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Report No. 1482
October 12, 2023

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Re: Report No. 1482 - Report on Selected International Issues Relating to the Corporate Alternative Minimum Tax

Dear Ms. Batchelder and Messrs. Werfel and Paul:

I am pleased to submit Report No. 1482 of the Tax Section of the New York State Bar Association on selected international issues relating to the corporate alternative minimum tax, including issues discussed in Notice 2023-64.

We appreciate your consideration of our Report. If you have any questions or comments, please feel free to contact us and we will be glad to assist in any way.

Respectfully submitted,

Philip Wagman
Chair

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Report No. 1482

New York State Bar Association Tax Section

Report on Selected International Issues Relating to the Corporate Alternative Minimum Tax

October 12, 2023

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Report on Selected International Issues Relating to the Corporate Alternative Minimum Tax

I. Introduction

This report ("**Report**")[1] supplements Report Number 1473[2] (the "**Prior CAMT Report**"), and discusses certain international tax issues arising under the corporate alternative minimum tax ("**CAMT**"), which applies to applicable corporations.[3] This Report focuses primarily on: (i) the rules in Sections 56A(c)(2)(C) and (c)(3), which relate to the portion of an applicable corporation's adjusted financial statement income, as defined below ("**AFSI**"), from distributions by, and income of, controlled foreign corporations[4] (such rules the "**CAMT CFC Rules**"); and (ii) the rules in Section 59(l), which provide for a foreign tax credit ("**FTC**") that may be used to offset CAMT liabilities (the "**CAMT FTC Rules**").

This Report has the following parts: Part II summarizes our recommendations for guidance from the Treasury regarding the CAMT CFC Rules and the CAMT FTC Rules, including recommendations in response to relevant portions of Notice 2023-64. Part III sets forth our analysis of our recommendations regarding the CAMT CFC Rules. Part IV sets forth our analysis of our recommendations regarding the CAMT FTC Rules.

II. Summary of Recommendations

1. We agree with Treasury's decision in Notice 2023-64 to adopt the Aggregation Approach (as defined below) when computing an applicable corporation's Look-Through Inclusion (as defined below) with respect to CFCs it owns.

[1] The principal drafters of this Report were Tijana Dvornic, Stephen Massed and William McRae. Helpful comments were received from Kimberly Blanchard, Peter Connors, Andrew Herman, Kevin Jacobs, Jiyeon Lee-Lim, Gary Scanlon, Michael Schler, Andrew Solomon, Joseph Toce, Philip Wagman, Andrew Walker, Jeshua Wright and Libin Zhang. Research assistance was received from Kylie Barza, Sarah Berger, and Kathy Zhang. This Report reflects solely the views of the Tax Section of the New York State Bar Association ("**NYSBA**") and not those of NYSBA's Executive Committee or its House of Delegates. Any reference to "**Section**" in this Report is a reference to a section of the Internal Revenue Code of 1986, as amended (the "**Code**"), and any reference to "**Treas. Reg. §**" is a reference to a section of the regulations promulgated thereunder (the "**regulations**") by the U.S. Department of the Treasury ("**Treasury**", including as applicable the Internal Revenue Service ("**IRS**")).

[2] Tax Section of the New York Bar Ass'n, Report No. 1473 – Report on Selected Issues Relating to the Corporate Alternative Minimum Tax (Mar. 20, 2023).

[3] An "**applicable corporation**" is a corporation, other than an S corporation, a regulated investment company, or a real estate investment trust, that meets one of the average annual AFSI ("**AAAFSI**") tests set forth in Section 59(k)(1)(B) for a prior taxable year that ends after December 31, 2021. Section 59(k)(1)(A).

[4] A "**controlled foreign corporation**" or "**CFC**" is any foreign corporation if more than 50 percent of either the total combined voting power or the total value of the stock in such corporation, is owned directly, indirectly under Section 958(a)(2), or constructively under Section 318, as modified by Section 958(b), by United States shareholders on any day during the taxable year of such foreign corporation. Section 957(a). A "**United States shareholder**" is, with respect to any foreign corporation, a United States person who owns directly, indirectly under Section 958(a)(2), or constructively under Section 318, as modified by Section 958(b), 10 percent or more of either the total combined voting power or the total value of the stock in such corporation.

2. Treasury should issue guidance that provides a Section 78 gross-up amount is not treated as a dividend for purposes of measuring a United States shareholder's Dividend Inclusion (as defined below) with respect to a CFC, to the extent that the related income is or has been taken into account in a Look-Through Inclusion.

3. Treasury should provide guidance to prevent an applicable corporation that is a United States shareholder of a CFC from having a double inclusion of income of a CFC, as both a Look-Through Inclusion and a Dividend Inclusion (each as defined below). If Treasury does not provide an exemption system under which CFC dividends are not treated as Dividend Inclusions, then Treasury should issue guidance to provide that Dividend Inclusions do not include distributions by a CFC that are attributable to PIANI (as defined below) and should issue rules necessary to track PIANI and determine the extent to which CFC distributions are attributable to PIANI. Specifically, Treasury should consider adopting one of three alternative methods to attribute PIANI to distributions by a CFC to a United States shareholder that is an applicable corporation:

   (i) the Distribution Method, a set of rules governing the treatment of CFC distributions for CAMT purposes which would operate completely independently from the dividend and PTEP rules that apply for regular tax purposes;

   (ii) the Dividend Method (with PTEP Replacement), which would follow the rules of Sections 301 and 316 to characterize distributions by a CFC as Dividend Inclusions, but would replace the regular PTEP rules under Section 959 for CAMT purposes with a new system (conceptually similar to the PTEP rules) that would deal with PIANI; and

   (iii) the Dividend Method (with PTEP Integration), which would also rely on Sections 301 and 316 to characterize distributions by a CFC as Dividend Inclusions, but would integrate (rather than replace) the existing PTEP rules under Section 959 in order to deal with PIANI in the CAMT CFC regime.

4. For purposes of the CAMT FTC, in prescribing what it means for a foreign income tax to be "taken into account" on the AFS, Treasury should consider changing the approach in Notice 2023-64, and instead limiting taxes that are "taken into account" on the AFS to those that increase the current tax expense.

5. Treasury also should modify the approach in Notice 2023-64 by providing that, in addition to a CAMT FTC being available where the Paid or Accrued Requirement (as defined below) is met in a year after the AFS Requirement (as defined below) (a result that appears to be approved in the Notice), the converse also would be true (*i.e.*, the CAMT FTC would be available where the Paid or Accrued Requirement is met in a year prior to the AFS Requirement).

6. Treasury should further consider administrative relief for the CAMT FTC where timing differences between book and tax accounting give rise to a deferred tax

liability. This relief may take the form of permitting amendments of prior year tax returns once both CAMT FTC requirements have been met, or permitting a CAMT FTC to be taken on an originally filed tax return in the year in which the AFS Requirement is met, provided it is reasonably expected that the Paid or Accrued Requirement will also be met (subject to subsequent recapture).

7. We agree with what appears to be Treasury's approach in Notice 2023-64 that items reported on a net-of-tax basis on the AFS are disaggregated into their pre-tax and tax components for purposes of the CAMT FTC.

8. We agree with Treasury's decision in Notice 2023-64 to clarify that a partner's share of partnership foreign income taxes is treated as paid or accrued by the partner for purposes of both the Direct FTC and Indirect FTC (each as defined below).

III. CAMT CFC Rules

This Part III discusses issues arising under the CAMT CFC Rules. Part III.A provides background on the CAMT CFC Rules. Part III.B explains our reasons for agreeing with the approach taken in Notice 2023-64 that an applicable corporation's AFSI in respect of CFCs should be calculated on an aggregate basis (netting items from different CFCs within the same taxable year). Part III.C analyzes the goals of the CAMT, and explains that, because the adjustments under the CAMT CFC Rules deviate from the calculation of income for financial accounting purposes in material ways, it is not meaningful to evaluate the CAMT CFC Rules by the standard of capturing an applicable corporation's financial accounting income. Finally, Part III.D discusses in detail several issues related to what we view as the biggest issue under the CAMT CFC Rules—the double counting of income—and offers three potential solutions.[5]

A. Background: Overview of the CAMT CFC Rules

The CAMT imposes a tax on an applicable corporation equal to the amount by which the corporation's tentative minimum tax for a taxable year exceeds the sum of its regular tax and base erosion anti-abuse tax ("**BEAT**") for the year.[6] An applicable corporation's "**tentative minimum tax**" for a taxable year is equal to 15 percent of its AFSI for the year, less its CAMT FTC for the year.[7] If an applicable corporation pays CAMT for a taxable year, the corporation can carry forward the amount of tax paid to offset its regular tax in future years (the "**CAMT credit carryforward**").[8]

An applicable corporation's AFSI for a taxable year is the net income or loss in its applicable financial statement ("**AFS**") for such year (respectively, "**financial statement net**

[5] In Notice 2023-64, Section 16.02(3), Treasury has requested comments on this issue.

[6] Section 55(a). An applicable corporation's "**regular tax**" for a taxable year is its regular tax liability for the year, less its allowable foreign tax credit for the year. Section 55(c)(1).

[7] Section 55(b)(2)(A)(i).

[8] Section 53(e).

income" or "**FSNI**" and "**financial statement net loss**" or "**FSNL**"), as adjusted by Section 56A(c).[9] Further, the AFSI of an applicable corporation that is a foreign corporation is determined using the principles of the effectively connected income ("**ECI**") rules in Section 882.[10] Thus, a CFC only has AFSI to the extent it is engaged in a trade or business within the United States and earns ECI, or in the case of a CFC entitled to the benefits of an in force income tax treaty, to the extent it earns income attributable to a permanent establishment in the United States.[11]

As regards corporate subsidiaries of an applicable corporation, Section 56A(c)(2)(C) provides that, if an applicable corporation owns shares in another corporation that is not part of the applicable corporation's consolidated group for U.S. federal ("**Federal**") income tax purposes, the applicable corporation's AFSI with respect to that other corporation is generally determined by taking into account:

> "the dividends received from such other corporation (reduced to the extent provided by the Secretary in regulations or other guidance) and other amounts which are includible in gross income or deductible as a loss under this chapter (other than amounts required to be included under Sections 951 and 951A or such other amounts as provided by the Secretary) with respect to such other corporation."

We refer to dividends included in AFSI under this rule as "**Dividend Inclusions**".

In the case of subsidiaries that are CFCs, however, there is another inclusion in addition to Dividend Inclusions. Specifically, an applicable corporation that is a United States shareholder of one or more CFCs is also required under Section 56A(c)(3) to make the following adjustment to AFSI:

> "the adjusted financial statement income of such [applicable corporation] with respect to such controlled foreign corporation (as determined under paragraph (2)(C)) shall be adjusted to also take into account such [applicable corporation's] pro rata share (determined under rules similar to the rules under Section 951(a)(2)) of items taken into account in computing the net income or loss set forth on the [AFS] (as adjusted under rules similar to those that apply in determining [AFSI]) of each such [CFC] . . . "

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[9] Section 56A(a). An applicable corporation's AFS for a taxable year is determined under Section 451(b)(3). Section 56A(b). A corporation testing whether it meets the income threshold to be an applicable corporation computes its AAAFSI using generally the same rules, as are described in the text for an applicable corporation computing its AFSI under Section 56A.

[10] Section 56A(c)(4).

[11] *See* Notice 2023-64, Section 7.02(4) (stating that if a foreign corporation qualifies for and claims the benefits of the business profits provisions of an applicable income tax treaty, the foreign corporation determines its AFSI by applying the principles of such provisions).

In other words, Section 56A(c)(3) effectively mimics the look-through regime of Subpart F to take account of the net income or loss of a CFC set forth in its AFS, as adjusted using rules similar to those that apply in determining AFSI ("**Adjusted Net Income or Loss**"). We refer to amounts of CFC Adjusted Net Income or Loss attributed to an applicable corporation under these rules as "**Look-Through Inclusions**".[12] A CFC's Adjusted Net Income or Loss includes income that is subject to current tax under Subpart F or as ECI,[13] as well as income that is not subject to current tax, such as income eligible for the Section 954(b)(4) high-tax exception and income attributable to qualified business asset investment, as defined in Section 951A(d) ("**QBAI**"), and thus these amounts are also included in a United States shareholder's Look-Through Inclusions. An applicable corporation's AFSI is also "appropriately" adjusted to disregard (*i.e.*, add back) foreign income taxes within the meaning of Section 901 ("**foreign income taxes**") and Federal income taxes that are taken into account on the applicable corporation's AFS (the "**Income Tax Adjustment Rule**").[14] That is, Look-Through Inclusions are of pre-tax income.

A United States shareholder's Look-Through Inclusion cannot be negative; [15] we refer to a negative amount determined under Section 56A(c)(3) with respect to CFCs as a "**Look-Through Net Loss**". If a United States shareholder has Look-Through Net Loss, the United States shareholder does not reduce its financial statement net income by the loss.[16] Instead, the United States shareholder carries the Look-Through Net Loss forward to offset future Look-Through Inclusions.[17] Thus, a United States shareholder cannot reduce its financial statement net income with its pro rata share of the net losses of its CFCs, but a United States shareholder can reduce its pro rata share of the net income of its CFCs with its non-CFC net losses.

Given the potential for overlaps and mismatches among these various rules, Treasury has a broad mandate to address such problems through guidance. For example, the CAMT regime includes the following delegations of authority:

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[12] One point of statutory interpretation regarding Look-Through Inclusions is that the quoted language above describes Look-Through Inclusions as an *adjustment* to the applicable corporation's AFSI, *as determined under the Dividend Inclusion rule*. It is possible to read that language, therefore, as suggesting that Look-Through Inclusions should arise only to the extent necessary to capture income that has not already been taken into account as a Dividend Inclusion. Under such a reading, the statute might on its face prevent some of the double inclusions that are discussed in Part III of this Report. While we believe this reading is a plausible one, it is also possible to read the above-quoted language as merely stating that AFSI shall be increased by adding Look-Through Inclusions to Dividend Inclusions. Notice 2023-64 appears to reflect the latter reading in section 7.02(2).

In any event, we believe that the above-quoted statutory language does not offer sufficient guidance as to how Look-Through Inclusions and Dividend Inclusions are to be coordinated to prevent double-counting of the same income, and as described in more detail below, we believe that there need to be clear rules on this account. Notice 2023-64 has requested comments on this point. See Notice 2023-64, Section 16.02(3).

[13] Under Notice 2023-64, Section 7.02(5), if a CFC is an applicable corporation its Adjusted Net Income or Loss is reduced by its AFSI treated as ECI.

[14] Section 56A(c)(5).

[15] Section 56A(c)(3)(B).

[16] Section 56A(c)(3)(B)(i).

[17] Section 56A(c)(3)(B)(ii).

(i) Treasury may issue regulations or other guidance to reduce the amount of Dividend Inclusions that are included in an applicable corporation's AFSI;[18]

(ii) Treasury shall issue regulations or other guidance as may be necessary and appropriate to provide for the proper treatment of current and deferred taxes for purposes of the Income Tax Adjustment Rule, including when such taxes are properly taken into account;[19]

(iii) Treasury shall issue regulations or other guidance that provides for adjustments to AFSI that it determines are necessary to carry out the purposes of Section 56A, including adjustments to prevent the omission or duplication of any item;[20] and

(iv) Treasury shall issue regulations and other guidance as necessary to carry out the purposes of Section 59 or 56A.[21]

B. Look-Through Inclusions on an Aggregate Basis: Aggregation of Income and Losses from Multiple CFCs

This Part III.B discusses a threshold issue under the CAMT CFC Rules: whether, if an applicable corporation is a United States shareholder in respect of multiple CFCs, the applicable corporation determines a single Look-Through Inclusion from all of its CFCs, effectively netting losses of one CFC against income of another CFC (the "**Aggregation Approach**"), or the applicable corporation determines a separate Look-Through Inclusion for each of its CFCs, with no netting of losses against income (the "**CFC-by-CFC Approach**"). In Notice 2023-64, Treasury has adopted the Aggregation Approach.[22] For the reasons discussed below, we believe this choice is an appropriate one.

First, the text of Section 56A(c)(3)(B), which provides for the carryforward of Look-Through Net Losses, appears to refer to the carryforward of a single amount determined under the Aggregation Approach. Specifically, Section 56A(c)(3)(B) provides that if "the" adjustment (we note the reference to a *single* adjustment) under Section 56A(c)(3)(A) would result in a negative adjustment to AFSI for the taxable year, the taxpayer carries that negative amount forward to the following year rather than applying it currently. The reference to a single adjustment for this purpose appears to be an implementation of the Aggregation Approach envisioned in the above-quoted legislative history. Section 56A(c)(3)(B) further reflects the Aggregation Approach by providing that, if an applicable corporation has a Look-Through Net Loss, there is *no* adjustment made for the tax year under "this paragraph"—referring to Section 56A(c)(3) as a whole—which also suggests that there would be no Look-Through Inclusion at all (for any CFC) under Section 56A(c)(3)(A) for that year.

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[18] Section 56A(c)(2)(C).

[19] Section 56A(c)(5).

[20] Section 56A(c)(15)(A).

[21] Sections 59(*l*)(3) and 56(e).

[22] Notice 2023-64, Section 7.02(2).

Second, the legislative history of Section 56A supports the Aggregation Approach. In describing the adjustment to an applicable corporation's AFSI for income of its CFCs, the House Rules Committee summary states: "[t]he AFSI of CFCs are aggregated globally, and losses in one CFC may offset income of another CFC."[23] Section 56A thus seems intended to operate in a manner similar to the global intangible low-taxed income ("**GILTI**") rules, rather than the more traditional Subpart F regime.

Finally, the concept of a single adjustment under Section 56A(c)(3) using the Aggregation Approach is reiterated in Section 59(l)(1)(A)(ii), which establishes a limitation on CAMT FTCs. Section 59(l)(1)(A)(i) provides that with respect to CFCs, a taxpayer may take as a CAMT FTC the "aggregate" amount of the taxpayer's pro rata share of creditable foreign income taxes that are paid or accrued by each CFC.[24] However, Section 59(l)(A)(ii) limits the amount of the CAMT FTC with respect to CFCs to 15% of "*the* adjustment" (again, referring to a single adjustment) under Section 56A(c)(3). It is therefore clear under Section 59(l) that to calculate this limitation on the taxpayer's CAMT FTC, the taxpayer looks to the single aggregated adjustment amount that is calculated under Section 56A(c)(3), rather than multiple CFC-by-CFC adjustments.

C. Goals of the CAMT CFC Rules

As noted above, we believe the most critical issue under the CAMT CFC Rules is developing a mechanism to avoid double counting, and Treasury has a broad regulatory mandate in this regard. Before the more detailed discussion of issues related to double counting begins in Part III.D, below, this Part III.C makes an initial observation, which is that the CAMT CFC Rules rely heavily on hybrid book-tax principles for purposes of calculating an applicable corporation's AFSI, and consequently appear designed to produce AFSI that will differ materially in many instances from the corporation's actual income reported in financial statements. Under U.S. Generally Accepted Accounting Principles ("**GAAP**"), an investor accounts for its investment in a corporation using one the following four methods.

- The "**Consolidation Method**" applies if the investor has a controlling financial interest in the corporation—that is, at least as a general matter, owns more than 50 percent of the voting power of the corporation.[25] Under the Consolidation Method, the investor consolidates the assets, liabilities, operations, and cash flows of the corporation with its own, making appropriate reductions to take account of any items that might be attributed to other equity holders of the entity.[26]

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[23] STAFF OF H. RULES COMM., 117th CONG., SECTION-BY-SECTION ON BUILD BACK BETTER ACT 18, 160 (Comm. Print 2021). (Note that this language relates to a bill that was not enacted into law, although the relevant provisions were later included in the Inflation Reduction Act.)

[24] We note that here the statute expressly aggregates the creditable foreign taxes of all CFCs, and that using the Aggregation Approach for purposes of determining a taxpayer's adjustment to AFSI under Section 56A(c)(3) would be consistent with the approach taken with respect to CAMT FTCs for CFCs in Section 59(l). *See* Part IV below for a further discussion of CAMT FTC issues.

[25] *See generally* ASC 810.

[26] *Id*.

