with a safe harbor of two years and an outside limit of four years but with an exception that extends the period in cases such as development of a product if the expenditures are scheduled and at least, for example, 50% of the projected expenditures has occurred within three years and 80% within five or six years.¹⁰

We would support an obligation of the taxpayer to report annually, in connection with the filing of its tax return, the results of the investment plan and, if the number of years warrants, a requirement to agree to an extension of the limitations period in respect of section 965.

⁸ This circumstance might be dealt with exclusively under the authority that would be granted in the Technical Corrections Bill.

⁹ If segregated accounts are required, the self-interest of taxpayers themselves would tend to limit the period. Taxpayers that were able to accumulate earnings at little tax cost abroad often would not be eager to hold funds for a lengthy time in taxable passive investments in the United States or in investments that are not consistent with targeted performance.

¹⁰ We do not believe that the defeat of the Breaux-Feinstein amendment means that taxpayers may automatically take longer than three years to complete an investment.

Bifurcation/proration

An additional overarching issue is whether uses of funds may be classified as mixed and prorated rather than treated as “all or nothing.” Examples of potential mixed uses of funds would include an acquisition of a domestic corporation with domestic and foreign operating subsidiaries, or a pension plan covering employees of domestic and foreign entities. We believe that bifurcation and proration should be provided in such circumstances, subject to, for example, a classification based on the predominant classification in, for example, 80% or more domestic or foreign cases. We also believe that, in determining the amount of a qualifying investment, that tolerance for “good faith” error in determining the qualified portion of a bifurcated investment be expressly permitted.¹¹

Uses not specified in domestic reinvestment plan

A qualified dividend is required to be invested pursuant to a domestic reinvestment plan. While this letter does not address generally the requirements of such a plan, we believe that guidance should clarify that language in a plan providing for the substitution of permitted investments other than those described be respected, at least under certain circumstances (such as where the original use becomes infeasible). We also suggest that consideration be given to deeming a plan to include such a provision. If the substitute use is substantially different in nature than the original use, reapprovals of the amended plan could be required (with reapproval by the CEO being deemed to satisfy the requirement that the approval have been obtained prior to the dividend).

Uses planned prior to enactment of section 965

Taxpayers typically budget expenditures for many projects on a multiyear basis in advance. As noted above, the statute does not expressly require that the use be newly identified. We believe guidance should confirm that, assuming the use otherwise qualifies, the fact that it was budgeted prior to enactment of section 965 and previously funded with, for example, operating cash flow of the taxpayer would not disqualify subsequent funding in whole or part with qualified dividend proceeds.

Investment

The touchstone principle in regard to permitted uses is that the funds be “invested in the United States.” Accordingly, there appear to exist two requirements: first, that the funds be “invested” and second, that geographically, the investment be in the United States. For purposes of section 965, all members of an affiliated group filing a consolidated federal income tax return are treated as a single U.S. shareholder, and accordingly, cash movements within the U.S. group are ignored.

Investment typically means making funds available to an enterprise with the expectation of future return. Investors typically become, through the act of

¹¹ Compare IRC § 422(a)(1).

investment, shareholders, partners, or even sole proprietors. The funds are used by the enterprise in any number of ways to further its business, including to fund both ordinary and necessary business expenditures as well as capital expenditures.

In the context of section 965, which provides for funds moving upstream (into a U.S. entity) rather than downstream, the concept must be reversed in the sense that an investment would be met by having the CFC transfer (dividend) funds to the United States shareholder corporation, which then deploys the funds in its business (whether to pay wages, buy inventoriable supplies, buy pencils, buy computers, or make an acquisition). An investment is the opposite of a disinvestment (removing funds from the business for, for example, passive investment by the corporation, payment of expenditures outside the United States or payment of dividends to shareholders).