- The "**Equity Method**" applies if the investor does not have a controlling financial interest in the corporation, but can exercise "significant influence" over the operating and financial decisions of the corporation.[27] Ownership of at least 20 percent of the voting stock in a corporation is presumed to confer "significant influence".[28] Under the Equity Method, the investor presents its investment in the corporation on its balance sheet as a single amount and its share of the corporation's income or losses in the income statement as a single amount.[29] The investor initially records its investment at cost and then each reporting period adjusts the carrying value of its investment for certain items, including its share of the corporation's income or loss, impairments of its investment, subsequent investments in the corporation, and dividends received from the corporation.[30]

- The "**Fair Value Method**" applies if neither the Consolidation Method nor Equity Method applies to the investor's investment in the corporation and the value of the investment is readily determinable.[31] The investor presents the value of the investment on its balance sheet as a single amount, and recognizes income or loss from the investment in its income statement as a single amount using mark-to-market principles.[32]

- The "**Measurement Alternative Method**" applies if neither the Consolidation Method, Equity Method, nor the Fair Value Method applies to the investor's investment in the corporation and the investor elects to apply this method.[33] The investor presents the initial cost of its investment on its balance sheet as a single amount and then remeasures this amount upon an impairment or an observable price change in identical or similar instruments issued by the corporation. The investor includes income or loss from remeasurements of the investment as a single amount in its income statement.[34]

In general, if a corporation pays a dividend to an investor, the dividend is eliminated under the Consolidation Method, treated as a reduction to the investment carrying value under the Equity Method, or treated as a dividend giving rise to financial accounting income under the Fair Value Method or the Measurement Alternative Method.

For CAMT purposes, the financial accounting treatment of an applicable corporation's investment in a CFC is disregarded and replaced with Dividend Inclusions and Look-Through Inclusions with respect to the CFC. As a result of (i) Dividend Inclusions, (ii) the numerous differences between a CFC's (x) financial statement income and loss and its (y) Adjusted Net Income or Loss, (iii) the determination of Look-Through Inclusions using the Aggregate

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[27] *See generally* ASC 323-10.

[28] *Id.*

[29] *Id.*

[30] *Id*.

[31] *See generally* ASC 321.

[32] *Id*.

[33] *Id*.

[34] *Id*. These four methods also apply, with some adjustments, to investments in partnerships, as discussed further in Part IV.B.1 below.

Approach (netting Adjusted Net Income and Adjusted Net Loss of different CFCs), and (iv) the ability to carry forward Look-Through Net Losses to offset future Look-Through Inclusions, we expect that an applicable corporation's AFSI attributable to an investment in a CFC often will differ substantially from the income or loss it includes in its financial statements with respect to such CFC. As a result, for purposes of construing the CAMT CFC Rules, it appears that achieving parity with an applicable corporation's financial statement results with respect to its stakes in CFCs generally should not be a guiding principle.

Instead, the CAMT CFC Rules appear designed to ensure that an applicable corporation is subject to a minimum level of tax on its pro rata share of the income (as computed under Section 56A(c)) of CFCs with respect to which it is a United States shareholder, determined on an aggregated basis (i) across CFCs, as discussed in Part III.B above, and also generally speaking (ii) forward across taxable years (due to the indefinite carryforward of CFC losses and the five-year carryforward of unused credits for CFC foreign taxes). Moreover, the CAMT regime appears to generally equate foreign and Federal taxes imposed on CFC Adjusted Net Income or Loss for purposes of satisfying the requisite level of taxation, by making available the CAMT FTC. Our recommendations are based generally on the goal of achieving this requisite minimum level of tax, while avoiding double counting—that is, ensuring that taxpayers are not taxed twice (or more) on a single item of income included in the applicable corporation's AFSI with respect to its CFCs. The potential for double counting under the CAMT CFC Rules is discussed in more detail immediately below.

D. Double Counting Issues with respect to CFCs under CAMT

1. Coordination of Dividend Inclusions and Look-Through Inclusions

In regard to the issue of double counting under the CAMT CFC Rules, the heart of the problem is fairly obvious: the CAMT regime does not currently include a method for coordinating Dividend Inclusions and Look-Through Inclusions with respect to a CFC's Adjusted Net Income. We believe developing a system to avoid double counting in this context should be a principal focus of guidance with respect to the CAMT CFC Rules and have proposed three alternative frameworks for doing so in Parts III.D.2.b. and III.D.3.b. Alternatively, Treasury could decide to address double-counting issues broadly by issuing guidance that uses current Sections 301, 316, and 959 to determine Dividend Inclusions and exempts CFC dividends from being treated as Dividend Inclusions.[35] Although this Report does not contain an analysis of an exemption system, the theory would be that (i) most book/tax differences for a CFC during an applicable corporation's holding period are temporary differences that will reverse, and (ii) there is not a compelling justification for treating distributions of CFC untaxed earnings and profits ("**E&P**")[36] as Dividend Inclusions, since distributions out of untaxed E&P

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[35] Such an approach would need to be reconciled with the statutory language of Section 56A(c)(2)(C), which contemplates that dividends as measured for income tax purposes that are received from a non-consolidated corporation are generally included in AFSI. The logic described above in the text, if accepted, might lead to a conclusion that under the parenthetical clause in Section 56A(c)(2)(C), it is appropriate for Treasury to provide guidance that reduces (to zero) the amount of any dividend out of E&P from pre-enactment or pre-relevance periods.

[36] "Untaxed" E&P is E&P that is not treated as previously taxed E&P under Section 959 ("**PTEP**"). As discussed below, a distribution of PTEP to the United States shareholder that had the inclusion to which the PTEP relates (or

will mostly be attributable to (a) CFC income excluded from Subpart F income or tested income on account of a high-tax election, (b) foreign oil and gas extraction income, as defined in Section 907(c)(1) ("**FOGEI**"), which is typically subject to high rates of source country tax, (c) CFC E&P attributable to tested loss offsets, and (d) pre-enactment and pre-relevance E&P.[37] Thus, we believe that the main benefit of this alternative is that it would simplify the application of the CAMT regime to investments in CFCs without materially eroding CAMT policy.[38] The main costs of this alternative are that it would exempt from CAMT: (i) distributions that might not have previously been taken into account in determining a United States shareholder's Look-Through Inclusions, and (ii) distributions of E&P attributable to temporary book/tax differences that do not reverse during an applicable corporation's holding period for a CFC and permanent book/tax differences.[39] If Treasury determines that the costs of a full exemption system

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such shareholder's successor-in-interest) is not treated as a "dividend" under Section 959(d).

[37] Since high-taxed foreign income would not be expected to give rise to a CAMT liability, we believe there is not a compelling reason to treat CFC distributions attributable to E&P from high-taxed foreign income or FOGEI as Dividend Inclusions. We also believe that there is not a compelling reason to treat CFC distributions of pre-enactment and pre-relevance E&P as Dividend Inclusions because this would be analogous to applying the CAMT CFC Rules retroactively.

The CAMT CFC Rules are similar to the GILTI rules in that losses of one CFC are permitted to offset income of another CFC for purposes of determining shareholder-level income inclusions. Putting book/tax differences aside, treating CFC distributions of E&P attributable to tested loss offsets as Dividend Inclusions would effectively reverse the (correct, in our view) decision in Notice 2023-64 to determine Look-Through Inclusions using the Aggregate Approach. For example, assume USP wholly owns CFC1 and CFC2, CFC1 has $100 Adjusted Net Income, CFC2 has $100 Adjusted Net Loss, and there are no book/tax differences. USP would not have a Look-Through Inclusion with respect to CFC1 and CFC2 but would have a dividend inclusion when CFC1 distributed the E&P attributable to its Adjusted Net Income. Thus, there appears to be little justification for treating CFC distributions attributable to E&P from tested loss offsets as Dividend Inclusions.

CFC untaxed E&P will also include returns from qualified business asset investment, as defined in Section 951A(d) ("**QBAI**"). Treating CFC distributions attributable to untaxed E&P from QBAI returns as Dividend Inclusions raises different policy considerations because QBAI returns are not necessarily high-taxed. Thus, Treasury would have to decide whether the CAMT CFC Rules should include an exemption for QBAI returns.

Adjusted Net Income of a CFC attributable to E&P in the above categories that arises while an applicable corporation is a United States shareholder of the CFC would give rise to Look-Through Inclusions. An exemption system would not prevent that; rather, such a system would only prevent the applicable corporation from having Dividend Inclusions, thus eliminating the potential for duplicative income inclusions.

[38] Another benefit of an exemption system is that taxpayers would not have to track CAMT attributes, such as PIANI (discussed below in this Report); and taxpayers also would not have to make related AFSI basis adjustments in the stock of CFCs. (In lieu of an upward stock basis adjustment on account of Look-Through Inclusions, a United States shareholder would receive an exemption for the portion of sale proceeds treated as a dividend under Section 1248.)

[39] The following example highlights the considerations associated permanent book/tax differences: USP purchases 100% of the stock of FS for $100 and does not make a Section 338(g) election for the purchase; the aggregate tax basis of FS's assets is $0. If the book basis of FS's assets is increased through purchase accounting adjustments, FS's asset basis will include a permanent book/tax difference of $100. If an exemption system were adopted, Treasury would have to consider whether exempting distributions of earnings attributable to pre-acquisition built-in gain is appropriate (*e.g.*, FS recognizes E&P in excess of book income as a result of additional book basis that reduces book gain from the sale of assets or reduces book income due to additional depreciation or amortization deductions).

outweigh the benefits of the system, Treasury could consider using a partial exemption system that includes targeted exceptions to address specific policy concerns.

If Treasury does not adopt an exemption system, and instead opts to include distributions from CFCs in a United States shareholder's AFSI as Dividend Inclusions, then there should be a way to account for the portions of those distributions that are attributable to CFC Adjusted Net Income that have been included in the shareholder's AFSI previously via Look-Through Inclusions. By comparison, in other regimes in the Federal income tax system where an equity holder of an entity is required to include in income items attributable to the entity (*e.g.*, Subpart F, Subchapter K, the corporate consolidation regime and Subchapter S), there is a mechanism for allowing tax-free distributions from the entity to the equity holder of amounts that have previously been included in the equity holder's income.

Example 1: Double-Counting Distributions Previously Included in AFSI

U.S. Shareholder is an applicable corporation and owns 100% of a CFC. The CFC has Adjusted Net Income of $100 in Year 1 reflected on its AFS, none of which is Subpart F income and all of which is untaxed due to QBAI. As a result of Section 56A(c)(3), U.S. Shareholder has a Look-Through Inclusion of $100 with respect to its share of the CFC's Adjusted Net Income. That incremental AFSI is subject to U.S. tax under the CAMT in Year 1. In Year 2, CFC distributes $80 in cash to U.S. Shareholder out of CFC's E&P, which relates to its Year 1 Adjusted Net Income. Absent a coordination rule, it appears that under Section 56A(c)(2)(C), U.S. Shareholder has a Dividend Inclusion equal to the $80 distribution. Thus, unless there is a mechanism to account for the fact that $100 of the CFC's Adjusted Net Income to which the $80 distribution relates has been included in the U.S. Shareholder's AFSI in Year 1, there is a potential for double counting of the $80 distribution in U.S. Shareholder's AFSI in Year 2.

Below, we discuss (i) how the potential for double counting under the CAMT can be mitigated or exacerbated, depending on how the term "dividend" is defined for purposes of determining an applicable corporation's Dividend Inclusions, and (ii) methods that could be used to mitigate double counting a CFC's and Adjusted Net Income as Dividend Inclusions and Look-Through Inclusions.

2. Measuring Dividends

a. The Problem

As noted above, Section 56A(c)(2)(C) provides that an applicable corporation's AFSI with respect to a non-consolidated corporate subsidiary is determined by "taking into account the dividends received from such [subsidiary] (reduced to the extent provided by the Secretary in regulations or other guidance)." Section 56A, however, does not define the word "dividends" for purposes of the CAMT regime. If Federal income tax principles guide the definition of a "dividend" for this purpose of determining Dividend Inclusions, the CAMT CFC Rules present a challenge that is difficult to address, and not present in other look-through regimes in the Code. Current look-through regimes in the Code coordinate look-through inclusions with distributions from the relevant entity (relatively) easily because in those cases, income for purposes of the look-through inclusion and the determination of what constitutes a taxable distribution are both

measured by reference to tax principles. In contrast, under the CAMT CFC Rules, Look-Through Inclusions are based on a CFC's Adjusted Net Income, and thus are inclusions of *adjusted book income*, while Dividend Inclusions could be understood to consist of dividends as determined under *Federal income tax principles.* Because the term "dividend" is a term of art for Federal income tax purposes and is defined in Sections 316 and 959, there is a textual argument for understanding the reference to "dividends" in Section 56A(c)(2)(C) to be a reference to dividends as defined for tax purposes. The difficulty with reading the reference to dividends in this manner, however, is that it requires a single set of rules to mix financial accounting concepts and tax concepts to accurately match Look-Through Inclusions of a CFC's Adjusted Net Income with Dividend Inclusions from the CFC based on distributions of its earnings and profits ("**E&P**").

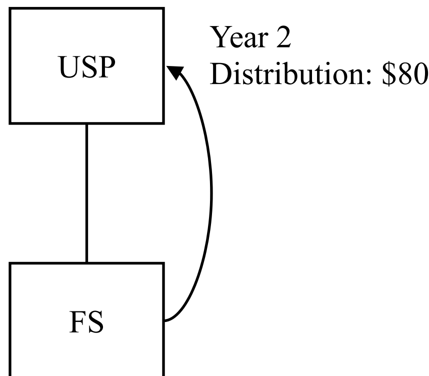
As noted in connection with Example 1 above, if a United States shareholder takes into account a CFC's Adjusted Net Income or Loss in computing its Look-Through Inclusion, then future distributions to that shareholder should not, in our view, give rise to additional AFSI if those distributions are attributable to such previously accounted-for Adjusted Net Income of the CFC. If distributions are measured by reference to whether they are "dividends" within the meaning of Section 316 and the tax rules, however, then the Dividend Inclusion rule operates independently of the Look-Through Inclusion rule without any reference to the Adjusted Net Income or Loss that was previously taken into account by a United States shareholder in computing its Look-Through Inclusion. Comparing amounts of distributed E&P to Look-Through Inclusions of AFSI becomes a matter of comparing "apples to oranges," and the difficulty inherent in that exercise are demonstrated below in Examples 2 and 3.

The following examples illustrate how double counting arises if the term "dividend" in Section 56A(c)(2)(C) is interpreted to include all amounts treated as dividends for Federal income tax purposes, even if the distribution in question is with respect to financial statement income of a CFC that a United States shareholder has previously taken into account as a Look-Through Inclusion.

Example 2: Double Counting the Section 78 Gross-Up and Untaxed E&P

Example 2 illustrates the consequences of an approach that treats a Section 78 gross-up amount and a dividend of untaxed E&P[40] as giving rise to a Dividend Inclusion, while also treating the financial statement items underlying such amounts as a Look-Through Inclusion.

[40] E&P is "**untaxed E&P**" if it is not previously taxed E&P, within the meaning of Section 959 ("**PTEP**").



USP		
	Year 1	Year 2
FSNI	$ 0.00	$ 0.00
AFSI	102.50	10.00
GILTI inclusion amount	70.00	-
Section 78 gross-up	10.50	-
Regular tax	0.05	-
CAMT	3.32	1.50

FS		
	Year 1	Year 2
Tested income	$ 80.00	$ -
Foreign income taxes on AFS and paid/accrued:	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-
FSNI	80.00	-

Facts. Under the GILTI rules, FS has tested income of $80 and $0 for Years 1 and 2, respectively, and USP has QBAI of $100 for Years 1 and 2, which provides $10 of "shelter" against inclusions of tested income as GILTI. All of FS's foreign income taxes paid or accrued are "**tested foreign income taxes**," as defined in Section 960(d)(3). FS realizes no Subpart F income in either Year 1 or Year 2.

USP does not have financial statement net income for Year 1 or 2, but FS has financial statement net income of $80 and $0 in Years 1 and 2, respectively. FS has foreign income taxes on its AFS that are paid and accrued for Federal income tax purposes of $12 and $0 for Years 1 and 2, respectively.

FS distributes $80 to USP in Year 2.

Analysis.

Year 1

For regular tax purposes: USP has a GILTI inclusion amount of $70 (representing $80 of FS's tested income offset by $10 in respect of USP's QBAI) and dividend income of $10.50, all of which is attributable to the Section 78 gross-up for FS's tested foreign income taxes.[41] Thus, for Federal income tax purposes, USP has a total income inclusion of $80.50 attributable to FS and is allowed a Section 250 deduction of $40.25 with respect to this inclusion.[42] Accordingly,

[41] Under Section 78, the amount of taxes included as a distribution is adjusted as per Section 960(d), discussed below in footnote 44, without regard to the 80% limitation.

[42] Section 250(a)(1)(B).

USP's regular tax liability is $8.45.[43] USP is deemed to pay $8.40[44] of FS's tested foreign income taxes under Section 960(d), which largely offsets USP's regular tax liability and thus USP's regular tax is $0.05.

For CAMT purposes: USP does not have financial statement net income. However, if the $10.50 deemed dividend under Section 78 is treated as giving rise to a Dividend Inclusion (which we do not recommend), then USP's AFSI includes a $10.50 Dividend Inclusion. USP's AFSI also includes a Look-Through Inclusion of $92, which is equal to FS's Adjusted Net Income.[45] Under this approach, the Dividend Inclusion and the Look-Through Inclusion both take account of the same $12 of foreign income taxes, without any coordination rule, and USP has AFSI of $102.50. USP's tentative minimum tax under CAMT (before the CAMT FTC) is $15.38[46] and its CAMT FTC is $12. Accordingly, USP has tentative minimum tax of $3.38 and CAMT liability of $3.32.[47]

Year 2

For regular tax purposes: USP has income of $10 from FS2's dividend, which is attributable to FS2's untaxed E&P from Year 1. USP is allowed a 100-percent dividend received deduction ("**DRD**") under Section 245A for this dividend and thus has regular tax of $0.

For CAMT purposes: USP does not have financial statement net income for Year 2 but has a Dividend Inclusion of $10.[48] Thus, USP has AFSI of $10. USP's gross minimum tax is $1.50[49] and its CAMT FTC is $0. Accordingly, USP has tentative minimum tax and CAMT liability of $1.50.[50]

Cumulative Taxes in Years 1 and 2

Over the course of Years 1 and 2, USP pays aggregate Federal income taxes of $4.88,[51] and FS pays foreign income taxes of $12. Thus, USP pays and is deemed to pay total taxes of

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[43] ($80.50 - $40.25) x 21% = $8.45.

[44] Under Section 960(d), USP is deemed to pay 80% *multiplied by* its "inclusion percentage" (which is its GILTI inclusion *divided by* the related amount of tested income) *multiplied by* the taxes paid by FS. Accordingly: 80% x ($70/$80) x $12 = $8.40.

[45] FS's Adjusted Net Income is equal to FS's financial statement net income of $80 plus the $12 of foreign income taxes. Unlike the provisions of Section 78, which give rise to a Dividend Inclusion in respect of the taxes, there is nothing in Section 56A(c)(5) to suggest that the Income Tax Adjustment Rule takes account of the various "haircuts" under Section 960(d).

[46] $102.50 x 15% = $15.38

[47] $3.38 - $0.05 = $3.32.

[48] Even assuming that a Section 56A(c)(2)(C) dividend means any "tax" dividend, the Dividend Inclusion does not include the $70 PTEP distribution from FS because this distribution is not a dividend as to USP under Section 959(d).

[49] $10 x 15%.

[50] Since USP does not have regular tax, USP's CAMT is equal to its tentative minimum tax.

[51] Regular tax in Year 1 of 0.05 plus CAMT in Year 1 of 3.32 plus CAMT in Year 2 of 1.50, adjusted for rounding.

$16.88 with respect to FS's pre-tax financial statement income of $92, for an effective tax rate of approximately 18.3% (higher than the CAMT rate of 15%).

The excess of USP's effective tax rate over the CAMT rate is the result of two factors that inflate USP's AFSI. First, including the $12 of foreign income tax twice, once as a Dividend Inclusion (albeit haircut by virtue of Sections 78 and 960(d)) and once as a Look-Through Inclusion, gives rise to a double counting of income. If, however, the Section 78 gross-up does not give rise to a Dividend Inclusion, then the CAMT tentative minimum tax would be less by $1.58.[52] As noted above, for Section 78 gross-up amounts in particular, given the double-counting consequences illustrated by this Example 2, we recommend that guidance clarify that such amounts are not treated as a "dividend" for purposes of the Dividend Inclusion rule to the extent they relate to income that is or has been included in AFSI.[53] Second, the Dividend Inclusion of $10 in Year 2 represents a distribution of FS's Adjusted Net Income that had already been taken into account under the CAMT in Year 1 as a Look-Through Inclusion, and thus gives rise to another instance of double counting. If this amount is not double counted, the CAMT would be less by $1.50.[54] Accordingly, if both of these items are not double counted, then the aggregate taxes of $16.88 are reduced by $3.08 to $13.80, which is exactly 15% of USP's $92 of AFSI attributable to FS.