The statute articulates certain examples of permitted uses of funds and one example (executive compensation) of a non-permitted use. The examples given suggest an intention that the expenditure have an ongoing benefit but, at the same time, an intention to promote U.S. employment. Particular uses will favor one or the other but not all clearly will favor both. We believe that the phrase “for the purposes of job retention or creation,” which is expressed in connection with financial stabilization, is a guiding statement of the purpose of the provision as a whole and, accordingly, that uses of funds that promote employment in the United States generally should be acceptable even if an asset is not necessarily created or an increase in number of personnel cannot be demonstrated. A further guiding principle is indicated by the limitation of the provision’s beneficiaries to corporate United States shareholders, which suggests that an increase in the business assets within a U.S. corporate enterprise is an objective.

Geographical limitation

The investment must be “in the United States.” We believe that this geographical requirement carries with it the obligation that the nexus to U.S. operations be demonstrable. Accordingly, acquisition of portfolio securities for passive investment generally would not be a qualifying investment (even if common stock of a domestic corporation and even if purchased in the United States). Similarly, the acquisition of shares of a foreign corporation¹² or assets used outside the United States would not satisfy this requirement. We also have concerns about a purchase of inventory manufactured or produced outside the United States (from a CFC or from an unrelated party) even if resold within the United States, except in circumstances where, for example, the inventory is not held for sale by the United States shareholders substantially in the form purchased. Further, a distribution to shareholders or repurchase of shares would be inconsistent with this requirement (except in certain narrow circumstances, as discussed below).

We turn now to certain specific types of cases for which guidance would be appropriate. We believe that it would be appropriate to treat certain uses identified in

¹² As a matter of simplicity, we would not permit proration even if the foreign corporation has U.S. effectively connected assets.

a Notice as per se permissible, certain other uses so identified as per se impermissible and uses not identified as subject to classification based on articulated guiding principles, in particular, promotion of job retention or creation in the United States and increase in the business assets of a domestic corporation.

Investment pending permitted use

As we have discussed above, investing the funds in short-term deposits or securities, pending the time when the funds are needed for the designated use should be acceptable. A taxpayer also should be permitted to use the funds to repurchase, the taxpayer's commercial paper or other debt or pay any liabilities pending the targeted investment (even if such a use does not qualify in its own right as a qualifying investment). To the extent that payment of "ordinary course" expenditures in the U.S. business (other than executive compensation) is not considered a permitted use in its own right, they would seem to not be objectionable uses on an interim basis.

Funding R&D costs

To the extent that the U.S. shareholder is not reimbursed under a cost-sharing arrangement or otherwise, costs for research and development in its broadest sense (not limited to the section 41 or 174 concepts) should be acceptable. If the U.S. shareholder is reimbursed under a cost sharing arrangement, we do not believe that the reimbursed amount would be a permissible use even if the research team is in the United States, since payment subject to reimbursement would not be consistent with investment of the dividend proceeds for this purpose.

Suppose the funds are used to pay a research team working abroad to develop an intangible that is, on the one hand, to be owned in the United States and used elsewhere or, on the other hand, is to be both owned and used in the United States. We would suggest that mere ownership, in a domestic corporation, of an asset used outside the United States would not be a qualifying investment (just as tangible assets in a foreign branch would not be), but if the asset also is used in the United States, it could qualify. Although, in the latter case, the funds would be paid to foreign parties, the investment nevertheless is in the United States in the sense that a domestic corporation has made a capital investment that will be used in the United States.

If the funds are used to pay a research team in the United States for contract research for a foreign party (unrelated or related), we believe the expenditure should qualify (see discussion of wages/salaries below). The fact that the customer that is acquiring an asset is non-U.S. should not obscure the fact that the funds are actually creating or retaining and maintaining U.S. jobs.

Payment of trade liabilities, wages/salaries or ordinary operating expenses

The payment of trade liabilities, wages or operating expenses of a U.S. business should be an investment in a U.S. business for two reasons, both because the funds are being devoted to the direct cash needs of the business and because the resulting relief from an obligation is analogous to reduction of indebtedness (discussed below).

Such uses, by expanding the business and/or increasing cash flow, may be considered to promote “financial stabilization of the corporation for the purposes of job retention or creation.”

It is possible to take the view, however, that, there is less clearly an “investment” in the business than is the case where, for example, a plant is acquired. As suggested above, however, a distinction should be drawn between the devotion of funds to the business (which is the “investment”) and the use to which the funds so devoted are put within the business. Any use that maintains, promotes or increases the operations of a business is consistent with an investment. For example, payment of advertising costs and compensation of marketing personnel, which are ordinary section 162 expenses, are intended to increase the value of the companies’ brands and/or general goodwill and so promote growth. And payment of any accrued expense increases the net worth of the enterprise on a balance sheet basis just as does the reduction of indebtedness.

In addition, specifically with respect to wages, a major purpose of the provision and a major purpose of the 2004 Act itself, as reflected in its name, is to promote job creation and retention. The use of the funds to promote an existing business would seem more consistent with the purpose of the statute than the use of the funds, for example, to acquire an existing business or purchase an existing facility. Both “job retention” and “worker hiring” are expressly referred to in the statute. Further, the fact that payment of executive compensation is expressly not allowed strongly suggests that payment of wages or other non-executive compensation is a permitted use.¹³

A worker is part of a work force which is an asset and investment. Drawing a line between retaining a worker and maintaining a worker, between a worker who is susceptible to termination by reason of downsizing and one who is not, or between wages and salaries resulting in an asset or specifically targeted towards a long-term benefit and other wages and salaries would not seem fruitful or viable. We note that an exercise in similar line drawing was abandoned in the recent capitalization of expenditure regulations. Treas. Reg. §1.263-4(d).

We recognize that the broader the scope of permitted uses the greater the availability of cash for nonpermitted uses. If that is a concern, one might consider a conditioning of certain types of ordinary course of business uses on a good faith intent to use the repatriated funds in the taxpayer’s U.S. business on an incremental basis (as measured by, for example, increases in budgeted amounts for certain U.S. operations for perhaps two years, subject to changes in circumstances).

¹³ We are not addressing whether “executives” for this purpose should be defined, for example, as persons subject to the insider trading rules of section 16(b) of the Securities Exchange Act of 1934, or, for example, “key employees” as defined in section 416(i) of the Code. We also are not addressing the scope of “compensation” for this purpose.

Payment of tort, pension or tax liabilities or contractual indemnity obligations

Payment of tort, pension or tax liabilities and contractual indemnity obligations that arise in the conduct of a U.S. business should be an acceptable use (except to the extent that the liabilities or indemnity obligations relate to a foreign operation or acquisition, which may require a proration). Such a use can be justified as an investment in a domestic operating business (as discussed above). In addition, at least to the extent that a reduction of debt generally qualifies as an investment maintaining or increasing financial stability (see discussion below), the payment of these liabilities should qualify as well. We have considered whether distinctions would be appropriate based on, for example, the amount of a tort liability, whether it was anticipated or not, whether a tax liability related to non-current taxes, whether the pension contribution related to underfunding (in one sense or another), etc., but ultimately find the line drawing to be artificial.

As noted above, however, we recognize that the broader the scope of permitted uses the greater the availability of free cash flow for nonpermitted uses. For this reason, consideration might be given to coupling a non-temporary use for certain such liabilities (for example, payment of current taxes) with a requirement that the taxpayer to such extent intend in good faith to use the repatriated funds in its U.S. business on an incremental basis (as measured by, for example, increases in budgeted amounts for one or more units, operations, departments or projects for, for example, two years, subject to changes in circumstances).

In the case of pension obligations, we recognize that many if not most plans will include executives and foreign-based employees. As regards executives, we believe that, so long as the plan is a qualified plan satisfying the minimum coverage requirements of section 410, the prohibition of payment of executive compensation should not be violated. As regards non-U.S. based participants, we believe a pro ration approach (which will vary with the type of plan) should be taken.

Reduction of indebtedness

As in the case of wage expense and the liabilities discussed above, the statute does not refer to the payment of indebtedness. As noted, however, it does refer to reinvesting the dividend as a source for the “financial stabilization of the corporation for the purposes of job retention or creation.”¹⁴ Further, the legislative history makes clear that the statutory language was considered to encompass at least certain kinds of debt reduction.¹⁵

¹⁴ “Corporation” for this purpose refers to the U.S. shareholder as distinguished from the CFCs.