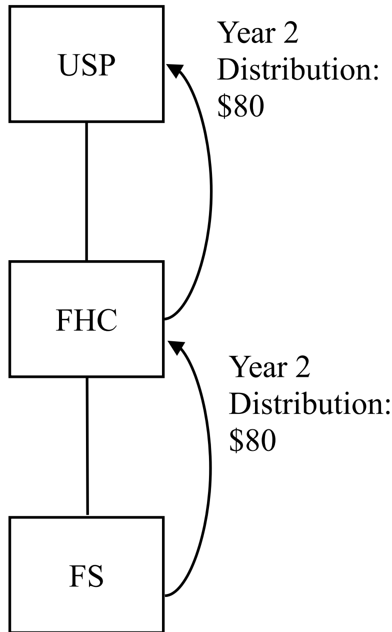
Example 3: Triple Counting of Lower-Tier CFC Income

Example 3 demonstrates the triple counting that can arise where income of a lower-tier CFC is reflected in a Look-Through Inclusion; and then gives rise to a second Look-Through Inclusion when paid to an upper-tier CFC; and then gives rise to an additional Dividend Inclusion when finally repatriated.

[52] $10.50 x 15% = $1.58

[53] In making this recommendation, we note that in circumstances where timing differences result in a CFC paying and accruing foreign income taxes for Federal income tax purposes with respect to income that is deferred for book purposes, the Section 78 gross-up with respect to such taxes could give rise to a Dividend Inclusion. Treasury should consider whether this result is appropriate. All other examples in this Report do not treat Section 78 gross-up amounts as giving rise to Dividend Inclusions.

[54] $10 x 15% = $1.50.



USP		
	Year 1	Year 2
AFSI	$92.00	$90.00
GILTI inclusion amount	70.00	-
Section 78 gross-up	10.50	-
Regular tax	0.05	-
CAMT	1.75	13.50

FHC		
	Year 1	Year 2
FSNI	$ -	$80.00

FS		
	Year 1	Year 2
FSNI	$80.00	$ -
Tested income	80.00	-
Foreign income taxes:		
AFS and paid/accrued	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-

Facts. The facts are the same as Example 2, except that (i) USP indirectly owns FS through FHC, and (ii) in Year 2, FS distributes $80 to FHC and FHC distributes $80 to USP. FHC is a holding company that does not own assets other than FS stock.

Analysis.

Year 1

The Year 1 analysis for this Example 3 is the same as the Year 1 analysis for Example 2, except that we have assumed that the Section 78 deemed dividend of $12 is not included in AFSI (thereby reducing AFSI from $102.50, in Example 2, to $92, in this Example 3).

Year 2

For regular tax purposes: USP has income of $10 from FHC's dividend. USP is allowed a 100-percent DRD under Section 245A for FHC's dividend and thus has regular tax of $0.

For CAMT purposes: USP does not have financial statement net income. USP has a Dividend Inclusion of $10 from the dividend paid by FHC (again reflecting FS's $10 of untaxed E&P generated in Year 1), and a Look-Through Inclusion of $80 in respect of the distribution received by FHC from FS (the distribution is a dividend in the hands of FHC and gives rise to

Adjusted Net Income for FHC through the application of the Dividend Inclusion rule).[55] Thus, USP has AFSI of $90 and tentative minimum tax and CAMT liability of $13.50.[56]

Cumulative Taxes in Years 1 and 2

USP and FS pay Federal income taxes of $15.30 and foreign income taxes of $12, respectively. Thus, USP pays and is deemed to pay total taxes of $27.30 with respect to FS's financial statement income before taxes of $92 because that financial statement income is increased in USP's hands to AFSI of $182 over Years 1 and 2 through a combination of Look-Through Inclusions and duplicative Dividend Inclusions. Accordingly, the CAMT results in extra taxes of $13.50.[57]

The application of CAMT to USP in Example 3 results in the same excessive taxation as in Example 2 with respect to USP's CAMT adjustments in Year 2 for its dividend income. Example 3, however, also results in excessive taxation with respect to USP's Year 2 AFSI attributable to dividends received by FHC from FS. Specifically, USP's Year 2 AFSI is increased for FHC's Adjusted Net Income, which is solely attributable to FS's CFC Year 1 Adjusted Net Income that has been taken into account in determining USP's Year 1 CAMT.

b. The Solution

For the reasons discussed above, determining Dividend Inclusions with respect to CFCs by reference to Federal income tax principles results in excessive taxation for United States shareholders. Specifically, when a distribution gives rise to a Dividend Inclusion under tax principles regardless of whether or not it represents a repatriation of amounts of Adjusted Net Income that have already been taken into account for CAMT purposes, the resulting lack of coordination leads to excessive taxation. We believe that these issues warrant determining Dividend Inclusions with respect to CFCs using different principles, but the question is what principles should be used? One approach would be to use financial accounting principles. However, as discussed above in Part III.C, it appears achieving parity with an applicable corporation's financial statement results with respect to its investments in CFCs generally should not be a guiding principle for CAMT.

Since CAMT is a hybrid of Federal income tax and financial accounting principles, we believe Treasury should exercise its authority under Section 56A(c)(15)(A) to develop a new set of rules that provide Dividend Inclusions do not include distributions of property by a CFC that are attributable to Adjusted Net Income of the CFC that is currently, or has been previously, taken into account by the shareholder in determining a Look-Through Inclusion (such Adjusted Net Income, "**previously included Adjusted Net Income**" or "**PIANI**"). If an exemption

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[55] Although $70 of the distribution is sourced to FS's PTEP, this amount is treated as a dividend for regular income tax purposes under Section 316, and Section 959(d) does not apply to CFC-to-CFC distributions. Rather, when FS distributes PTEP to FHC, the distribution is excluded from FHC's gross income for purposes of determining USP's Subpart F income and excluded from FHC's tested income for GILTI purposes. Sections 959(b) and 951A(c)(2)(A)(i)(IV).

[56] $90 x 15%. Since USP does not have regular tax, USP's CAMT is equal to its tentative minimum tax.

[57] $27.30 – ($92 x 15%).

system is not adopted, we believe that this is the best way to avoid double inclusions of AFSI with respect to the same CFC Adjusted Net Income while also allowing for the possibility of Dividend Inclusions from CFCs.

In making this recommendation, we recognize that the PIANI concept will lead to additional complexity because it will require taxpayers to track and account for a new tax attribute. The additional complexity arising from our recommendation is the result of (i) an alternative minimum tax system, which necessarily operates as an alternative system operating in parallel to the regular tax system, and (ii) the presence of two separate means of measuring income within that alternative minimum tax system. Ultimately, we believe this additional complexity is an acceptable trade off to mitigate excessive taxation under the CAMT.

3. Accounting for PIANI

Once it is determined that Dividend Inclusions should not include distributions attributable to PIANI, rules must be developed to track PIANI and determine the extent to which distributions are attributable to PIANI. Below, we provide recommendations for developing PIANI tracking rules, which are largely based on the principles of Sections 959 and 961, and then describe three methods to attribute distributions to PIANI.

a. Determining the Amount of PIANI for a Taxable Year

The first major design choice to make in developing rules to track PIANI is to decide whether a United States shareholder should determine its amount of PIANI for a taxable year on an aggregate basis for all of its CFCs (the "**Aggregate Attribute Approach**") or separately for each of its CFCs (the "**CFC-by-CFC Attribute Approach**").

The Aggregate Attribute Approach would be similar to the approach used to determine and allocate PTEP under the GILTI rules.[58] Specifically, the amount of a United States shareholder's PIANI for a taxable year would be equal to the amount of its Look-Through Inclusion for the year (adjusted to reverse out the application of the Income Tax Adjustment Rule), and the United States shareholder would allocate its PIANI to each of its CFCs based on the relative amount of each CFC's Adjusted Net Income for the taxable year. A United States shareholder would not allocate PIANI to any CFC that has Adjusted Net Loss for the taxable year.

Under the CFC-by-CFC Attribute Approach, a United States shareholder would not allocate a single amount of PIANI to its CFCs based on their relative amounts of Adjusted Net Income. Instead, each CFC with Adjusted Net Income would be allocated an amount of PIANI equal to its Adjusted Net Income, and each CFC with Adjusted Net Loss would be allocated negative PIANI (a PIANI deficit) equal to its Adjusted Net Loss; in each case PIANI would be

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[58] As discussed below, the regular tax rules in Section 245A provide a 100% DRD for dividends attributable to untaxed E&P of a foreign corporation. Thus, when untaxed E&P of a foreign corporation results from the application of Aggregate Attribute Approach to the GILTI rules, such E&P can generally be distributed tax-free to a corporate United States shareholder. This would not be the case for CAMT if Dividend Inclusions are determined solely with respect to regular tax principles but without a 100% DRD.

adjusted to reverse out the application of the Income Tax Adjustment Rule.[59] This approach would be similar to how a United States shareholder's GILTI would have been allocated to CFCs under Prop. Reg. § 1.951A-6(e), which was withdrawn in 2019.[60]

b. PIANI Accounts and Stock Basis

The second major design choice to make in developing PIANI tracking rules is to decide how PIANI should be adjusted for distributions by, and ownership changes in, CFCs. Since PIANI would be a new Federal income tax concept that is divorced from the regular corporate tax system, we believe that the easiest way to track PIANI would be for a United States shareholder to maintain a shareholder-level PIANI account for each of its CFCs. A United States shareholder would: (i) increase the balance of its PIANI account for a CFC (A) by the amount of the positive PIANI allocated to such CFC using the Aggregate Attribute Approach or the CFC-by-CFC Attribute Approach and (B) in the case of an upper-tier CFC, by distributions received from a lower-tier CFC that are attributable to the lower-tier CFC's PIANI, and (ii) decrease the balance of its PIANI account by the amount of distributions made by the CFC, and if the CFC-by-CFC Attribute Approach is used, also by the allocation of the amount of negative PIANI to the CFC.[61] If a United States shareholder owns multiple classes of stock in a CFC, consideration should be given to whether the shareholder should keep PIANI accounts for the CFC on a class-by-class basis.

As regards the timing of adjustments to a United States shareholder's PIANI accounts, we recommend that Look-Through Inclusions and corresponding increases in PIANI be taken into account for a given taxable year *prior to* the application of any rules relating to the treatment of distributions for that year. For example, if a CFC has $100 of Adjusted Net Income allocable to a United States shareholder in Year 1, and makes a distribution of $100 to that United States shareholder in Year 1, we would recommend that: (i) the United States shareholder have a Look-Through Inclusion of $100, and (ii) the United States shareholder's PIANI account for the CFC be increased by $100, with the consequence that (iii) the $100 distribution by the CFC to the United States shareholder in the same year would be treated as repatriation of PIANI that does not give rise to a Dividend Inclusion. Such a system would resemble the current system in under Sections 316 and 959 for Subpart F inclusions.[62]

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[59] It should be noted that it is possible that if a United States shareholder has a PIANI deficit with respect to a CFC, a distribution by the CFC out of current-year E&P nonetheless may result in a Dividend Inclusion for the shareholder. This would be the result under the Dividend Methods described below.

[60] *See* 84 Federal Register 29,288, at 29,317 (2019) (discussing the withdrawal of proposed Treas. Reg. § 1.951A-6(e)).

[61] As in the regular tax system, this approach allows a CFC to sell assets in order to recognize a built-in gain, thereby raising the basis of stock in the hands of a United States shareholder, and then allows the shareholder to use that basis to reduce gain/increase loss on a subsequent sale of the stock (similar to "son of mirror" transactions). It is hard for us to know the extent to which this could be a meaningful issue that should be addressed through, say, something akin to the unified loss rules under Treasury regulation section 1.1502-36, which in turn would bring additional complexity to what looks to be an already-complex system.

[62] S*ee, e.g.,* the example in Treasury regulation 1.959-1(b).

The PIANI tracking rules should also provide rules that adjust CFC stock basis to reflect Look-Through Inclusions and distributions of PIANI.[63] We believe that these adjustments should be based on the principles of Section 961. Thus, United States shareholders should increase the AFSI basis of CFC stock for Look-Through Inclusions attributable to such stock and reduce the AFSI basis of CFC stock for distributions of PIANI with respect to such stock. However, to avoid the ambiguity with respect to the timing of basis adjustments under Section 961, Treasury should issue guidance that provides that AFSI stock basis increases for current year Look-Through Inclusions are made before the AFSI stock basis decreases for current year PIANI distributions.[64] As discussed below, distributions that are not attributable to PIANI should reduce AFSI stock basis to the extent thereof.

Aside from making basis adjustments to CFC stock to reflect Look-Through Inclusions and PIANI distributions, consideration also should be given more broadly to the proper method for computing gain or loss from the sale of CFC stock for CAMT purposes. The Prior CAMT Report discusses three alternative ways to determine the amount of gain or loss for CAMT purposes from an applicable corporation's sale of stock in a non-consolidated corporation:

(i) The seller's gain or loss could be determined generally with reference to financial accounting principles. We note that under this approach, although financial accounting principles would provide the starting point, it appears it would be necessary to make significant adjustments to those principles in order to appropriately take into account the design of the CAMT regime. Section 56A(c)(2)(C) appears to contemplate the seller recognizes gain or loss with respect to the stock that is sold, in turn implying the seller has a basis in that stock for AFSI purposes. Such stock basis logically would not be solely (or even, in some cases, primarily) determined using financial accounting principles. This is true for multiple reasons:

(A) First, as described above, where a subsidiary is accounted for using the Full Consolidation Method, the parent is considered to directly own – and sell – the assets of the subsidiary, rather than to own stock of the subsidiary. Where the Equity Method is used, the parent adjusts its stock basis by reference to the parent's share of the profit or loss of the subsidiary as computed under financial accounting principles, an adjustment that, as discussed in the Prior CAMT Report, Section 56A(c)(2)(C) appears to prohibit. And where the Fair Value Method or the Measurement Alternative Method is used, the fair value adjustments prescribed by financial accounting principles also appear to be prohibited under Section 56A(c)(2)(C).

[63] If the CFC-by-CFC Attribute Approach is adopted, then an applicable corporation could have a negative PIANI account balance, for a CFC that generated net losses. Conceivably, this negative balance could exceed the applicable corporation's basis (as computed for CAMT purposes). This would not be possible, if the Aggregate Attribute Approach was used.

[64] *See* PLR 202304008 (Nov. 3, 2022); IRS AM 2023-002 (Mar. 10, 2023).

(B) Second, as also described above as well as in the Prior CAMT Report, because AFSI diverges substantially from financial accounting income, it would be logical to make adjustments to the basis of stock (or any other asset) by reference to the treatment of transactions and computation of items for purposes of computing AFSI (*e.g.*, the treatment of Section 351 transactions and Section 368 stock-for-stock reorganizations, etc.).

Although a full discussion is beyond the scope of this Report, we believe in the case of a taxable acquisition of stock of a corporation to which Section 56A(c)(2)(C) applies, it would be logical for basis at the time of acquisition to be equal to cost, with subsequent adjustments being made in a manner consistent with the rules used to determine AFSI. As noted in the Prior CAMT Report, this interpretation would enhance the coherence of the CAMT system;[65] or

(ii) The seller's CAMT gain or loss might be equal to its taxable gain or loss with respect to the sale of stock in the non-consolidated corporation, *i.e.*, using its basis as computed for income tax purposes. This arguably is consistent with the plain language of Section 56A(c)(2)(C); or

(iii) The seller's CAMT gain or loss might be the lesser of the seller's financial accounting gain (computed as described above) and its taxable gain with respect to the sale of stock in the non-consolidated corporation.

We believe that our proposed system of PIANI accounts is most easily compatible with approach (i) above. In effect, PIANI accounts represent one of the adjustments that would be made under approach (i) to the computation of gain or loss for CAMT purposes, in order to help to eliminate double counting and improper omission of income in the case of an applicable corporation's investments in CFCs. Under this approach, the United States shareholder's AFSI basis in its CFC stock would increase or decrease each year by the amount of the positive or negative adjustment in its PIANI account for the year. By comparison, since the other two approaches are based solely or largely on regular tax principles, it would be significantly more difficult to harmonize PIANI accounts with the computation of stock basis for purposes of measuring gain or loss on a disposition, in a manner that eliminated duplications or omissions.

Finally, the PIANI tracking rules would have to address how PIANI accounts are affected by ownership changes in a CFC. For example, if a United States shareholder disposes of CFC stock in a taxable sale, the shareholder would determine its CAMT gain or loss recognized from the sale by taking into account the PIANI account adjustments discussed above. Thus, there is a question as to whether the United States shareholder's PIANI accounts should carry over to the purchaser of the CFC stock (*e.g.*, under rules similar to the current PTEP successor-in-interest rules). We believe the answer to this question depends, to some degree, on how the rules in general should tax distributions by a CFC of Adjusted Net Income arising before the current shareholder owned the relevant stock, which are discussed below. The PIANI tracking rules, however, would have to include provisions to provide for PIANI account adjustments and carryover in nonrecognition transactions involving CFCs. The PIANI tracking rules would also

[65] *See* Prior CAMT Report at 27-28.

need to address circumstances where (i) an applicable corporation loses United States shareholder status with respect to a CFC; and (ii) a foreign corporation loses CFC status with respect to a United States shareholder. In these circumstances, we believe that the United States shareholder should maintain its existing PIANI account and use the account to offset (reduce) future Dividend Inclusions from the foreign corporation.

c. PIANI Attribution Rules

The third major design choice to make in developing PIANI tracking rules is to determine how to attribute CFC distributions to PIANI. Below, we discuss three attribution methods. The first attribution method we discuss is the "**Distribution Method**", which attributes CFC distributions to PIANI based on the amount of cash or fair market value of the other property distributed, without regard to how the distributions are characterized for regular tax purposes under Sections 301 and 959. The other two attribution methods are the "**Dividend Methods**", which attribute CFC distributions to PIANI based on certain principles of Sections 301(c), 316 and 959. We believe that the Distribution Method approach provides what is likely to be the most consistent method for avoiding double counting and for coordinating Look-Through Inclusions with Dividend Inclusions from CFCs. If, however, Treasury determines that CFC "dividends" for purposes of the CAMT are determined more appropriately under regular tax principles in Section 301 and 316, we believe the Dividend Methods should be used to attribute CFC distributions to PIANI accounts, because both of these methods proceed from the basic premise that whether a CFC distribution results in a Dividend Inclusion is determined by reference to the CFC's E&P as computed for income tax purposes (but is reduced on account of PIANI to prevent double inclusions).[66]

i. Distribution Method

The Distribution Method would attribute CFC distributions to PIANI and CAMT stock basis using principles included in Section 301(c)(1) and (2). Specifically, a distribution by a CFC would first be attributed to its United States shareholders' PIANI account for the CFC. Thereafter, the distribution would reduce the AFSI basis that the recipient shareholder has in its stock in the distributing CFC.

One question pertaining to the Distribution Method is how to treat CFC distributions that exceed PIANI account balances and CAMT stock basis. The simplest approach would be to treat such distributions as Dividend Inclusions, irrespective of how such distributions are characterized for regular tax purposes. We recognize that this approach could characterize stock gain recognized from a distribution as a Dividend Inclusion in certain circumstances, but we believe that this character conversion is irrelevant for CAMT purposes and should not be material factor in designing PIANI attribution rules.

Under the broadest application of this approach, a distribution that is attributable to the CFC's Adjusted Net Income generated prior to the enactment or relevancy of CAMT could result

[66] The Dividend Methods thus follow the basic approach suggested by the statutory language of Section 56A(c)(2)(C), which contemplates that dividends as measured for income tax purposes that are received from a non-consolidated corporation are generally included in AFSI.

in a Dividend Inclusion, to the extent the amount of the distribution exceeds the recipient shareholder's AFSI basis in the stock (or else increased CAMT gain on a later sale of the stock). However, one should ask whether it is appropriate to subject a United States shareholder to CAMT with respect to Adjusted Net Income attributable to periods before the United States shareholder became an applicable corporation. If this is seen as a valid concern, then we believe that there are two approaches to mitigate this result. One approach would be for a United States shareholder to determine its opening PIANI account balance for a CFC by recreating a CFC's Adjusted Net Income and distribution history in the same manner as if it had always owned the stock in the CFC. If this approach is too burdensome or complex, another approach would be to allow a United States shareholder to use the amount of a CFC's undistributed E&P (both untaxed E&P and PTEP, assuming those number are known or are easier to determine than AFSI) as the opening balance for its PIANI account for the CFC—*i.e.*, use undistributed E&P as a rough estimate for the amount of a CFC's undistributed Adjusted Net Income, recognizing this approach would not account for book-tax differences.[67]

Distributions to an applicable corporation in excess of its PIANI account balance could also arise in situations not involving pre-enactment or pre-relevance financial statement income of a CFC. For instance, what if a United States shareholder receives a distribution in respect of an amount that has already been taken into account for regular tax purposes, but has not yet given rise to Adjusted Net Income at the CFC level because of a timing difference between tax and book inclusions? If that distribution is a distribution of PTEP under Section 959, then it would not give rise to taxable income in the hands of the recipient, but still could give rise to a Dividend Inclusion creating additional AFSI. If the distribution does give rise to AFSI in the hands of the recipient, what should be the appropriate adjustment when the timing difference reverses and that later inclusion of Adjusted Net Income is recognized by the CFC? Should there be an offset of any Look-Through Inclusion in that later year to take account of the fact that the Adjusted Net Income (or, rather its absence in the earlier year) gave rise to a Dividend Inclusion? Does this mean that the PIANI concept should be used to offset amounts that otherwise would be Dividend Inclusions because of prior Look-Through Inclusions—and *vice versa*?

It is worth noting that complexity would arise with the Distribution Method in situations where an applicable corporation loses United States shareholder status or a foreign corporation loses CFC status. As discussed above, our recommendations as regards the coordination of Dividend Inclusions and Look-Through Inclusions only apply to distributions by CFCs with United States shareholders. Thus, after a change in United States shareholder or CFC status, Dividend Inclusions would be determined using Sections 301, 316 and 959, not the rules described above. Accordingly, the PIANI attribution rules addressing United States shareholder and CFC status changes would need to coordinate the application of post-status change distributions and the applicable corporation's unexhausted PIANI balance. We believe that, generally similar to the result under Section 959, the applicable corporation should maintain its

[67] At a minimum, it would seem a reasonable argument can be made that a United States shareholder that owns CFC stock during the three-year testing period at the end of which it becomes an applicable corporation, should have a PIANI account balance that begins at the time the United States shareholder first started computing inclusions under Section 56A(c)(3), for purposes of testing applicable corporation status.

existing PIANI account and should be entitled to use that account to reduce future Dividend Inclusions from the foreign corporation.

ii. Dividend Methods

(1) Description of the Two Dividend Methods

For the Dividend Methods, the initial design choice is to determine whether PIANI should be tracked through a standalone system which attributes PIANI to CFC E&P in a manner that replaces the current PTEP system under Section 959 with an independent, but conceptually similar, system for CAMT purposes (the "**Dividend Method (with PTEP Replacement)**") or, instead, through a system that is integrated with the existing PTEP system under Section 959 (the "**Dividend Method (with PTEP Integration)**"). The Dividend Methods would differ from the Distribution Method because, as noted above, the Dividend Methods would use the Code's existing principles for determining when a distribution of property is treated as a dividend.

Under the Dividend Method (with PTEP Replacement), distributions by a CFC that would otherwise be characterized as dividends under Sections 301 and 316 would not give rise to a Dividend Inclusion, to the extent such distributions do not exceed the PIANI account for the CFC. Importantly, the Dividend Method (with PTEP Replacement) would not apply the rules in Section 959(b) and (d). That is, the amount of a distribution characterized as a dividend would not be reduced by PTEP as determined for regular tax purposes. Instead, essentially, PIANI will entirely replace regular PTEP in the CAMT system, performing the same function as PTEP does in the regular Subpart F regime.

In contrast, the Dividend Method (with PTEP Integration) would allocate a United States shareholder's PIANI to a CFC's current year E&P and would treat part or all of the PIANI so allocated as "CAMT PTEP," using one of the approaches described in (2) below. From there, the Dividend Method (with PTEP Integration) would treat distributions of property by a CFC as Dividend Inclusions to the extent the distributions would be characterized as dividends under Sections 301 and 316 and are not attributable to Subpart F PTEP[68] or CAMT PTEP.

The Dividend Methods try to hue closer than the Distribution Method does to the Code's current system for treating distributions out of E&P as dividends, while providing an exclusion for distributions attributable to PIANI. In that regard, an Aggregate Attribute Approach for allocating a United States shareholder's PIANI might initially appear more consistent with the Dividend Methods, since the Aggregate Attribute Approach is used in allocating PTEP attributable to tested income among a United States shareholder's CFCs for regular tax purposes. However, closer analysis suggests that an Aggregate Attribute Approach, in conjunction with either of the Dividend Methods, could result in what is arguably excess CAMT taxation. Specifically, since PIANI would be allocated to a CFC only to the extent of its share of the *net* CFC adjustment under the Aggregate Attribute Approach, distributions from the CFC to the extent of its Adjusted Net Income that is offset with Adjusted Net Loss of other CFCs could result in Dividend Inclusions for CAMT purposes. By comparison, for regular tax purposes, a

[68] The discussion that follows refers to "Subpart F PTEP". These references are intended to cover PTEP with respect to GILTI inclusions under Section 951A, as well as inclusions under Section 951(a).

corporate United States shareholder would generally be entitled to a full deduction under Section 245A for a dividend received from a CFC to the extent of its "offset" tested income. Thus, the CFC-by-CFC Attribute Approach would come closer to achieving a result in the CAMT system that corresponds to the result for regular tax purposes (*i.e.*, receipt of a distribution not subject to tax); this is because, under the CFC-by-CFC Attribute Approach, the amount of PIANI allocated to a CFC would be more likely to be at least as large as the amount of the CFC's E&P.

A question for each Dividend Method would be how to treat distributions attributable to untaxed E&P generated prior to the enactment or relevancy of the CAMT. To the extent it is believed to be appropriate for the United States shareholder not to have Dividend Inclusions for such distributions, we believe that the most effective way to prevent this result would be to treat all pre-enactment and pre-relevance untaxed E&P of CFCs the same as PIANI (*i.e.*, as being excluded from the United States shareholder's AFSI when distributed). As regards the Dividend Method (with PTEP Replacement), a similar question would be how to treat distributions attributable to PTEP generated prior to the enactment or relevancy. We believe that it would be appropriate to treat such amounts as CAMT PTEP.[69]

(2) Dividend Method (with PTEP Integration) – Allocating PIANI to a CFC's Current-Year E&P and Calculating "CAMT PTEP"

A design choice for the Dividend Method (with PTEP Integration) is to determine the portion of PIANI that is allocated to a CFC that gives rise to CAMT PTEP. We believe that this determination could be made through a two-step process. The first step would be to determine a CFC's "tentative" CAMT PTEP. The second step would be to determine the portion of a CFC's tentative CAMT PTEP that is CAMT PTEP. This design choice is not relevant to the Dividend Method (with PTEP Replacement), because that method ignores PTEP as determined under Subpart F.

The amount of a CFC's tentative CAMT PTEP for a taxable year would be equal to the lesser of the amount of PIANI allocated to the CFC for the year, and the amount of the CFC's current year E&P. Thus, if the amount of PIANI that is allocated to a CFC is equal to or less than the CFC's current year E&P, the amount of the CFC's tentative CAMT PTEP would be equal to the amount of the allocated PIANI amount. If, however, the amount PIANI allocated to a CFC exceeds the amount of the CFC's current year E&P, then the amount of the CFC's tentative CAMT PTEP would be equal to the amount of its current year E&P. In this second scenario, rules should be provided that allow a United States shareholder to either (i) carry forward the excess PIANI amount to treat future current year E&P of the CFC as tentative CAMT PTEP, or (ii) apply the excess PIANI amount to the CFC's accumulated E&P so that the portion of the excess amount apportioned to the CFC's accumulated untaxed E&P becomes CAMT PTEP—*i.e.*, the excess amount should be available to address the effects of book-tax timing differences.

[69] This question is not relevant for the Dividend Method (with PTEP Integration) because it does not treat distributions of Subpart F PTEP as giving rise to Dividend Inclusions, irrespective of when that PTEP was earned.

A CFC's tentative CAMT PTEP would be apportioned between its current year Subpart F PTEP and current year untaxed E&P (determined after the application of the Subpart F PTEP rules), and the CFC's CAMT PTEP would be equal to the amount of its tentative CAMT PTEP that is apportioned to its *untaxed E&P* (that is, the amount that could be paid by the CFC to a United States shareholder as a taxable dividend under Section 959 for regular tax purposes but that already has been taken into account for CAMT purposes). This step is necessary to coordinate CAMT PTEP and Subpart F PTEP and avoid double counting to the extent that a CFC's Subpart F income and tested income are included in a United States shareholder's Look-Through Inclusion. We believe that a CFC's tentative CAMT PTEP should be apportioned between its current year Subpart F PTEP and current year untaxed E&P through one of the following methods: (i) pro rata, by reference to the positive amounts of E&P in each basket (the "**Pro Rata Approach**"); (ii) first to the CFC's current year Subpart F PTEP to the extent thereof, and then to the CFC's current year untaxed E&P (the "**PTEP First Approach**"); or (iii) first to the CFC's current year untaxed E&P to the extent thereof, and then to the CFC's current year PTEP (the "**Untaxed E&P First Approach**"). Issues related to these alternative methods for apportionment are discussed further at Examples 6 through 8 below.

A United States shareholder would add the amount of a CFC's CAMT PTEP to its existing PTEP account for the CFC and treat the CAMT PTEP as a separate category of PTEP for purposes of the CAMT regime that prevents distributions from giving rise to Dividend Inclusions, even if they are treated as dividends for regular tax purposes. Principles corresponding to Section 959(d) would apply so that a distribution of CAMT PTEP would not be treated as a Dividend Inclusion, to the extent it is made to the United States shareholder that had the Look-Through Inclusion to which the PTEP relates (or such shareholder's successor-in-interest). As noted above, we believe that a distribution of CAMT PTEP or Subpart F PTEP by a lower-tier CFC to another CFC in the same Section 958(a) ownership chain as the United States shareholder that had the inclusion to which the PTEP relates (or such shareholder's successor-in-interest) should not give rise to a Dividend Inclusion. Thus, consistent with the above discussion, we believe that the Dividend Method (with PTEP Integration) should include rules that provide that the principles of Section 959(d) – not Section 959(b) – apply to dividends between CFCs for purposes of the CAMT.

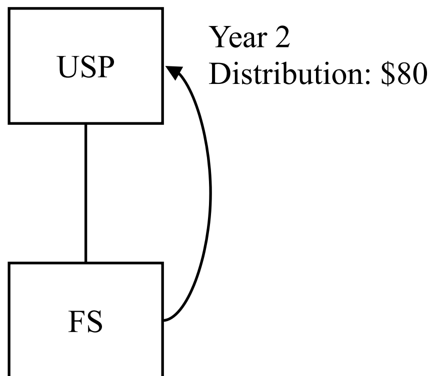
d. Examples Illustrating the Distribution Method and the Dividend Methods

The examples below illustrate the operation of the Distribution Method and the Dividend Methods and discuss some of the design choices involved with each method. We believe the examples demonstrate that the Distribution Method is simpler and also show many issues of mismatch and double counting that create considerable complexity in both of the Dividend Methods.[70]

[70] Examples 4 through 9 address situations where all the taxes on a CFC's AFS are paid or accrued for Federal income tax purposes in the same year as they are recorded as a current tax expense on the AFS. Issues related to the treatment for CAMT purposes of CFCs' foreign tax expenses where the year in which payment or accrual for Federal income tax purposes differs from that in which the taxes are accrued on an AFS as a current expense are discussed in Part IV below.

Example 4: Basic Illustration of the Distribution Method and the Dividend Methods

Example 4 illustrates how the Distribution Method and the Dividend Methods apply to a simplified fact pattern where a CFC's financial statement net income and E&P are equal. Given the multitude of book-tax differences, this fact pattern will likely not occur often; but we believe it provides a useful starting point in order to show the basic operation of the Distribution Method and the Dividend Methods.



USP		
	Year 1	Year 2
FSNI	$ 0.00	$ -
AFSI[71]	92.00	-
GILTI inclusion amount	70.00	-

FS		
	Year 1	Year 2
Tested income	$ 80.00	$ -
Foreign income taxes on AFS and paid/accrued	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-
FSNI	80.00	-

Facts. Same facts as Example 2.

Analysis.

The Distribution Method.

USP establishes a PIANI account of $80 for FS in Year 1. The amount of USP's PIANI account for FS reflects its Look-Through Inclusion for FS of $92, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. In Year 2, USP reduces its PIANI account for FS to zero to reflect the $80 distribution. USP increases the AFSI basis of its FS stock by $80 in Year 1, and then decreases that basis by $80 in Year 2. The basis increase and basis decrease are for CAMT purposes only; it is not an adjustment to basis as determined for regular tax purposes.

[71] As indicated above, all examples in this Report other than Example 2 do not treat a Section 78 gross-up amount as a Dividend Inclusion.

The Dividend Method (with PTEP Replacement).

The results under the Dividend Method (with PTEP Replacement) are the same as the results under the Distribution Method because FS does not have any book-tax timing differences for Years 1 and 2.

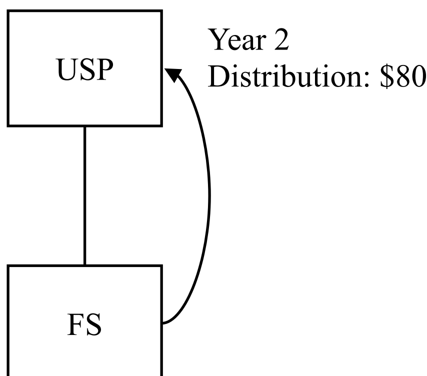
The Dividend Method (with PTEP Integration).

USP's tentative CAMT PTEP for Year 1 is $80, which is equal to USP's Look-Through Inclusion for FS of $92, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. USP's CAMT PTEP for Year 1 is determined by allocating its tentative CAMT PTEP to FS's GILTI PTEP and untaxed E&P. USP's tentative CAMT PTEP for Year 1 is equal to FS's total current year E&P and thus the method used to apportion USP's tentative CAMT PTEP among FS's GILTI PTEP and untaxed E&P will not affect the amount of USP's CAMT PTEP. Therefore, USP's CAMT PTEP for Year 1 is equal to $10 and FS's untaxed E&P becomes CAMT PTEP. At the end of Year 1, USP has an $80 PTEP account for FS and FS has $70 of GILTI PTEP and $10 of CAMT PTEP. USP increases the AFSI basis of its FS stock by $80 to reflect FS's total PTEP.

FS's distribution in Year 2 is characterized as a distribution of PTEP in full and thus does not result in a Dividend Inclusion for USP under the principles of Section 959(d). USP reduces its PTEP account and the AFSI basis of its FS stock by $80 to reflect the $80 distribution.

Example 5: Issues Where More FSNI Than E&P

Example 4 is simpler than many real-world fact patterns because it does not involve any book-tax adjustments. In actuality a United States shareholder will rarely, if ever, be able to attribute its Look-Through Inclusion to CFC E&P merely by accounting for a deduction for paid or accrued foreign income taxes. Example 5, illustrates the application of the Distribution Method and the Dividend Methods to a situation where a CFC's financial statement net income is greater than its E&P.



USP		
	Year 1	Year 2
FSNI	$ -	$ -
AFSI	102.00	-
GILTI inclusion amount	70.00	-

FS		
	Year 1	Year 2
FSNI	$ 90.00	$ -
Tested income	80.00	-
Foreign income taxes on AFS and paid/accrued	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-

Facts. Assume the same facts as Example 2, except that FS has financial statement net income of $90.

Analysis. The analysis for Year 1 in Example 5 is the same as the analysis for Year 1 in Example 2, except that USP has AFSI of $102, which is solely attributable to its Look Through Inclusion for FS.[72]

The Distribution Method.

USP establishes a PIANI account of $90 for FS in Year 1. The amount of USP's PIANI account for FS reflects its Look-Through Inclusion for FS of $102, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. In Year 2, USP reduces its PIANI account for FS to $10 to reflect the $80 distribution. USP increases the AFSI basis of its FS stock by $90 in Year 1, and then decreases that basis by $80 in Year 2.

The Dividend Method (with PTEP Replacement).

The results under the Dividend Method (with PTEP Replacement) are similar to the results under the Distribution Method because FS's book-tax timing differences for Years 1 and 2 result in its E&P being less than USP's PIANI account for FS. Specifically, USP establishes a PIANI account of $90 for FS in Year 1. In Year 2, USP reduces its PIANI account for FS to $10 to reflect the $80 E&P distribution from FS. USP increases the AFSI basis of its FS stock by $90 in Year 1, and then decreases that basis by $80 in Year 2. The basis increase and basis decrease are for CAMT purposes only; it is not an adjustment to basis as determined for regular tax purposes.

The Dividend Method (with PTEP Integration).

USP's tentative CAMT PTEP for Year 1 is equal to $80, which is the lesser of USP's $90 Look-Through Inclusion for FS ($102, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule), and $80 of current year E&P. USP's CAMT PTEP for Year 1 is determined by allocating its tentative CAMT PTEP to FS's GILTI PTEP and untaxed E&P. USP's adjusted Look-Through Inclusion for Year 1 is greater than FS's total current year E&P, but because of the "lesser of" rule, the method used to apportion USP's tentative CAMT PTEP among FS's GILTI PTEP and untaxed E&P will not affect the amount of USP's current year CAMT PTEP. USP's CAMT PTEP is $10.[73]

The method used to apportion the $10 excess of USP's adjusted Look-Through Inclusion over its tentative CAMT PTEP will, however, affect how much of USP's remaining $10 of Look-Through Inclusion will be available to carry over to future years to treat future E&P as

[72] $90 + $12 = $102.

[73] Under the Pro Rata Approach, the math is as follows: $80 (tentative CAMT PTEP) x ($10 (untaxed E&P)/$80 (total E&P)).

CAMT PTEP (assuming the Dividend Method (with PTEP Integration) is implemented with a carryover system).[74]

If the Pro Rata Approach is used, USP will have a tentative CAMT PTEP carryforward of $1.25, determined by multiplying the $10 excess amount by the same ratio used to apportion the tentative CAMT PTEP among untaxed E&P and GILTI PTEP.[75]

If either the PTEP First Approach or the Untaxed E&P First Approach is used, USP will have a tentative CAMT PTEP carryforward of $10. However, the use of the carryforward will be different in each of these methods. Specifically, if the PTEP First Approach is used, then the tentative CAMT PTEP carryforward will be added with the USP's future year tentative CAMT PTEP and allocated to FS's future year E&P using the PTEP first method. In contrast, if the Untaxed E&P First Approach is used, then the tentative CAMT PTEP carryforward will be added with the USP's future year tentative CAMT PTEP and allocated first to FS's future year E&P that is untaxed. As a result, the Untaxed E&P First Approach, unsurprisingly, is more taxpayer favorable. Since the difference between USP's tentative CAMT PTEP and FS's current year E&P is due to book-tax differences, we believe a reasonable approach is to use the Pro Rata Approach and assume that the book-tax differences stem equally from all of FS's income. Alternatively, the Dividend Method (with PTEP Integration) could allow USP to allocate FS's Year 1 book-tax differences by directly tracing them to FS's Subpart F income and tested income, on one hand, or all of FS's other (untaxed) income, on the other hand, based on FS's facts and circumstances. Treasury would have to determine whether this added complexity is desirable.

At the end of Year 1, USP has an $80 PTEP account for FS and FS has $70 of GILTI PTEP and $10 of CAMT PTEP. USP increases the AFSI basis of its FS stock by $80 to reflect FS's total PTEP. FS's distribution in Year 2 is characterized as a distribution of PTEP in full and thus does not result in a Dividend Inclusion for USP under the principles of Section 959(d). USP reduces its PTEP account and the AFSI basis of its FS stock by $80 to reflect the $80 distribution.

Example 6: Issues Where Less FSNI Than E&P

Example 6 is the opposite of Example 5 and highlights considerations of applying the Distribution Method and the Dividend Methods to a situation where a CFC's financial statement net income is less than its E&P.

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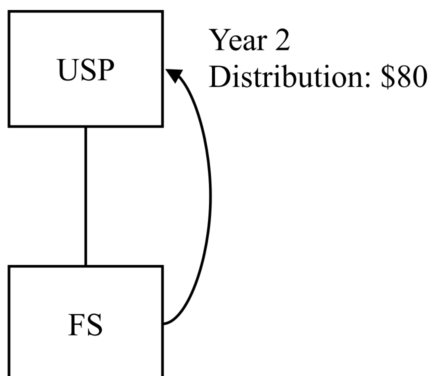
[74] As noted above, in cases like Example 5, a CFC's accumulated E&P could also be converted to CAMT PTEP, to the extent that current-year Adjusted Net Income exceeds the CFC's current-year E&P. It is not clear, however, that such conversion should be the preferred means of dealing with excess Adjusted Net Income in such cases, as a CFC not infrequently might not have material accumulated E&P in excess of its CAMT PTEP (particularly if pre-enactment or pre-relevance E&P is treated as CAMT PTEP).

[75] $10 x $10/$80.



USP		
	Year 1	Year 2
AFSI	$82.00	$ -
GILTI Inclusion Amount	70.00	-

FS		
	Year 1	Year 2
FSNI	$70.00	$ -
Tested income	80.00	-
Foreign income taxes on AFS and paid/accrued	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-

Facts. Assume the same facts as Example 2, except that FS has financial statement net income of $70.

Analysis. The analysis for Year 1 in Example 5 is the same as the analysis for Year 1 in Example 2, except that USP has AFSI of $82, which is solely attributable to its Look Through Inclusion for FS.[76]

The Distribution Method.