¹⁵ Senator Gordon Smith (a sponsor of the legislation) made the following statement on the Senate floor: “It is my understanding that the concept of financial stabilization, for this purpose, encompasses use of the repatriated funds to repay debt of the U.S. parent corporation. Use of these funds to pay down debt is a qualified use for purposes of the provision. In fact, debt repayment will strengthen U.S. corporate balance sheets, which will improve a company’s ability

Recognizing that the listed purposes are not exclusive, and that a reduction of debt will produce substantial cash flow savings for the United States shareholder (as opposed to the CFC(s)), and will result in an increase in its net worth (disregarding the CFC(s)), it is not clear what, if anything, further is required for a reduction of debt to qualify under this language. It would seem a futile exercise to attempt to draw distinctions based on the strength of the taxpayer's balance sheet or whether there actually is an increase in credit rating or creditworthiness. Therefore, the phrase "purposes of job retention or creation" may, in the context of debt reduction, bear little independent significance.

We note that in many cases in which a CFC is required to borrow in order to pay a dividend under section 965 it will be advantageous for the United States shareholder to guarantee the loan. On balance, we believe that such a guarantee should not cause a retirement of indebtedness to fail to be a permitted use.¹⁶

Under certain circumstances, transactions can appear to go beyond the broad flexibility permitted under the statute and be fundamentally inconsistent with its purpose. These may be limited to egregious cases in which the taxpayer in effect is acting in bad faith. If a transaction involving a material amount of borrowed funds can be shown to be linked with a payment of an obligation of a material amount, then scrutiny will be warranted. Thus, if funds are used to reduce debt, the use of reborrowings within a short period thereafter might be examined. Conversely, if the original debt was incurred a short time earlier and its proceeds used for a nonqualified purpose, the repayment of the debt might be a questionable use. Further, in either of such cases, the borrowings could be considered in assessing the bona fides of the purpose of financial stabilization.

A distinction might be drawn based on whether the indebtedness has (or had a term when issued) of greater than, for example, one year. See the discussion of trade liabilities above.

Acquisition of a business entity or integrated business operation

Acquisition of a domestic business likely satisfies the statutory language, even though as a general matter such a transaction will not result in an increase in U.S. employment (and in many cases will not even result in an increase in assets in domestic corporate solution). In general, we believe that no distinction should be drawn between asset purchases, purchases of interests in pass-through entities and purchases of shares of

to employ and hire workers." See Cong. Rec. S5220 (May 11, 2004). Accord, Remarks of Senator Ensign, Cong. Rec. S3506 (March 11, 2003).

¹⁶ We do not address the circumstances in which a shareholder-guaranteed loan may be recharacterized as a loan to the shareholder under general income tax principles.

a corporation. Further, we do not believe the statute permits any distinction based on the nature of the seller.¹⁷

Acquisitions often involve multijurisdictional businesses. As a general rule, proration on some basis seems appropriate. A basis ready at hand, which distinguishes domestic from foreign assets would be the asset method used for allocating interest expense under section 1.861-9T.

If less than, for example, 20% or more than, say 80% of the relevant assets are foreign, we would not require or permit bifurcation, provided that if a business entity (including a disregarded entity or a purchase via a section 338(h)(10) election) is not purchased, the foreign line of business forms a part of or is complementary to the U.S. business. Anti-stuffing rules could be appropriate to protect the proration cliff.

Repurchase of shares

Under certain limited circumstances, a share repurchase might be viewed as increasing the financial stability of the enterprise. For example, a redemption of preferred stock could be considered an elimination of a tranche of financing that no longer comports with the financial posture of the business. A second example could be where shares are held by a dissident shareholder in circumstances where the dissension rises to the level of creating financial instability. A third could be to forestall a takeover threat, or possibly even if common shares are trading at unusually depressed prices relative to perceived value as a result of something other than general market conditions. In addition, a repurchase of shares can be considered beneficial as an offset for the increased outstanding shares resulting from option exercises.¹⁸ Using a repurchase of shares to improve the earnings per share (EPS) profile of the company can also be an effective way to boost a company's stock price,¹⁹ at least in the short term.²⁰

¹⁷ We note that the strongest case can be made for an acquisition that brings assets not in domestic corporate solution into domestic corporate solution. A sale of assets between domestic corporations, or an acquisition of shares of a domestic corporation, results in no net increase (or decrease) in assets within domestic corporate solution. Nevertheless, we do not believe that these distinctions are relevant for purposes of section 965.