USP establishes a PIANI account of $70 for FS in Year 1. The amount of USP's PIANI account for FS reflects its Look-Through Inclusion for FS of $82, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. The issue presented in Example 6 is how to treat the portion of FS's distribution that exceeds USP's PIANI account for FS. FS's distribution in Year 2 is treated as a $70 distribution of PIANI and, if basis is recovered under the CAMT, a distribution to the extent of USP's FS stock basis and a Section 56A(c)(2)(C) inclusion thereafter. USP reduces its PIANI account for FS to zero in Year 2 to reflect the $70 distribution. USP increases the AFSI basis of its FS stock by $70 in Year 1, and then decreases that basis by $80 in Year 2.

The Dividend Method (with PTEP Replacement).

The results under the Dividend Method (with PTEP Replacement) are different than the results under the Distribution Method because FS's book-tax timing differences for Years 1 and 2 result in its E&P being greater than USP's PIANI account for FS. Specifically, USP establishes a PIANI account of $70 for FS in Year 1. In Year 2, USP reduces its PIANI account for FS to zero to reflect the $70 E&P distribution from FS and recognizes a $10 Dividend Inclusion with respect to FS. USP increases the AFSI basis of its FS stock by $70 in Year 1, and

[76] $70 + $12 = $82.

then decreases that basis by $70 in Year 2. The basis increase and basis decrease are for CAMT purposes only; it is not an adjustment to basis as determined for regular tax purposes.

The Dividend Method (with PTEP Integration).

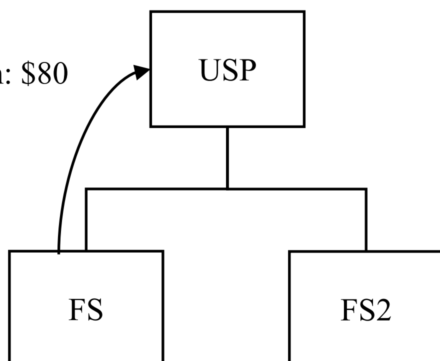
USP's tentative CAMT PTEP for Year 1 is equal to $70, which is equal to USP's Look-Through Inclusion for FS of $82, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. USP's CAMT PTEP for Year 1 is determined by allocating its tentative CAMT PTEP to FS's GILTI PTEP and untaxed E&P. USP's tentative CAMT PTEP for Year 1 is less than FS's total current year E&P and thus the method used to apportion USP's tentative CAMT PTEP among FS's GILTI PTEP and untaxed E&P will affect the amount of USP's current year CAMT PTEP. If the Pro Rata Approach is used, USP will have CAMT PTEP of $8.75.[77] If the PTEP First Approach is used, USP will have CAMT PTEP of $0, and if the Untaxed E&P First Approach is used, USP will have CAMT PTEP of $10. For the reasons discussed above in Example 5, we believe the Pro Rata Approach should be used, unless Treasury decides to adopt a direct tracing approach for FS's book-tax differences.

At the end of Year 1, USP has a $78.75 PTEP account for FS and FS has $70 of GILTI PTEP and $8.75 of CAMT PTEP. USP increases the basis of its FS stock by $78.75 to reflect FS's total PTEP. FS's distribution in Year 2 is characterized as a $78.75 distribution of PTEP and a Dividend Inclusion of $1.25 for USP under the principles of Section 959(d). USP reduces its PTEP account and the AFSI basis of its FS stock by $78.75 to reflect the PTEP distribution.

Example 7: Application of the Distribution Method and Dividend Methods to CFC Losses

Example 7 illustrates how the Distribution Method and Dividend Methods could be applied where a United States shareholder owns some CFCs that have financial statement net income and others that have financial statement net losses in a given year, with a Look-Through Inclusion for the United States shareholder for the year. Example 7 is particularly relevant to the Distribution Method design choice of whether to use the Aggregate Attribute Approach or the CFC-by-CFC Attribute Approach.

[77] $70 x $10/$80.



USP		
	Year 1	Year 2
AFSI	$ 72.00	-
GILTI inclusion amount	50.00	-

FS		
	Year 1	Year 2
FSNI	$ 80.00	$ -
Tested income	80.00	-
Foreign income taxes on AFS and paid/accrued	12.00	-
Section 951A PTEP	50.00	-
Untaxed E&P	30.00	-

FS2		
	Year 1	Year 2
FSNL	$(20.00)	-
Tested loss	(20.00)	-
Untaxed E&P	(20.00)	-

Facts. Assume the same facts as Example 2, except that: (i) USP also owns 100 percent of the issued and outstanding shares in FS2; (ii) FS2 has a financial statement net loss and tested loss of $20 for Year 1 and no financial statement income or loss or tested income or loss for Year 2; and (iii) for Years 1 and 2, FS2 does not have taxes on its AFS and does not pay or accrue taxes for Federal income tax purposes.

Analysis.

The Distribution Method.

Under the Aggregate Attribute Approach, USP has PIANI of $60 in Year 1, which is calculated as USP's Look-Through Inclusion from FS ($92), less FS's taxes ($12) and FS2's financial statement net loss ($20). All of this PIANI is allocated to FS. FS's distribution in Year 2 is treated as a $60 distribution of PIANI, and then a distribution to the extent of USP's FS stock basis and a Section 56A(c)(2)(C) inclusion thereafter. USP increases the basis of its FS stock by $60 in Year 1, and then decreases the basis of its FS stock by $80 in Year 2. In addition, since it would not be possible for USP to have a PIANI account balance below zero, there would be no need to reverse out negative account balances. There would also be a

possibility for USP to sell the FS2 stock and recognize a $20 loss, which would arguably lead to a double benefit to USP.[78]

Under the CFC-by-CFC Attribute Approach, USP has gross PIANI of $80 in Year 1, which is calculated as USP's AFSI from FS ($92), less FS's taxes ($12). All of this gross PIANI is allocated to FS. FS's distribution in Year 2 is treated as a $80 distribution of PIANI. USP increases the basis of its FS stock by $80 in Year 1, and then decreases the basis of its FS stock by $80 in Year 2. USP allocates a negative attribute of $20 to FS2 to reflect FS2's financial statement loss in Year 1 and reduces its FS2 stock basis by $20. As noted above, a design choice would have to be made as regarding situations where the negative attribute allocated to a CFC exceeds the basis of its stock—*e.g.*, cause an immediate inclusion under Section 56A(c)(2)(C) or establish an account that gets triggered upon a subsequent disposition of the stock. We believe causing an immediate inclusion would be inappropriate. FS2's losses never have reduced USP's AFSI below zero or given rise to the kind of benefits that provide a rationale for excess loss accounts in the consolidated return context, or minimum gain recapture in the partnership context. An alternative would be to allow USP to maintain a negative PIANI account for FS2 which, to the extent not subsequently eliminated by Adjusted Net Income of FS2 in later years, would be triggered and result in an AFSI inclusion at the time of a disposition of the FS2 stock.

The Dividend Method (with PTEP Replacement).

Since there are no book-tax differences in Example 7, the end results under the Dividend Method (with PTEP Replacement) are the same as those under the Distribution Method, using the Aggregate Attribute Approach or the CFC-by-CFC Attribute Approach.

The Dividend Method (with PTEP Integration).

Aggregate Attribute Approach

USP's tentative CAMT PTEP for Year 1 is equal to $60, which is equal to USP's Look-Through Inclusion for FS of $92, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule and FS2's financial statement net loss of $20. USP's CAMT PTEP for Year 1 is determined by allocating its tentative CAMT PTEP to FS's GILTI PTEP and untaxed E&P. None of USP's tentative CAMT PTEP is allocated to FS2 because FS2 has a financial statement net loss.

USP's tentative CAMT PTEP for Year 1 is less than FS's total current year E&P and thus the method used to apportion USP's tentative CAMT PTEP among FS's GILTI PTEP and untaxed E&P will affect the amount of USP's current year CAMT PTEP. If the Pro Rata Approach is used, USP will have CAMT PTEP of $22.50.[79] If the PTEP First Approach is used, USP will have CAMT PTEP of $0, and if the Untaxed E&P First Approach is used, USP will

[78] We note that under GILTI, in a similar fact pattern USP would be able to use a $20 tested loss of FS2 to reduce its GILTI inclusion with respect to FS without a basis reduction. As indicated above (see note 55 *supra*), Treasury proposed regulations to address this issue, but it withdrew them in 2019, announcing that any future regulations would have only prospective effect. *See* 84 Federal Register 29,288, at 29,317 (2019) (discussing the withdrawal of proposed Treas. Reg. § 1.951A-6(e)).

[79] $60 x $30/$80.

have CAMT PTEP of $30. For the reasons discussed above in Example 5, we believe the Pro Rata Approach should be used, unless Treasury decides to adopt a direct tracing approach for FS's book-tax differences.

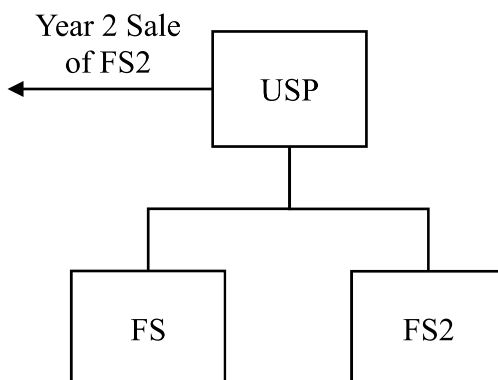
At the end of Year 1, USP has a $72.50 PTEP account for FS and FS has $50 of GILTI PTEP and $22.50 of CAMT PTEP. USP increases the AFSI basis of its FS stock by $72.50 to reflect FS's total PTEP. FS's distribution in Year 2 is characterized for CAMT purposes as a $72.50 distribution of PTEP and a Dividend Inclusion of $7.50 for USP under the principles Section 959(d). USP reduces its PTEP account and the AFSI basis of its FS stock by $72.50 to reflect the PTEP distribution.

CFC-by-CFC Attribute Approach

USP has gross PIANI of $80 in Year 1, all of which is allocated to FS. Since the PIANI allocated to FS is equal to FS's current year E&P, the method used to apportion this PIANI among FS's PTEP and untaxed E&P to determine its CAMT PTEP does not matter. Accordingly, at the end of Year 1, USP has an $80 PTEP account for FS ($50 of GILTI PTEP and $30 of CAMT PTEP). USP increases the AFSI basis of its FS stock by $80 to reflect FS's total PTEP. FS's distribution in Year 2 is characterized for CAMT purposes as an $80 distribution of PTEP under the principles Section 959(d). USP reduces its PTEP account and the AFSI basis of its FS stock by $80 to reflect the PTEP distribution.

USP allocates a negative attribute of $20 to FS2 to reflect FS2's financial statement loss in Year 1 and reduces its FS2 stock basis by $20. For the reasons discussed above, we believe that if the reduction to USP's FS2 stock basis exceeds the amount of such basis, USP should be allowed to maintain a negative PIANI account for FS2 that is either offset FS2's Adjusted Net Income in future years or triggered when USP disposes of its FS2 stock.

Example 8: Application of the Distribution Method and Dividend Methods Where There Is a Look-Through Net Loss



Facts. USP owns 100% of FS and FS2. FS has $20 of AFSI and FS2 has a $100 adjusted financial statement loss in Year 1. All of FS's AFSI is tested income and FS2's entire

adjustment financial statement loss is a tested loss (*i.e.*, neither FS nor FS2 has book/tax differences). USP does not have any QBAI for Year 1. USP sells FS2 to a third-party Buyer on January 1, Year 2.

Analysis. USP has a Look-Through Net Loss of $80 for Year 1, which it can carryforward to future years to offset AFSI from its CFCs that would otherwise result in Look-Through Inclusions.

Distribution Method.

If the Aggregate Attribute Approach is used, USP has no increase in its PIANI account balance for either FS or FS2 at the end of Year 1. USP thus has the issues discussed above in Example 7 if FS makes a distribution of up to $20 in the future. USP also has the same issues as discussed in Example 7 regarding an arguable double benefit when it sells FS2 to Buyer in Year 2.

In addition, when USP sells FS2 in Year 2, a question arises regarding how this affects the $80 loss carryforward. Conceivably, the loss carryforward should be eliminated at that time, to the extent it does not exceed USP's AFSI basis in the FS2 stock, on the theory that USP is getting the benefit of the loss in the form of basis that reduces gain or increases loss on the sale. To the extent of any excess of the loss carryforward over stock basis, arguably that excess should also be eliminated, as it is an attribute related to USP's investment in FS2, which has now terminated, and such attribute does not correspond to an economic detriment that has actually been borne by USP. Alternatively, USP could be permitted to retain FS2's loss carryforward for USP's use in computing its Look-Through Inclusion with respect to other CFCs in future periods, if USP reduces its basis in the FS2 stock by $60 for purposes of computing its gain or loss under Section 56A(c)(2)(C) on the sale of FS2, but this may be more complicated than an approach that eliminates the loss carryforward.[80]

A final approach would be for FS2 to take the loss carryforward with it when it is sold, with USP having a corresponding reduction in its basis in the FS2 stock.[81] That would be broadly similar to the result in the consolidated return rules when a group sells the stock of a member with net operating loss carryforward. Buyer would acquire FS2 with the loss carryforward for purposes of Buyer's computations of Look-Through Inclusions for post-acquisition periods, subject to Section 382 principles to the extent those apply for CAMT purposes. However, particularly if USP's PIANI account is treated as an attribute personal to USP, it may be more appropriate to treat FS2's loss carryforward as similarly being addressed at the USP level (in one of the ways described above), rather than remaining with FS2.

Under the CFC-by-CFC Attribute Approach, USP has gross PIANI of $20 in Year 1, all of which is allocated to FS. USP increases the basis of its FS stock by $20. USP allocates a negative attribute of $100 to FS2 to reflect FS2's adjusted financial statement loss in Year 1 and

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[80] *Cf.* former proposed Treas. Reg. § 1.951A-6(e).

As indicated above, USP might need to reduce its basis below zero if its basis is less than the amount of the loss carryforward.

[81] Again, USP might need to reduce its basis below zero.

reduces its FS2 stock basis by $100. If the negative attribute allocated to FS2 exceeds the basis of USP's FS2 stock, we believe that the excess should be maintained by USP in a separate account for FS2 that gets triggered in Year 2 as a result of the sale of FS2 to the third-party Buyer. As is the case under the Aggregate Attribute Approach, it would need to be determined whether the loss carryforward attributable to FS2 remains with USP when FS2 is sold, or instead is taken by FS2.

The Dividend Method (with PTEP Replacement).

Since there are no book-tax differences in Example 8, the results under the Dividend Method (with PTEP Replacement) are the same as those under the Distribution Method, using the Aggregate Attribute Approach or the CFC-by-CFC Attribute Approach. Similarly, the same loss carryforward questions presented in the Distribution Method are relevant to applying to the Dividend Method (with PTEP Replacement) to USP's sale of FS2 to the third-party Buyer.

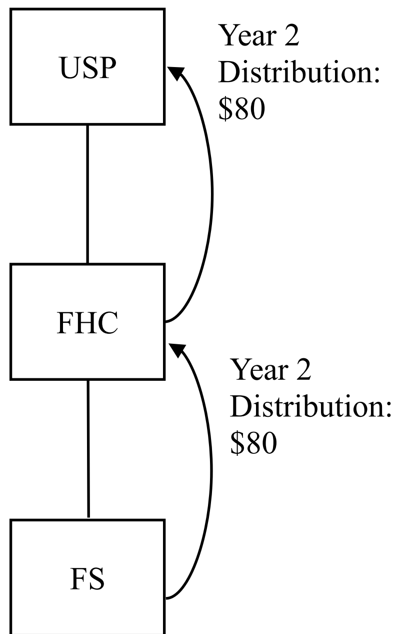
The Dividend Method (with PTEP Integration).

Since there is no GILTI PTEP in Example 8, the results under the Dividend Method (with PTEP Integration) are generally the same as those under the Dividend Method (with PTEP Replacement) (and consequently the Distribution Method), using the Aggregate Attribute Approach or the CFC-by-CFC Attribute Approach.[82] Similarly, the same loss carryforward questions presented in the Distribution Method and the Dividend Method (with PTEP Replacement) are relevant to applying to the Dividend Method (with PTEP Integration) to USP's sale of FS2 to the third-party Buyer.

Example 9: Application of the Distribution Method and Dividend Methods to Tiered-CFC Structures

Example 9 illustrates the application of the Distribution Method and the CAMT PTEP Methods to a situation where a United States shareholder owns a tiered CFC structure, and the lower-tier CFC distributes property through the ownership chain to the United States shareholder.

[82] The only difference would be that FS has $20 of GILTI PTEP under the Dividend Method (with PTEP Integration).



USP	Year 1	Year 2
AFSI	$92.00	$ -
GILTI inclusion amount	70.00	-
Section 78 gross-up	12.00	-

FHC	Year 1	Year 2
FSNI	$ -	$ -

FS	Year 1	Year 2
FSNI	$80.00	$ -
Tested income	80.00	-
Foreign income taxes on AFS and paid/accrued	12.00	-
Section 951A PTEP	70.00	-
Untaxed E&P	10.00	-

Facts. Same facts as Example 3.

Analysis.

The Distribution Method.

In Year 1, USP establishes a PIANI account of $80 for FS. The amount of USP's PIANI account for FS reflects its Look-Through Inclusion for FS of $92, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule.

In Year 2, USP first reduces its PIANI account for FS to zero and increases its PIANI account for FHC to $80 to reflect FS's distribution. FS's distribution to FHC is a distribution of PIANI and thus does not give rise to a Dividend Inclusion for FHC. USP reduces its PIANI account for FHC to zero to reflect FHC's distribution. FHC's distribution to USP is a distribution of PIANI and thus does not give rise to a Dividend Inclusion for USP.

Assuming the Distribution Method includes stock basis adjustment rules, USP increases the AFSI basis of its FHC stock and FHC would increase the AFSI basis of its FS stock by $80 in Year 1 to reflect USP's Look-Through Inclusion with respect to FS. In Year 2, FHC decreases the AFSI basis of its FS stock by $80 to reflect FS's distribution to FHC, and USP decreases the AFSI basis of its FHC stock by $80 to reflect FHC's distribution.

The Dividend Method (with PTEP Replacement).

Since there are no book-tax differences in Years 1 and 2 for FHC or FS, the results under the Dividend Method (with PTEP Replacement) are the same as the results under the Distribution Method.

The Dividend Method (with PTEP Integration).

USP's tentative CAMT PTEP for Year 1 is equal to $80, which is equal to USP's Look-Through Inclusion for FS of $92, less $12 of foreign income taxes contained in the inclusion under the Income Tax Adjustment Rule. USP's CAMT PTEP for Year 1 is determined by allocating its tentative CAMT PTEP to FS's GILTI PTEP and untaxed E&P. None of USP's tentative CAMT PTEP is allocated to FHC because FHC does not have any AFSI.

USP's tentative CAMT PTEP for Year 1 is equal to FS's total current year E&P and thus the method used to apportion USP's tentative CAMT PTEP among FS's GILTI PTEP and untaxed E&P will not affect the amount of USP's CAMT PTEP. Therefore, USP's CAMT PTEP for Year 1 is equal to $10 and FS's untaxed E&P becomes CAMT PTEP. At the end of Year 1, USP has an $80 PTEP account for FS and FS has $70 of GILTI PTEP and $10 of CAMT PTEP. USP increases the AFSI basis of its FHC stock, and FHC increases the AFSI basis of its FS stock, by $80 to reflect FS's total PTEP.

In Year 2, USP first reduces its PTEP account for FS to zero and increases its PTEP account for FHC to $80 to reflect FS's distribution. FS's distribution to FHC is a distribution of PTEP and thus should not give rise to a Dividend Inclusion for FHC. FHC reduces the AFSI basis of its FS stock by $80 to reflect FS's distribution. As noted above, we believe that Treasury should issue guidance that Section 959(d) principles, not Section 959(b) principles, apply for purposes of distributions from lower-tier CFCs to upper-tier CFCs. USP reduces its CAMT PTEP account for FHC to zero to reflect FHC's distribution. FHC's distribution to USP is a PTEP distribution in full and thus would not give rise to a Dividend Inclusion for USP under Section 959(d). USP reduces the AFSI basis of its FHC stock by $80 to reflect FHC's distribution.

IV. CAMT FTC Considerations

This Part IV discusses several of the issues raised by the CAMT FTC Rules. The CAMT FTC is available to reduce the tentative minimum tax on AFSI in any taxable year in which an applicable corporation elects to receive the benefits of the FTC under the regular income tax system.[83] As with the regular tax system, the CAMT FTC is available for "income, war profits and excess profits taxes" within the meaning of Section 901 that are imposed by a foreign country or possession of the United States.[84] There are two components to the CAMT FTC—a direct FTC for taxes incurred by the taxpayer and an indirect FTC for taxes incurred by a taxpayer's subsidiaries that are CFCs. Specifically, the CAMT FTC equals the sum of:

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[83] Section 55(b)(2)(A); Section 59(l)(1).

[84] Section 59(l).

1. The amount of foreign income taxes that are (a) taken into account on the AFS of the applicable corporation and (b) paid or accrued (for Federal income tax purposes) by the applicable corporation (the "**Direct FTC**"), *and*

2. The applicable corporation's aggregate pro rata share of the foreign income taxes that are (a) taken into account on the AFS of each CFC with respect to which the applicable corporation is a United States shareholder and (b) paid or accrued (for Federal income tax purposes) by each such CFC (subject to an overall cap as discussed immediately below) (the "**Indirect FTC**").[85]

The Indirect FTC is subject to an overall limitation equal to 15% of the applicable corporation's adjustments for its pro rata share of the Adjusted Net Income of its CFCs pursuant to Section 56A(c)(3) (the "**15% Limitation**").[86] The primary effect of this provision is to prevent a taxpayer from using the Indirect FTC to reduce its CAMT liability imposed with respect to its domestic AFSI. This is also a feature of the FTC system under the regular income tax.[87] Notably, however, the 15% Limitation applies only with respect to the Indirect FTC. It does not apply with respect to foreign income taxes incurred by the taxpayer directly, such as foreign withholding taxes with respect to dividends received or foreign income taxes payable in respect of foreign operations conducted through a branch (or a disregarded subsidiary).[88]

The effect of the 15% Limitation on the Indirect FTC is ameliorated through a five-year carryforward. Specifically, to the extent an applicable corporation's aggregate pro rata share of CFC foreign income taxes exceeds 15% of the applicable corporation's Look-Through Inclusion with respect to its CFCs, the excess will increase the amount of taxes that are treated as paid or accrued and taken into account on the AFSs of the applicable corporation's CFCs for the next five taxable years (until such excess is utilized or expires).[89] No carryforward exists for the applicable corporation's direct foreign income taxes.

Finally, Section 59(l)(3) directs the Secretary to issue such regulations or other guidance as is necessary to carry out the purposes of the CAMT FTC.

A. Taxes "Taken into Account" on the AFS: Amount and Timing Issues

As described above, for an applicable corporation to be eligible for a CAMT FTC (whether direct or indirect) with respect to a foreign income tax, the foreign income tax must meet a two-pronged test: (1) the tax must be "taken into account on the applicable financial statement" of the applicable corporation or CFC (the "**AFS Requirement**"), and (2) it must be "paid or accrued (for Federal income tax purposes)" by the applicable corporation or CFC (the

[85] Section 59(l)(1).

[86] Section 59(l)(1)(A)(ii).

[87] *See* Sections 904 and 960. Another current feature of the regular foreign tax credit system that is also present in the CAMT FTC is the ability to "blend" taxes among foreign jurisdictions.

[88] Section 59(l)(1)(B).

[89] Section 59(l)(2).

“**Paid or Accrued Requirement**”).[90] In other words, the statute requires satisfaction of both book and tax concepts in fixing the amount and timing of foreign income tax creditability.

The meaning of “paid or accrued” for Federal income tax purposes is well developed in the context of the regular FTC under Section 901, for which purpose the accounting and timing rules of Section 461 generally apply. Under these rules, foreign taxes generally accrue at the end of the foreign taxable year to which such taxes relate (and are taken into account by the taxpayer in its U.S. taxable year within which the relevant foreign taxable year ends).[91] As a result, the timing and amount of accrual of foreign income taxes is largely a function of the foreign taxable period and methods of accounting utilized for applicable foreign tax purposes.

The meaning of “taken into account on the applicable financial statement” is less clear. The term clearly refers to items relevant to the AFS, and therefore indirectly pulls from financial accounting principles. However, “taken into account” is not a term of art with any special meaning in financial accounting. Notice 2023-64 has provided guidance regarding the interpretation of this term which we discuss below, in Part IV.B.2.

In addition, the decision to refer to both tax and financial accounting concepts for purposes of determining the CAMT FTC is a curious choice: the CAMT base is in substantial part based on book principles, and book and tax accounting rules often diverge, particularly when it comes to the timing of items. In fact, accounting for income taxes for financial statement purposes is fundamentally concerned with the goal of reconciling differences between book and tax accounting, or more specifically, reconciling the tax amounts actually owed to a taxing authority with the tax expense attributable to income reported on the financial statements.[8926]

1. Accounting For Income Taxes

Given the important role that book concepts play in the determination of the CAMT FTC, we lay them out (briefly) here. The FASB Accounting Standards Codification Topic 740 (*Accounting for Income Taxes*) contains the relevant rules for U.S. GAAP purposes. As noted in ASC 740-10-10-1, the overall objectives of accounting for income taxes are for an entity to (1) “recognize the amount of taxes payable or refundable for the current year” (*i.e.*, the current income tax expense or benefit, which is the amount that is actually payable to or receivable from the relevant tax authorities for the year) and (2) “recognize deferred tax liabilities and assets for the future tax consequences of events that have been recognized in an entity’s financial statement or tax returns” (*i.e.*, the deferred tax consequences of financial statement items, the year-to-year change in which corresponds to the deferred tax expense or benefit for the year). Accordingly, an entity’s total tax expense for the year, which is the number reflected as a line item on its income statement and can broadly be thought of as the amount of tax expense corresponding to

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[90] Section 59(l)(1).

[91] *See* Rev. Rul. 61-93, 1961-1 C.B. 390.

[92] *See* ASC 740-10.

the items of income and non-tax expense reported on the income statement for that year, can be expressed as the following formula:

Total Tax Expense (Benefit) = Current Tax Expense (Benefit) + Deferred Tax Expense (Benefit),

where:

- Current Tax Expense or Benefit = Total amount owed to or receivable from tax authorities and actually reflected on the entity's tax returns for the current taxable year; and

- Deferred Tax Expense or Benefit = Generally, the change in the sum of the entity's deferred tax assets ("**DTA**") (net of valuation allowance) and deferred tax liabilities ("**DTL**") during the reporting period.

Except for DTAs attributable to tax attributes, such as net operating losses, which can correspond in amount and timing of utilization as between book and tax, DTAs and DTLs only exist because the timing of book and tax items can temporarily differ. Usually, these differences reverse over time (*i.e.*, the timing of items of income and expense can differ, but over time, the overall amounts taken into account are the same). DTAs and DTLs attributable to these so-called "temporary differences" represent the future tax effect that will arise when the related amount recognized for book purposes is recovered or paid. Specifically, DTAs represent differences that will result in future tax deductions, while DTLs represent differences that will result in future taxable income. The book accounting for temporary differences is best illustrated with an example:

> **Example 10**—Assume that an entity, Taxpayer, acquires an asset for $100 on January 1st of Year 1. The initial carrying value of the asset for book purposes and its initial basis for tax purposes is generally its cost, or $100. Assume the applicable tax rules allow for immediate full expensing in Year 1. The financial accounting rules, on the other hand, require the asset to be depreciated on a straight-line basis over five years (resulting in annual depreciation expense of $20). The asset generates $100 of annual income for both book and tax and the applicable tax rate for all relevant years is 25%.

In Year 1, the book pre-tax income is $80 ($100 – $20 depreciation), while net income for tax reporting purposes is $0. Current tax expense is therefore also $0. As a result of the different depreciation schedules, at the end of Year 1, the book carrying value of the asset of $80 is greater than its tax basis of $0. The temporary book-tax difference of $80 yields a DTL of $20 (because the recovery of the value of the asset for its carrying value, $80, would result in additional tax of $20 at the 25% tax rate). Accordingly, the deferred tax expense is $20 (the increase in the DTL), yielding a total tax expense amount that is reflected on the income statement of $20, and net book income of $60. These calculations are laid out in the following table:

Year 1	Book	Tax
Income	100	100
Depreciation	(20)	(100)
Income pre-tax	80	0
Net income on tax return		0
Tax rate		25%
Current tax expense		**0**
Asset basis (year-end)	80	0
Temporary difference	80	
DTL/(DTA)	20	
Deferred tax expense/(benefit)	**20**	
Income pre-tax	80	0
Total tax expense	**(20)**	**0**
Income after tax	60	0

Year 2	Book	Tax
Income	100	100
Depreciation	(20)	0
Income pre-tax	80	100
Net income on tax return		100
Tax rate		25%
Current tax expense		**25**
Asset basis (year-end)	60	0
Temporary difference	60	
DTL/(DTA)	15	
Deferred tax expense/(benefit)	**(5)**	
Income pre-tax	80	100
Total tax expense	**(20)**	**(25)**
Income after tax	60	75

While book and tax will sometimes match, this is often not going to be the case. Moreover, while total tax expense on the income statement generally will (because it is designed to do so) match up with the income base reported on an AFS, the actual/current tax expense often will not. Because of this relationship (or lack thereof), there is the potential under Section 59(l) for foreign taxes eligible for the credit to not match up with the CAMT income base. This mismatch in turn could often lead to anomalous results, as described further below, including the unavailability of the CAMT FTC for taxes that are in fact paid and accrued by a taxpayer for both book and tax purposes.[93]

It is hard to believe that a full denial of the CAMT FTC for foreign income taxes that are ultimately both paid and reflected on the AFS is a design feature of the statute. Accordingly, in resolving ambiguities—in particular, (1) what does it mean to be "taken into account" on an AFS and (2) when must the AFS Requirement and the Paid or Accrued Requirement be met—we

[93] It is perhaps interesting to note that the model GloBE rules under Pillar 2 expressly recognize that a problematic mismatch between tax and the GloBE income tax base would result if only taxes that were actually paid or accrued for payment to the taxing authorities in a particular period were taken into account as "covered taxes" for purposes of GloBE. To avoid the resulting distortions, GloBE expressly requires that deferred tax expense be taken into account in determining covered taxes attributable to a particular period (with adjustments and recapture rules to avoid distortions from permanent differences). *See* OECD (2021), *Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, OECD, Paris, https://www.oecd.org/tax/beps/tax-challenges-arising-from-the-digitalisation-of-theeconomy-global-anti-base-erosion-model-rules-pillar-two.htm ("The Adjusted Covered Taxes of a Constituent Entity for the Fiscal Year shall be equal to the current tax expense accrued in its Financial Accounting Net Income or Loss with respect to Covered Taxes for the Fiscal Year adjusted by . . . the Total Deferred Tax Adjustment Amount"); OECD (2022), *Tax Challenges Arising from the Digitalisation of the Economy – Commentary to the Global Anti-Base Erosion Model Rules (Pillar Two)*, OECD, Paris, https://www.oecd.org/tax/beps/tax-challenges-arising-from-thedigitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two-commentary.pdf ("The Total Deferred Tax Amount adjusts the Covered Taxes of a Constituent Entity to take certain deferred tax assets and liabilities into account in order to address the impact of temporary differences.").

recommend that Treasury adopt rules that will, to the greatest extent possible, prevent taxpayers from losing the CAMT FTC solely on account of temporary timing differences between book and tax.

2. Overview of Timing Issues and Notice 2023-64

There are two main ambiguities in the CAMT FTC statute that bear on timing differences between book and tax accounting. The first is the meaning of the phrase "taken into account on an applicable financial statement." As noted above, the phrase "taken into account on an applicable financial statement" is not one that involves any special meaning under financial accounting rules. It could be interpreted in one of two basic ways. Either it could mean that *any* entry or component of an entry on any of the financial statements of a corporation suffices—including, for example, amounts recorded as a DTA that result in a deferred tax benefit and actually reduce the total tax expense line item—or it could refer to a specific line item or specific effect of taxes on the AFS, such as when an income tax is taken into account to increase total tax expense on the income statement.

Treasury had recently provided helpful interim guidance on timing issues and the AFS Requirement in Notice 2023-64, and one such item of guidance is the adoption of the first, more expansive reading of "taken into account on an applicable financial statement." Specifically, Notice 2023-64 provides that the AFS Requirement is met if *any* journal entry is recorded with respect to income taxes on the AFS, even if the income tax does not increase or decrease financial statement income at the time of the journal entry.[94]

We recognize the benefits of this approach. It seems to follow more naturally from the plain English of the statute, since a statement to the effect that something was "taken into account" is generally understood to mean that something was given attention to or considered,[95] and does not require the item that was considered to have had any particular effect. Furthermore, the definition of "applicable financial statement" is not just limited to the income statement (though even if it were, it would not necessarily point toward a specific journal entry given that a deferred tax expense or benefit is a component of, and therefore taken into account in determining, the total tax expense line item on the income statement). This reading also may have the benefit of being simpler, and we appreciate any effort on the part of Treasury to simplify the complex CAMT framework.

However, we believe that there are additional benefits to a narrower reading of the AFS Requirement that, on balance, outweigh the benefits of the approach taken in Notice 2023-64. While an expansive reading of the words "taken into account" may be more consistent with the plain language of the statute, it may be the less persuasive reading, as it could effectively make the AFS Requirement meaningless by making it all-encompassing. Any time a tax is paid or accrued for Federal tax purposes, there will be a corresponding journal entry meeting the standard set forth in Notice 2023-64. Furthermore, an overly broad reading of the phrase "taken

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[94] Notice 2023-64, Sections 8.02(2), 14.02(2).

[95] *Taken into account*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/taken%20into%20account (last visited Jun. 5, 2023).

into account" could, in many cases, divorce book tax expense from book income, resulting in an inappropriate denial of the CAMT FTC. For these reasons, we believe Treasury should consider instead adopting a reading of the AFS Requirement that ties satisfaction of the requirement to the year in which foreign income taxes are taken into account to *increase* total tax expense on the income statement.

The second main point of ambiguity in the CAMT FTC statute bearing on timing differences is the relationship between the AFS Requirement and the Paid or Accrued Requirement—whether the two requirements must be met in the same taxable year or whether (to account for timing differences between book and tax) they can be met in separate years. Notice 2023-64 addresses this too, stating that a foreign income tax is eligible to be claimed as a CAMT FTC in the taxable year in which the Paid or Accrued Requirement has been met, provided that the AFS Requirement has also been met.[96] We read this to mean that where the AFS Requirement is met in an earlier year, and the Paid or Accrued Requirement is met in a later year, the CAMT FTC is available in that later year. We appreciate Treasury's clarification of this point and agree with this approach.

We note, however, that this approach to timing is only complete if Treasury adopts the expansive reading of the AFS Requirement that it has proposed in Notice 2023-64 (because the Paid or Accrued Requirement would never be met in a year prior to the AFS Requirement). If, instead, as we recommend, Treasury adopts the narrow reading of the AFS Requirement, then a reciprocal rule is needed—*i.e.*, the CAMT FTC would be available in the later of the two years in which the AFS Requirement and the Paid or Accrued Requirement is met, regardless of which is met first. We refer to this approach as the "**Later of Approach**".

The following two sections lay out a number of examples to demonstrate how the timing issues described above might arise, how each of the approaches to these issues would operate, and the reasons for our two recommendations.

3. Temporary Differences Under CAMT—DTAs

Consider the following example:

> **Example 11A**—Due to a temporary book-tax difference, an applicable U.S. corporation, Parent, has $0 of AFSI and $100 of taxable income from its foreign branch in Country Y, and no other income, in Year 1. The temporary difference is expected to fully reverse in Year 2, and there will be no other income (for tax or book purposes) in Year 2. Country Y's income tax rate is 15%.

Parent (through its branch) pays $15 in Country Y foreign income taxes in Year 1 and has $15 of current tax expense for GAAP. Parent will also record a DTA of $15, and the $15 increase in its DTAs will result in $15 of deferred tax benefit. This deferred tax benefit offsets the $15 of current tax expense, and, accordingly, the total net tax expense reported on Parent's income statement is $0.

[96] Notice 2023-64, Section 14.02(1).

In Year 2, the book-tax difference reverses, and Parent has $100 of book income but no taxable income. There will be no actual tax liability in Country Y, resulting in $0 of current tax expense for GAAP. The reversal of the $15 DTA will, however, result in $15 of deferred tax expense, resulting in $15 of total tax expense on Parent's income statement. Parent will report $100 of AFSI, and its CAMT liability, prior to the utilization of the CAMT FTC, is $15.

Can Parent claim a CAMT FTC in Year 2? Over the two-year period, Parent has reported $100 of foreign source income and has incurred $15 of corresponding foreign income taxes for both book and tax purposes. Accordingly, it seems appropriate that Parent be able to take the credit and not lose it solely on account of temporary book-tax differences. But, as we noted above, the result under the statute is not entirely clear. The $15 in foreign income taxes is clearly paid and accrued for Federal income tax purposes in Year 1, but is it also "taken into account" on the AFS in Year 1, and does this timing matter for availability of the CAMT FTC?

If, as Notice 2023-64 indicates, it is taken into account in Year 1 by being recorded as a DTA, then the CAMT FTC would also become available in Year 1 as both the AFS Requirement and the Paid or Accrued Requirement would be satisfied in that year. However, in Year 1 there is no AFSI, and thus no CAMT liability, against which to use the CAMT FTC. In Year 2, there is $100 of AFSI and $15 of CAMT liability (before the credit). But Section 59(l) does not provide for a carryforward of the Direct FTC. Accordingly, if both the Paid or Accrued Requirement and the AFS Requirement are deemed to be met in Year 1 (and only in Year 1), Parent likely would not be able to claim the credit in Year 2 and would incur a total tax liability of $30 over the two-year period under the foreign tax laws and the CAMT.

If, instead, as we recommend, the $15 of foreign income taxes is deemed "taken into account" not in Year 1 but in Year 2 because that is when it increases total tax expense on the income statement, the result under the statute is still unclear. If the timing of the Paid or Accrued Requirement and the AFS Requirement relative to each other matters—*i.e.*, if both must be met in the same taxable year—then again, Parent would not be able to claim the credit in Year 2 and would incur a total tax liability of $30 over the two-year period under the foreign tax laws and the CAMT. The rule in Notice 2023-64 that permits the Paid or Accrued Requirement to be met in a later year does not help here, where it is the AFS Requirement that is met in the later year. If, however, Treasury were to also extend that rule on relative timing in Notice 2023-64 by adopting the Later of Approach, then the foreign tax would be creditable in Year 2, the first year in which both requirements have been met (whether in that year or a prior year), and would be credited against the $15 CAMT liability (15% times $100 of AFSI) in Year 2. Thus, a narrow reading of the AFS Requirement combined with the Later of Approach would preserve the CAMT FTC in this example, while the approach adopted in Notice 2023-64 regarding the AFS Requirement and relative timing of the two requirements would result in the CAMT FTC being lost.

The DTA scenario illustrated in Example 11A demonstrates why we believe that our two recommendations taken together—a narrow reading of the AFS Requirement and the Later of Approach—would be incrementally more effective at preventing temporary differences between book and tax from resulting in the denial of the CAMT FTC than the approaches in Notice 2023-

64.[97] With respect to our first recommendation, the CAMT FTC is more likely to be preserved because, as we noted earlier, the effect of reading the AFS Requirement expansively is to divorce the book tax item from the book income to which it relates. While the $15 tax payment to the taxing authority in Example 11A is reflected in multiple book entries in Year 1, these entries are driven by the fact that the tax in question is in fact paid or accrued (for Federal income tax purposes) to the relevant tax authority, a wholly separate requirement of Section 59(l). Moreover, the ultimate effect of those book entries is to *reverse* the $15 of current tax expense on the income statement. This is done precisely because the income associated with that $15 of expense is also not reflected on the income statement.[98] We accordingly believe that the narrow reading of the AFS Requirement would more properly match book taxes with book income by considering the impact of the foreign tax only on the total tax expense line item on the income statement, thereby preserving the CAMT FTC.

We do, however, recognize that the application of our proposed approach could result in significant complexity and would require detailed rules to implement. In particular, the approach would likely require a degree of disaggregation, tracking and matching of different types of taxes with related income that is generally not necessary for financial accounting purposes, and is therefore not already performed today.[99] For this reason, a different approach that relies on amounts that are more easily retrievable from the financial statements may have appeal from both a compliance and administration perspective. We acknowledge that avoiding this complexity may have been a driver behind the approach adopted in Notice 2023-64. Nevertheless, we believe that, on balance, the benefits of our proposed approach would outweigh the additional complexity.