¹⁸ A concern we have in this regard is that executives are typically generous beneficiaries of stock option grants and, accordingly, an effect of employing a share buyback by a company to offset dilution from stock option exercises can be considered to at least have the appearance of being inconsistent with the prohibition on payment of executive compensation

¹⁹ A higher stock price can provide better acquisition currency. While a good business purpose, however, this would seem to have little to do with financial stabilization, and the acquisition through repurchase of shares (even if definite) would not itself be an investment of the dividended funds in the United States.

²⁰ By the same token, it cannot be assumed that a share buyback will have its intended effect. Reported instances of buybacks at prices higher than a share's subsequent trading value are legion.

However, we find the connection between a higher share price and financial stabilization for the purposes of job retention or creation to be generally tenuous and not sufficiently direct to satisfy the statute. We believe that one must distinguish an enterprise's shareholder level from its corporate level. The concept of financial stabilization suggests creditworthiness, which suggests that the situation be examined through the lens of a creditor. A typical institutional credit agreement treats share repurchases (and share distributions) as "restricted payments" that must be carefully circumscribed, for the obvious reason that they erode the enterprise's net worth and its capacity to meet its obligations as a going concern. Stock price is given no weight.

Further, the targeted financial stabilization is to be "for the purposes of job retention or creation." While, in order to avoid line-drawing in view of the legislative history and to further the tax administrability of the statute, the phrase may be accorded little independent significance in the context of debt repayments, we do not believe it is intended to be treated as an empty letter generally. The objective of job retention or creation at the corporate level of the U.S shareholder would seem much more aligned with using the cash for a purpose that, if it does not directly increase or maintain jobs, at least increases the net worth of the company and strengthens its balance sheet, rather than one that increases EPS.

More basically, while certain share repurchase transactions have more potential than others to be viewed as promoting financial stabilization, in our view all suffer from a different statutory shortcoming, namely that there is not an investment in the United States. A repurchase of shares represents an outflow of funds and a shrinking of the enterprise. Thus, generally, in such a case, it is the shareholders who would have to be investing. There is no way to know whether, how or where they will do so. Further, inevitably there will be foreign shareholders likely to invest outside of the United States. The starkest case would be a targeted repurchase from a large foreign shareholder. In any event, looking to possible investment by a shareholder would be inconsistent with the limitation of the provision's benefits to domestic corporations rather than also to non-corporate United States shareholders.

Accordingly, the only possible investment in accordance with a plan could be if the company were investing in itself. The argument that a repurchase of shares represents an investment in the company's own shares or underlying assets seems weak, as the shares do not represent directly or indirectly any operating asset or goodwill that is not already owned by the corporation. While such a repurchase could conceivably be viewed as a temporary investment pending a more appropriate use, expanding the scope of the temporary investment concept to that extent, such that the cash leaves the control of the company subject to obtaining a new equity infusion, seems to us to be straining too hard.

Funding dividends or increased level of dividends

Using repatriated funds to pay dividends raises concerns similar to those described above for a repurchase of shares. Under certain narrow circumstances, a

payment of dividends might arguably be viewed as contributing to the financial stability of the enterprise. For example, if cumulative preferred stock dividends are in arrears, a payment of those dividends might be viewed as increasing financial stability. On balance, however, we would not be inclined to go down this path.²¹

As always, we would be happy to discuss these issues with you further.

Respectfully submitted,



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²¹ A dividend from one U.S. shareholder to another (for example, from a section 936 company to its parent company) might qualify if the domestic reinvestment plan of the subsidiary includes an annexed binding agreement by the parent company to use the funds for a permitted purpose pursuant to its own reinvestment plan (itself annexed to the agreement). The statute does not require that the U.S. reinvestment be by the U.S. shareholder itself.