As for our second recommendation, we do not believe that requiring that both the AFS Requirement and the Paid or Accrued Requirement be satisfied in the *same* taxable year for the CAMT FTC to be available is required by the statute or appropriate, and it appears from Notice 2023-64 that Treasury agrees. As discussed above, there are many circumstances where the timing of inclusion of book and tax items is different, and we do not believe that differences between the two sets of rules that will ultimately reconcile over time should cause taxpayers to bear an artificially high overall tax burden as a result of the CAMT. As illustrated in the prior example, if the "same year" approach were adopted, taxes relating to temporary timing differences would generally never be creditable because either: (1) under our recommended approach, the AFS Requirement and the Paid or Accrued Requirement would be satisfied in different years (if the AFS Requirement is only treated as satisfied when the foreign tax is reflected as a total tax expense on the income statement); or (2) as proposed by Notice 2023-64,

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[97] If Treasury instead retains the expansive reading of the AFS Requirement put forth in Notice 2023-64, we urge consideration as to whether the Direct FTC could still be allowed in Year 2 on a different theory. We note that Section 59(l)(1)(B) does not expressly incorporate <u>any</u> timing requirement, and accordingly Treasury has flexibility (and ample authority under Section 59(l)(3)) to address these timing issues.

[98] When the temporary difference reverses in Year 2, and the book income is reflected on the income statement, the $15 of taxes previously accrued for tax purposes are reflected as an income tax expense against the corresponding income.

[99] For example, Treasury may need to promulgate rules relating to the treatment of entries in respect of uncertain tax positions, how to disaggregate components of the net tax expense line item, how to track and tie items to specific jurisdictions and entities, etc.

the AFS Requirement and the Paid or Accrued Requirement would be satisfied in the same year (if the AFS Requirement is satisfied whenever the foreign taxes paid to a foreign government affect *any* entry on a financial statement) but the related book income would be recorded in a different year. We do not believe that Congress intended such a result. Indeed, in a colloquy between Senators Wyden and Menendez with respect to a very similar issue relating to non-conforming book and tax years, Senator Wyden acknowledged that Treasury has the authority to issue regulations to deal with potential timing issues caused by nonconforming foreign tax years and that such regulations "would be in line with legislative text and our intent for companies to be able to appropriately utilize foreign tax credits."[100] Accordingly, we strongly agree with the approach adopted by Treasury in Notice 2023-64 that permits the Paid or Accrued Requirement to be met in a later year than the AFS Requirement, and we recommend Treasury extend this rule by adopting the Later of Approach described above.[101]

In the case of an Indirect FTC, too, where excess foreign income taxes can be carried forward for five years under Section 59(l)(2), adopting our two recommendations—the narrow reading of the AFS Requirement coupled with the Later of Approach—leads to a better result than would the reading of the AFS Requirement under Notice 2023-64. Consider the following example:

> **Example 11B**—Parent, an applicable corporation, owns 100% of the stock of CFC, a foreign corporation organized in Country Y. Due to a temporary book-tax difference, in Year 1, CFC has $0 of Adjusted Net Income and $100 of taxable income. The temporary difference will fully reverse in Year 2, and there will be no other income in Year 2 (for either book or tax purposes). Country Y's income tax rate is 15%.

As in the previous example, if our recommendations are adopted, the Paid or Accrued Requirement is satisfied in Year 1, while the AFS Requirement is satisfied in Year 2 (when the $15 of taxes increase total tax expense). Under the Later of Approach, both the AFS Requirement and the Paid or Accrued Requirement would be satisfied by Year 2, and the credit would be allowed against the $15 CAMT liability in Year 2, just as in Example 11A.

By contrast, under the expansive reading of the AFS Requirement adopted by Notice 2023-64, the AFS Requirement would be satisfied in Year 1 (along with the Paid or Accrued Requirement), and Parent would have $15 of potentially creditable foreign income taxes in Year 1. The credit would not be allowed because of the 15% Limitation, which in this case would be $0 (15% x $0 Look-Through Inclusion). The excess $15 could be carried forward for five years under Section 59(l)(2), and Parent would be able to use this $15 carryforward in Year 2 to reduce its CAMT liability to $0.

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[100] 168 Cong. Rec. S4166 (Aug. 6, 2022).

[101] There will of course be situations where an exception to the Later of Approach makes sense. For example, Treasury in Notice 2023-64 adopted a rule for foreign tax redeterminations that makes the CAMT FTC available in the taxable year to which the foreign tax redetermination relates, regardless of the fact that the AFS Requirement may be met in a later year. *See* Notice 2023-64, Section 14.02(3). In such a case, the Later of Approach should be modified to allow for this result.

While both approaches ultimately preserve the CAMT FTC in this example, our recommended approach has the benefit of allowing Parent to utilize the credit in the year it arises, rather than relying on the credit carryforward (which might not be of use to Parent in succeeding years if Parent does not have any CAMT liability in those years). We therefore continue to believe that a narrow reading of the AFS Requirement coupled with the Later of Approach is appropriate in both the Direct FTC and Indirect FTC context, and that the availability of the carryforward should not be interpreted to suggest that relief is not necessary in the context of the Indirect FTC.

4. Temporary Differences Under CAMT—DTLs

While the narrow reading of the AFS Requirement coupled with the Later of Approach would generally resolve temporary timing issues in the context of deductible temporary differences or DTAs, it does not fully solve timing issues relating to taxable temporary differences or DTLs (which are likely to be more common), though it at least preserves the amount of the credit for future use in the context of the Indirect FTC. Consider the following example:

> **Example 12A**—Parent, an applicable corporation, owns 100% of the stock of CFC, a foreign corporation organized in Country Y. Country Y's income tax rate is 15%. Due to a temporary book-tax difference, in Year 1 CFC has $100 of Adjusted Net Income (all of which will be included in Parent's AFSI) and $0 of taxable income. The temporary difference is expected to fully reverse in Year 2, and Parent will have no other income in Year 1 or Year 2 (for either book or tax purposes).

In Year 1, CFC has $0 of current tax expense and a $15 DTL, the increase in which produces $15 of deferred tax expense, in turn giving rise to $15 of total tax expense on the income statement. The Section 59(l)(1)(A)(i) amount is $0, because while the $15 in taxes has been taken into account on the AFS (under any interpretation of that phrase), it has not yet been paid or accrued for Federal income tax purposes. In Year 2, the book-tax difference reverses. This gives rise to $15 of tax owing to the tax authority (satisfying the Paid or Accrued Requirement), and $0 of total tax expense on the income statement ($15 current tax expense – $15 deferred tax benefit due to the reversal of the DTL). Under our recommended approach, both requirements are satisfied by Year 2, resulting in a Section 59(l)(1)(A)(i) amount of $15. While this solves the mismatch between the timing of the recognition of book tax expense on the AFS and the accrual of the same foreign taxes for Federal tax purposes, it is not a perfect solution. The foreign taxes still cannot be used in Year 2 against the income to which they are actually attributable because the 15% Limitation is $0 (15% times $0 Look-Through Inclusion), though they may be carried forward. This may result in some taxpayers never receiving the benefit of the credit (including, for example, taxpayers that happen not to be subject to CAMT in the following five years). The same is true under the approach in Notice 2023-64: the AFS Requirement is satisfied in Year 1, the Paid or Accrued Requirement is satisfied in Year 2, and the Notice provides that the CAMT FTC in such a case arises in Year 2. But again, there is no Adjusted Net Income in Year 2 against which to use the CAMT FTC and it may be carried forward with the possibility that it may never be used.

The result is even more stark in the case of the Direct FTC. Consider the following variation of the above example:

> **Example 12B**—Same as Example 12A, except that, rather than operating through a CFC, Parent operates its business in Country Y through a branch. As before, Country Y has a 15% tax rate, and due to a temporary book-tax difference, in Year 1, Parent earns $100 of book income through its branch (all of which will be treated as Parent's AFSI) and $0 of taxable income. The temporary difference reverses in Year 2.

As in Example 12A, under either the Notice's or our approach, the $15 of foreign taxes will be eligible for a credit in Year 2 (*i.e.*, the year in which the Paid or Accrued Requirement is met (with the AFS Requirement having already been met), under the approach in Notice 2023-64, or the first year in which both the AFS Requirement and the Paid or Accrued Requirement are satisfied, under our approach). The Section 59(l)(1)(B) amount is $15. But because Parent has no AFSI in Year 2, it has no CAMT liability against which to use the credit, and because it cannot be carried forward, the credit is lost.

The results obtained in the two preceding examples do not seem appropriate given that the taxpayer does, in fact, eventually satisfy both statutory requirements for the credit. But it is not clear that there is an immediately obvious regulatory solution. Unlike in the DTA examples, solving for temporary differences in the DTL scenario in a single year would require matching the timing of the accrual of foreign taxes actually imposed and the recognition of the related book income, which are required to be recognized in different periods under GAAP. This is an impossible task. While adherence to these irreconcilable rules may seem inherent in the statutory language, it is difficult to imagine that this state of affairs is what Congress specifically intended. Treasury has a broad grant of regulatory authority in this area; indeed, the statute instructs the Secretary to provide regulations and other guidance necessary to carry out the purposes of the CAMT FTC. One overarching purpose of the CAMT FTC that may be gleaned from the statutory text (and which Treasury evinces in Notice 2023-64) is to allow a credit for taxes that satisfy the AFS Requirement and the Paid or Accrued Requirement, and we do not believe that achieving this general result should be thwarted as a result of timing differences between book and tax that generate a DTL.

Accordingly, we encourage Treasury to exercise its authority to prevent this result in these circumstances. One potential approach would be to permit taxpayers to amend a prior year tax return to claim a CAMT FTC against AFSI attributable to foreign taxes that were taken into account on the AFS in that year but were not paid or accrued until a later year. The amendment would become permissible at such time as the relevant taxes are in fact paid to a foreign tax authority. Alternatively, to minimize the need for amendments, Treasury could adopt a rule that would allow taxpayers to, in a DTL-type scenario, claim a CAMT FTC on an originally filed tax return for the year in which the related AFSI and taxes are taken into account, as long as it is reasonably expected that the underlying foreign tax would be in fact paid to a foreign tax authority over the next specified period of time (*e.g.*, five years). This credit would then be subject to recapture if it turns out that the foreign tax is never ultimately paid. Other approaches

may be available, and we encourage Treasury to consider administrative relief in these circumstances, regardless of its form.[102]

5. Items Reported Net of Tax

Another question regarding whether and when (foreign) taxes are "taken into account" on the AFS for purposes of Section 59(l) (as well as Section 56A) relates to items that are reported net of tax. Under U.S. GAAP, certain items are reported on a net-of-tax basis on the income statement. Examples include results of discontinued operations and extraordinary items of income or loss. Another very common example, relevant to the FTC for partnership taxes (discussed below), is investments that are accounted for under the equity method. The results of such investments are reported as one line item on the income statement, which is reflected net of tax.

To the extent that the relevant category of income is otherwise to be included in the determination of AFSI, we believe the items that are reported on a net-of-tax basis should be disaggregated into their pre-tax and tax components for purposes of the various CAMT determinations, including for purposes of the CAMT FTC in Section 59(l) and the general adjustment for taxes pursuant to Section 56A(c)(5) (such that the net-of-tax income/loss number reported on the income statement is grossed up for the applicable taxes for purposes of determining AFSI). We therefore agree with what appears to be the approach adopted by Treasury in Notice 2023-64 to the effect that taxes are "taken into account" on the AFS even when they are reported only as increases or decreases to other line items on the AFS.[103] Consider the following example:

> **Example 13**—CFC, a controlled foreign corporation and wholly owned subsidiary of Parent (an applicable U.S. corporation), has the following items reflected on its AFS: net income of $100, total tax expense of $10 and income from discontinued operations of $45. The $45 of income from discontinued operations is attributable to a subsidiary held for sale and consists of $50 of pre-tax income and $5 of tax expense. Parent has no AFSI or tax expense other than for the items attributable to CFC.

If the taxes reported in the net number on the income statement are not viewed as "taken into account" on the relevant AFS, they would presumably not be adjusted for pursuant to Section 56A(c)(5) and would not be considered for purposes of the CAMT FTC. Parent would

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[102] We note that taxpayers may be able to exercise a degree of self-help in particular years by not electing the benefits of the foreign tax credit in that taxable year. Consider Example 12B once again, but this time assume that Parent forgoes the foreign tax credit in both Years 1 and 2. In Year 1, Parent will only report $85 of AFSI and $0 of AFSI in Year 2, for a total CAMT liability over the two-year period of $12.75 and overall tax burden of $27.75 (as compared to $15 of CAMT liability and $30 overall tax burden over the same time period if the tax credit is elected). Of course, if a taxpayer elects to take a deduction in the first year, it should not be permitted to also take a credit in a subsequent year. As noted earlier, we appreciate that tracking these various amounts and their associations year-over-year will involve significant complexity, and in some cases may require the introduction of new and simplifying conventions. On balance, however, we believe that the additional complexity is tolerable if it helps prevent inappropriate distortions and unfair results.

[103] *See* Notice 2023-64, Section 8.02(1) and (2).

include only $155 ($100 net income + $10 of foreign taxes + $45 of after-tax discontinued operations net income) in its AFSI with respect to CFC. Parent's CAMT liability before the credit for $10 of foreign taxes stated separately would be $23.25 ($155 x 15%), and $13.25 after the credit. The overall tax rate would be 17.7% ($28.25 in total taxes, *divided by* $160 pre-tax income).

If, on the other hand, taxes reported in the net number are disaggregated, Parent would include $160 in its AFSI with respect to CFC ($100 + $10 + $45 + $5) (including for scoping purposes) and its CAMT liability before the FTC would be $24 ($160 x 15%), and $9 after the credit ($24 - $10 - $5). The overall tax rate would be 15% ($24 in total taxes, *divided by* $160 of pre-tax income).

The second result is more consistent with the policy and overall architecture of the CAMT, and it properly gives effect to the adjustments required by Section 56A(c)(5) and the CAMT FTC. Indeed, the first approach would result in an overall tax rate greater than the CAMT rate even where the foreign tax rates are equal or lower, and effectively force the taxpayer to take a deduction for the foreign taxes rather than a credit, even if the taxpayer elected the benefits of the FTC provisions for the taxable year. In addition, Section 56A(c)(5) clearly indicates that for scoping purposes, taxpayers are to look at a pre-tax number. However, because the term "taken into account" is not a term of art for financial accounting purposes, we appreciate the confirmation that, as we read it, is provided in Notice 2023-64 that items that are reported on a net-of-tax basis should be disaggregated into their gross and tax components for CAMT purposes.

B. Partnership FTCs

Notice 2023-64 provides much needed clarification on the treatment of partnership taxes for purposes of the CAMT FTC.[104] We fully agree with the guidance provided, that a corporate partner (whether an applicable corporation for purposes of the Direct FTC, or a CFC for purposes of the Indirect FTC) is treated as paying or accruing its share of foreign taxes paid or accrued by the partnership for purposes of the CAMT FTC. We explain below why we believe this to be the right answer. In addition, we recommend that the amount of a partner's appropriate share of partnership foreign taxes be determined under the method adopted in guidance to determine a partner's "distributive share" of partnership AFSI.

Section 56A(c)(2)(D) provides that if a taxpayer is a partner in a partnership, the AFSI of the taxpayer with respect such partnership is to include the AFSI of such partnership, limited to only take into account such partner's "distributive share" of the partnership's AFSI.[105] For this purpose, a partnership's AFSI is the net income or loss set forth on the partnership's AFS, adjusted in accordance with Section 56A.[106] This partnership inclusion rule is analogous to the Look-Through Inclusion rule set forth in Section 56A(c)(3), which similarly provides that a taxpayer's AFSI is to be adjusted to take into account its pro rata share of the items taken into

[104] Notice 2023-64, Section 14.02(5).

[105] Section 56A(c)(2)(D)(i).

[106] Section 56A(c)(2)(D)(ii).

account in computing the net income or loss set forth on the AFS of any CFC in which such taxpayer is a United States shareholder.[107] However, while Section 59(l) expressly provides for a CAMT FTC for foreign taxes incurred by the taxpayer's CFCs,[108] the statute says nothing on the creditability of foreign income taxes incurred by the partnerships in which the taxpayer is a partner.

Although we believe that the statute is best read to provide for a CAMT FTC with respect to partnership-level foreign taxes through the Direct FTC provisions set forth in Section 59(l)(1)(B), we appreciate the guidance from Treasury in Notice 2023-64 clarifying this point. We do not believe that a different interpretation would be appropriate. If the statute were interpreted so as not to provide a credit for partnership-level foreign taxes, it appears that an applicable corporation's tentative minimum tax would include its share of the net income of its partnerships (and of its CFCs' partnerships), but if the taxpayer elects the benefit of the regular FTC provisions of the Code for the year, such partnership net income might still be adjusted to disregard any foreign income taxes paid by the partnerships under Section 56A(c)(5).[109] In other words, the taxpayer would be required to report the pre-tax net income of its partnerships (whether held directly or through CFCs) in its CAMT base without a related tax credit, even though, economically, the taxpayer (or its CFCs) would only be entitled to receive income from such partnerships *net of* their share of the partnerships' foreign income taxes. Consequently, the taxpayer would be subject to double taxation with respect to its share of its partnerships' (and its CFC's partnerships') foreign AFSI under the CAMT regime. This result does not make policy sense.

Denying a credit for partnership-level foreign taxes would also create an unfair mismatch between the tentative minimum tax (which is reduced by the CAMT FTC)[110] and the regular tax (which is reduced by the regular tax FTC).[111] Under the regular tax regime, a corporate partner takes into account its distributive share of foreign income taxes paid by the partnership and is entitled to an FTC equal to its proportionate share of the partnership's foreign income taxes.[112] Absent a similar credit for partnership foreign income taxes under the CAMT regime, an applicable corporation's tentative minimum tax would be artificially inflated relative to its regular income tax. It does not appear that either the double taxation or the artificial inflation of income subject to the CAMT on account of partnership-level foreign taxes would have been intended, and we commend Treasury for exercising its authority to prevent such a result.

We recommend that Treasury expand on the approach outlined in Notice 2023-64 as follows. Generally, we recommend that regulations provide that an applicable corporation is able to claim a CAMT credit for foreign taxes incurred by the partnerships in which it holds an interest (or in which its CFCs hold an interest) under Section 59(l)(1)(B) (or Section 59(l)(1)(A)

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[107] Section 56A(c)(3).

[108] Section 59(l)(1)(A).

[109] Section 56A(c)(5).

[110] Section 55(b)(2)(A).

[111] Section 55(c)(1).

[112] Sections 702(a)(6), 901(b)(5); Treas. Regs. § 1.901-1(a)(2)(ii).

in the case of a CFC-owned partnership) if (1) the applicable corporation elects to credit its foreign taxes for regular tax purposes for such year, (2) the foreign taxes incurred by the partnership are "taken into account" on the AFS of the applicable corporation (or on the AFS of its CFC in the case of a CFC-owned partnership) by being reflected thereon (as further described below) and (3) such foreign taxes are paid or accrued (for Federal income tax purposes) by the applicable corporation.

1. The AFS Requirement

With respect to the AFS Requirement set forth in the second prong of this test, foreign income taxes incurred by a partnership should generally be treated as "taken into account" on the AFS, to the extent of the partner's share of such taxes, if they are reflected on and impact the partner's income statement, regardless of the specific accounting method used.

A corporation will generally account for its partnership interests on its financial statements in one of the following principal ways.[113] First, the Consolidation Method is generally required when the entity has a "controlling financial interest" in the partnership.[114] This analysis can be nuanced, especially in the case of limited partnerships.[115] If the Consolidation Method is used, then generally 100% of a partnership's results are incorporated, line item by line item, into the consolidated financial statements, with subsequent adjustments to back out the portion of such items attributable to other owners. With respect to the consolidated income statement specifically, the net amount of *after-tax* profit attributable to non-controlling interests (*i.e.*, the portion of a consolidated subsidiary partnership that is not owned by the parent entity) is backed out below the after-tax net profit line, which reflects 100% of the partnership's line items (including foreign taxes). We believe, consistent with the earlier discussion regarding the treatment of items reported net of tax and the meaning of the phrase "taken into account on the [AFS]" and consistent as well with Notice 2023-64, that (1) the non-controlling interests line item should be disaggregated into its gross and tax components for purposes of the CAMT and income adjustments under Sections 56A(c)(2)(D), 56A(c)(3), 56A(c)(5) and 59(l), and (2) the amount of foreign taxes incurred by a consolidated subsidiary partnership and reported in the total tax expense line item on the parent's AFS, as adjusted for the portion of such taxes attributable to the portion of the partnership owned by third parties and reflected in the non-controlling interest line item, should be treated as "taken into account" on the relevant AFS for purposes of Section 59(l)(1)(B) (and Section 59(l)(1)(A) in the case of a CFC partner).

Second, the Equity Method usually applies when a partner does not own a "controlling financial interest" but has the ability to exercise "significant influence" over the partnership.[116] In the context of partnerships and limited liability companies, this method may apply even where "significant influence" (in the traditional meaning of the term) does not exist. For general partners, significant influence is generally inherent in the applicable partnership law (absent

[113] Other methods may be available and special rules may be required in certain industries or special types of investments.

[114] *See generally* ASC 810 (*Consolidation*).

[115] *See* ASU 2015-02.

[116] *See* ASC 323-30-25-1.

contractual arrangements that would supersede the generally applicable legal framework) and accordingly general partners will, unless they have a "controlling financial interest," use the equity method with respect to their partnerships. For limited partners or members in limited liability companies, accounting guidance generally requires a partner to use the equity method unless the interest is so minor that the partner has virtually no influence over the operating and financial policies of the partnership.[117] An ownership interest greater than 3-5% is generally presumed to provide a partner with the ability to sufficiently influence the operations and financial policies of the partnership for this purpose (this is in contrast to the 20% voting ownership threshold that generally applies for the applicability of the Equity Method).

An entity that applies the Equity Method with respect to an investment in a partnership will generally report the investment and the results from the investment as a single line item. Specifically, with respect to the income statement, the entity's share of the partnership's net income (after tax) will be reported as a single line item on the income statement below the consolidated net income (after tax) line. This amount is generally pulled directly from the partnership's net income statement (the after-tax net income line item). Consistent with the earlier discussion, we believe that for purposes of the partnership income adjustment and CAMT FTC, the amount of foreign taxes incurred by a subsidiary partnership and embedded in the partner's net income statement equity method investment line item should be disaggregated and each component should be treated as being "taken into account" on the relevant AFS.[118] To the extent a partner is unable to receive information from the partnership necessary to specifically identify and isolate the amount of income taxes embedded in the partnership's after-tax book net income, we believe that a partner should be able to estimate the amount of such taxes and the gross amount of the related income for CAMT purposes using any reasonable method based on all reasonably available information (including information in any Schedules K-2 and K-3 received by the partner). We would appreciate guidance to that effect.

Finally, a less than 3-5% partner in a partnership may be required to account for this investment for GAAP purposes using either the Fair Value Method or the Measurement Alternative Method, as applicable.[119] It is currently not entirely clear if and how income of partnerships accounted for with the Fair Value Method or the Measurement Alternative Method is to be taken into account in computing the partner's AFSI, especially where a minority partner does not have access to information that would allow it to report its proportional share of the partnership's AFS items.[120] However the broader issue is resolved, we recommend that related guidance in respect of the CAMT FTC be issued that will follow the general approach chosen. In other words, if a minority partner that accounts for its partnership investment on the Fair Value Method or Measurement Alternative Method is required to report its share of partnership AFSI in determining its CAMT liability, it should also be allowed to credit its share of

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[117] *See* ASC 323-30-S99-1; ASC 323-30-35-3.

[118] This would be consistent with the disaggregation of partnership financial statement income suggested in Section 5.02(3)(c) of Notice 2023-64.

[119] *See* ASU 2016-01.

[120] *See* Part IV.G.3 of the Prior CAMT Report for a related discussion. Section 13.04(1) of Notice 2023-64 does provide for inclusion in AFSI of partnership income reported under the Fair Value Method or the Equity Method, but this applies only for purposes of Section 59(k) to determine applicable corporation status.

partnership-incurred foreign income taxes as reported on the partnership's AFS. If, on the other hand, a partner using either such method is not required to include its share of the partnership's AFSI in determining its CAMT liability, it should similarly not be allowed a credit for the partnership-level foreign income taxes.

2. The Paid or Accrued Requirement

As to the Paid or Accrued Requirement, Notice 2023-64 has made clear that with respect to partnership-level foreign income taxes, a partner in a partnership is treated as having paid or accrued its share of foreign income taxes paid or accrued (for Federal income tax purposes) by the partnership. We are grateful for this clarification because, while this result seems like the obvious "right" answer, it is not completely clear under the statute in all circumstances. Under current law, foreign income taxes imposed on a partnership that is opaque for local tax purposes are technically not treated as actually paid or accrued by the partner. Rather, such taxes are generally viewed as being paid or accrued by the partnership because the partnership is the entity on which the tax is imposed and that bears the legal liability for such taxes.[121] The partner, in turn, is expressly allowed to claim a credit for its distributive share of such partnership taxes.[122] In our view this technical nuance is not determinative; as a substantive matter it is clear that for regular tax FTC purposes a partner is effectively treated as paying its distributive share of foreign income taxes paid or accrued by the partnership.[123] The same should be true for the CAMT FTC.

In summary, the availability (or lack thereof) of a CAMT FTC for taxes incurred by a partnership in which an applicable corporation (or its CFC) is a partner is a significant issue that affects many taxpayers trying to grapple with the CAMT and could have a significant impact on their CAMT liability. We therefore welcome the guidance from Treasury on this topic in Notice 2023-64, and we respectfully request that Treasury also clarify how a partner's share of the partnership's income taxes is to be calculated. Generally, we believe that the same methodology that will be used, under forthcoming guidance, to determine a partner's "distributive share" of partnership AFSI should also be applied to determinations of the partner's share of the partnership's foreign income taxes.[124]

C. Additional Issues with the FTC

In addition to the issues discussed above, there are a number of other questions relating to the CAMT FTC that require clarification or resolution in guidance, some of which Treasury has begun to address in Notice 2023-64. We review some of these additional questions briefly in this Part IV.C.

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[121] Treas. Reg. § 1.901-2(f)(4)(i).

[122] Treas. Reg. § 1.901-1(a)(2)(ii); Section 702(a)(6).

[123] *See, e.g.*, Treas. Reg. §§ 1.702-1(a)(6), 1.905-1(f)(1).

[124] *See* Part IV.G.3 of the Prior CAMT Report for further discussion of this topic.

1. Timing and Base Issues: Intercompany Transactions

There are circumstances where the foreign taxes that are potentially available for crediting under the CAMT FTC will not match up to the CAMT income base, whether temporarily or in some cases permanently. One such circumstance could involve intercompany transactions. For U.S. GAAP purposes, profit and loss from intercompany transactions is generally eliminated in consolidation.[125] For tax purposes, however, intercompany transactions between U.S. parents and their foreign subsidiaries have immediate tax consequences. And even though the related profit or loss consequences are eliminated in consolidation, the tax consequences are, in some cases, nevertheless required to be taken into account on the consolidated financial statements.

There are significant questions regarding whether and to what extent AFSI of a parent entity and its subsidiaries that are not part of the parent's tax consolidated group (including CFCs) should be adjusted for intercompany items that are eliminated in consolidation for financial accounting purposes, and a discussion of those issues is beyond the scope of this Report. Treasury has outlined an approach in Notice 2023-64 which would disregard book consolidation entries that have the effect of eliminating intercompany transactions (unless those transactions are between a taxpayer and its disregarded subsidiary).[126] We are continuing to study this proposal and note only the complexity that it entails. We recommend that, however the issue is ultimately addressed, Treasury issue rules that will operate to generally match the timing and location of tax paid with respect to intercompany transactions with the timing and location of AFSI to which such taxes relate.

2. Timing Issues: Overall Domestic Loss and the Indirect FTC

Another timing issue that could arise and, in the absence of additional guidance, preclude a taxpayer from claiming the CAMT FTC for foreign taxes that satisfy both the Paid or Accrued Requirement and the AFS Requirement relates to domestic losses. Consider the following example:

> **Example 14**—Parent, an applicable U.S. corporation, owns 100% of CFC. In Year 1, Parent, which operates exclusively in the United States, incurs a financial statement loss of $200. Also in Year 1, CFC, which operates exclusively outside of the United States, has Adjusted Net Income of $200 and pays $30 in foreign taxes imposed at a 15% rate (which taxes are also "taken into account" on the CFC's AFS). In Years 2 through 6, CFC generates no Adjusted Net Income or taxable income, and Parent generates $100 of AFSI in each year.

In Year 1, without regard to Parent's domestic financial results, Parent would be able to claim a CAMT FTC for $30 in foreign taxes. However, Parent's total AFSI for Year 1 is zero, and Parent therefore has no CAMT liability against which the credit can be used. Further, because the foreign taxes do not exceed the 15% Limitation set forth in Section 59(l)(1)(A)(ii), it appears that they cannot be carried over to subsequent years. Accordingly, over the six-year

[125] *See* ACS 810 (*Consolidation*).

[126] *See* Notice 2023-64, Section 5.02(3)(c)(iii).

period (assuming Parent is an applicable corporation throughout), Parent will pay a total of $105 of taxes,[127] resulting in an effective tax rate over that period of 21%. This is higher than the CAMT rate because, due to the domestic loss in the first year, the foreign taxes imposed with respect to the foreign AFSI earned in such year are never taken into account for CAMT purposes. This is largely a function of a timing accident. If Parent had incurred the $200 of the domestic expenses equally in Years 2 and 3 instead, Parent's overall tax liability over the six-year period would have been $75,[128] resulting in an effective tax rate of 15%.

The result in Example 14 seems unfair, and Treasury may choose to promulgate rules that would minimize timing distortions on similar facts, for example by providing for a limited carryforward of foreign CFC taxes that are not utilized because of an overall domestic loss and a recapture rule for prior domestic losses that would recharacterize income as CFC Adjusted Net Income in subsequent years solely for purposes of the CAMT FTC in order to allow taxpayers to utilize such taxes.[129] Alternatively, Treasury could address the issue by providing for an election to silo domestic and CFC income, such that a taxpayer could choose to utilize the Indirect FTC against CFC Adjusted Net Income despite an overall domestic loss in the same year (which loss would then be carried forward and could be utilized against the taxpayer's domestic AFSI only).

On the other hand, despite its apparent unfairness, the result in Example 14 does follow from the statutory language because the carryover in Section 59(l)(2) applies only to *excess* indirect foreign taxes, and not to foreign taxes for which a credit in the current year is unavailable due to insufficient AFSI. More broadly, if the CAMT regime is meant to be a less precise but simpler tax system, we acknowledge that not all efforts to resolve timing differences will be worth the added complexity or consistent with the statutory scheme.

3. Applicability of Regular Tax FTC Limitations to the CAMT FTC

The CAMT FTC makes only one reference to the rules governing the regular tax foreign tax credit: to be creditable under the CAMT FTC regime, a tax must be an income, war profits or excess profits tax "within the meaning of section 901."[130] Whether and to what extent other provisions applicable to the regular tax FTC likewise apply to the CAMT FTC is not stated and we would appreciate guidance on this point. We recommend below several general rules that may be adopted to distinguish between credit limitations in the Code that should apply to the CAMT FTC and those that should not.

First, it seems fairly clear that limitations on the creditability of foreign income taxes in the regular FTC—such as those found in Sections 904, 245(a)(8), 245A(d), 861(d)(3), 901(j),

[127] $30 of foreign taxes in Year 1 + 5 x ($15 of domestic taxes in Years 2 through 6).

[128] $30 of foreign taxes in Year 1 + 2 x ($0 of domestic taxes in Years 2 and 3) + 3 x ($15 of domestic taxes in Years 4 through 6).

[129] We note that because Section 56A(c)(3)(B) does not permit negative CFC Adjusted Net Loss to reduce domestic income, an inverse rule similar to the overall foreign loss recapture rules should not be necessary. We also note that similar, but not identical, timing issues could arise with the Direct FTC. However, in that context, it is possible for foreign losses to reduce domestic AFSI, and accordingly different considerations may apply and, if recapture rules are adopted, they should be reciprocal.

[130] Section 59(l)(1).

901(k), 901(l), 901(m), 908, and 965(g)—should not apply. The CAMT FTC is a parallel regime to the regular FTC, and unless explicit reference is made to a Code section applicable to the regular FTC in the CAMT provisions, there is no reason to believe it would apply.

Second, provisions that limit what definitionally constitutes a potentially creditable foreign income tax within the meaning of Section 901—such as Sections 901(f), 901(g), and 901(i)—seemingly should apply to the CAMT FTC, because these sections prescribe what it means to be a foreign income, war profits or excess profits tax "within the meaning of Section 901."

Third, it seems that provisions such as Section 909 that dictate when a foreign tax is taken into account under the Code (and are not limited to taking a tax into account only for purposes of the regular tax FTC) should also be applicable to the CAMT FTC in determining when a tax has been "paid or accrued" for Federal income tax purposes.

Finally, limitations that apply to any credit allowed under the Code, such as Section 280E, apparently should, to the extent relevant, apply to the CAMT FTC as well.

4. The Indirect Tax Carryforward—Transition Rules

Section 59(l)(2) allows an applicable corporation to carry forward for up to five years its excess indirect foreign income taxes for CAMT FTC purposes. The statute is silent on, and guidance should address, whether transition rules will be available to taxpayers that would allow a carry forward of excess indirect foreign income taxes from either (i) the five years preceding the effective date of the CAMT ("**Pre-Effectiveness Years**") or (ii) the five years preceding a taxpayer becoming an applicable corporation subject to the CAMT, once CAMT has already come into effect ("**Pre-Applicability Years**"), in each case, to reduce the corporation's tentative minimum tax in its first year(s) of CAMT applicability.

With respect to either Pre-Effectiveness Years or Pre-Applicability Years, the absence of a carryforward could cause an incremental mismatch between an applicable corporation's tentative minimum tax in its first CAMT years (not reduced by prior years' excess indirect foreign taxes) and its tentative minimum tax in later years (reduced by prior years' excess indirect foreign taxes).[131] The CAMT regime clearly intends for both the tentative minimum tax and the regular tax to be reduced by their respective foreign tax credits, including applicable carryforwards, in calculating the tax imposed by Section 55(a).[132] Arguably, this should be no less true in the first years of CAMT applicability to a taxpayer.

However, the case for allowing a carryforward from Pre-Effectiveness or Pre-Applicability Years is muddied by a number of considerations. To begin with, as noted, the statute is silent on providing for such transition relief, and such silence may be particularly

[131] We note that, should a carryforward of indirect foreign income taxes from Pre-Applicability Years or Pre-Effectiveness Years be permitted, there could be a perceived mismatch running in the opposite direction: the tentative minimum tax would be reduced more relative to the regular tax liability because the CAMT allows for all indirect foreign taxes to be carried forward, while there is no carryforward for foreign taxes in the GILTI basket. This "mismatch," of course, is clearly part of the statutory scheme for post-transition years.

[132] Section 55(b)(2)(A) & (c)(1).

notable for Pre-Effectiveness Years in light of the explicit transition rules provided for pre-2023 financial statement net operating losses.[133] Section 59(l)(2) also uses the term "applicable corporation," and might be read to mean that a carryover can only arise in years in which a taxpayer is an applicable corporation. This reading may find support in Notice 2023-64 which, although it does not address this issue, includes a potentially relevant rule with respect to foreign tax redeterminations that deems such redetermined taxes to be eligible for the CAMT FTC only if the taxpayer was an applicable corporation in the year to which the foreign tax redetermination relates.[134] Because a CAMT FTC of course cannot be taken in a year in which a taxpayer is not an applicable corporation (because it does not have a CAMT liability), the purpose of this rule may be to specifically prevent the carryforward of such redetermined taxes under Section 59(l)(2) from Pre-Effectiveness Years or Pre-Applicability Years, and it is hard to articulate a policy reason for prohibiting the carryforward of redetermined taxes from such years while allowing the carryforward of other indirect foreign income taxes.[135]

With respect to Pre-Effectiveness Years, a few additional considerations may apply. In particular, with respect to net operating loss carryforwards, Section 56A(d)(3) expressly provides that only financial statement net operating losses from taxable years ending after December 31, 2019, are to be taken into account. This may suggest that the lookback in Pre-Effectiveness Years for foreign tax credits (if any is adopted) should be similarly limited. In addition, if it is the case that, as discussed in Part III.D.3, distributions that an applicable corporation receives out of a CFC's E&P from Pre-Effectiveness Years do not result in Dividend Inclusions, that may further support a conclusion that it should not be possible to carry forward indirect CAMT FTCs from such years.

Finally, we note that allowing for a carryforward of foreign taxes from Pre-Applicability Years and Pre-Effectiveness Years would require additional computations and tracking. Taxpayers already will be required to undertake certain AFSI-related calculations for pre-CAMT

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[133] *See* Section 56A(d)(3).

The difference in treatment between NOLs and the FTC carryforward may not be determinative. We note, for example, the legislative history to the corporate alternative minimum tax enacted in 1986 (where the statute likewise provided for a carryforward of pre-effectiveness NOLs but was silent on pre-effectiveness FTCs), which stated that pre-effective date FTCs would be carried forward for purposes of the minimum tax (although, in that case, it was regular tax FTCs that would be carried forward to reduce the minimum tax). *See* H.R. Rep. No. 99-841, at II-282 (1986) (Conf. Rep.) ("It is clarified that, with regard to years prior to the effective date of the corporate alternative minimum tax, rules apply similar to those applying in 1982 upon the enactment of the individual alternative minimum tax. Thus, pre-effective date regular tax foreign tax credits carried forward to 1987 are treated as minimum tax foreign tax credit carryforwards, and minimum tax foreign tax credits are reduced by the amount of any foreign tax credits carried back, for regular tax purposes, to years prior to 1987.").

[134] *See* Notice 2023-64, Section 14.02(3).

[135] On the other hand, Section 59(l)(2)'s reference to "applicable corporation" could also be read to indicate that a carryover is allowed from any year in which a taxpayer takes a regular FTC, but may only be claimed in years in which a taxpayer is an applicable corporation. This reading would generally not be inconsistent with the CAMT regime. To the extent that a corporation takes into account Look-Through Inclusions with respect to CFCs in a given year for purposes of determining the corporation's AAAFSI, it would seem consistent for the same corporation to be entitled to use indirect CAMT FTC carryforwards from that year to reduce its CAMT liability in future years. The CAMT regime takes the same approach, for example, with respect to asset basis created in Pre-Applicability Years.

applicability periods. Adding one more CAMT attribute—indirect FTC carryovers—to the list need not necessarily be the place to draw the line in defense of simplicity. At the same time, we acknowledge that if the FTC carryover from Pre-Applicability Years and Pre-Effectiveness Years is to be determined in a manner entirely consistent with CAMT principles, this could conceivably require redeterminations of various CAMT items (*e.g.*, CFC Adjusted Net Income) all the way back to a corporation's first taxable year. Accordingly, if any lookback is adopted, there ought to be some limit, even if it might lead to a less 'correct' result, because the complexity and compliance burden could otherwise outweigh any benefits. We do not undertake to prescribe here the appropriate starting point, but we do believe that the approach to pre-effectiveness excess indirect foreign taxes should be consistent with the approach adopted in guidance for other CAMT items relating to Pre-Applicability Years and Pre-Effectiveness Years (*e.g.*, the lookback periods for basis redeterminations for property acquired in a Covered Nonrecognition Transaction[136], financial statement NOLs and Dividend Inclusions).

5. The Indirect Tax Carryforward: Ordering Rules

The CAMT FTC allows for a carryforward to the five succeeding tax years for excess CFC foreign income taxes, but it does not make clear how the carryforward should be ordered, both among the foreign income taxes carried forward and in relation to the current taxable year's foreign income taxes. Guidance should clarify that later years' foreign income tax carryforwards will not expire prior to the carryforwards from earlier years (*i.e.*, a first-in-first-out ("**FIFO**") approach) so that each years' foreign income taxes are ensured up to a five-year carryforward as provided in the statute. Further, guidance should clarify the order between carryforwards and current year taxes. The statute merely provides that the amount of the FTC carryforward "shall increase the amount described in [Section 59(l)(1)(A)(i) (*i.e.*, the amount of taxes treated as satisfying both the AFS Requirement and the Paid or Accrued Requirement for such taxable year)] in any of the first five succeeding taxable years to the extent not taken into account in a prior taxable year."[137] At least two readings are possible. First, in each year the applicable corporation could first apply its current year's foreign income taxes toward the CAMT FTC limit in Section 59(l)(1)(A)(ii), followed by a FIFO approach to applying prior years' foreign income taxes that have been carried forward. Second, following a pure FIFO approach, the current year's foreign income taxes could likewise be subject to FIFO ordering, so that each of the prior years' carried forward foreign income taxes is applied against the 15% limit (in the order in which the foreign income taxes became creditable) before the current year's foreign income taxes.[138] Guidance should specify which of these two approaches should be followed in applying the CAMT FTC carryforward to CFC taxes. The carryover rules for the regular foreign tax

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[136] *See* Part IV.B.6.i. of the Prior CAMT Report for a discussion of this lookback period.

[137] Section 59(l)(2).

[138] In fact, a third reading of the plain language is possible pursuant to which any excess from Year 1 could be carried forward and blended with Year 2 current foreign income taxes to arrive at the amount described in Section 59(l)(1)(A)(i) for Year 2. After utilization, there would be no further tracking going forward of Year 1 versus Year 2 foreign income taxes, and any excess in Year 2 would be carried forward for five years. While plausible from the plain reading of the statute, this reading appears inconsistent with the notion that the carryforward period is only five years.

credit generally follow the former approach.[139] Given that the language of Section 59(l)(2) is similar to that of Section 904(c), we would suggest adopting the same for purposes of the CAMT FTC.

[139] See Treas. Regs. § 1.904-2.