U.S. Chamber of Commerce

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U.S. Department of Treasury
1500 Pennsylvania Avenue N.W.
Washington, D.C. 20220

The Honorable Marjorie A. Rollinson
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue N.W.
Washington, D.C. 20224

Re: Rules Regarding Dual Consolidated Losses and the Treatment of Certain Disregarded Payments (REG-105128-23)

Dear Dr. Aviva Aron-Dine and Ms. Rollinson:

The U.S. Chamber of Commerce ("Chamber") welcomes the opportunity to comment on the proposed regulations under section 1503(d) of the Internal Revenue Code,[1] which would address issues arising under the dual consolidated loss ("DCL") rules and the treatment of certain disregarded payments.[2] The proposed regulations would address the effect of intercompany transactions and items arising from stock ownership in calculating a DCL. They would also address the application of the DCL rules to certain foreign taxes under the OECD/G20 Inclusive Framework on BEPS's Global Anti-Base Erosion ("GloBE" or "Pillar Two") Model Rules, and rules regarding certain disregarded payments that give rise to losses for foreign tax purposes.

Congress enacted the DCL rules to prevent taxpayers from claiming a duplicate tax benefit on the same economic loss—once in the United States and simultaneously in a foreign jurisdiction. The Chamber is concerned, however, that the proposed rules regarding Pillar Two taxes and disregarded payments would exceed Treasury's statutory authority. Our comments also address a handful of other problematic aspects of the proposed regulations and provide reasoned, consensus-based recommendations for addressing them in a manner consistent with the underlying statute and congressional intent.

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[1] Unless otherwise indicated, all textual references to "section" herein are to the sections of the Internal Revenue Code of 1986, as amended ("Code").

[2] Rules Regarding Dual Consolidated Losses and the Treatment of Certain Disregarded Payments, 89 Fed. Reg. 64750 (proposed Aug. 7, 2024) (as corrected by 89 Fed. Reg. 71214 (Sept. 3, 2024)).

Background

Congress added section 1503(d) to the Code in 1986 to address concerns that taxpayers were isolating expenses in dual resident corporations to enable two profitable companies, subject to tax in two different jurisdictions, to use the dual resident corporation's losses.[3] Section 1503(d) and the regulations thereunder (the "DCL rules") are intended to prevent this result by stopping a dual resident corporation from using a single economic loss twice—once to offset income that was subject to U.S. tax, but not foreign tax, and a second time to offset income subject to foreign tax, but not U.S. tax ("double dip").[4] In view of these double dips, Congress saw the prior treatment of dual resident corporations as giving an undue tax advantage to certain foreign investors that made U.S. investments.[5]

A DCL is generally any net operating loss of a dual resident corporation that is incurred in a year in which the corporation is a dual resident corporation; and in the case of a separate unit (e.g., a foreign branch or hybrid entity), the net loss attributable to the separate unit under Treas. Reg. § 1.1503(d)-5(c)-(e).[6] Unless an exception applies, to prevent a double deduction, there is generally no domestic use of a DCL (i.e., the DCL may be used for federal income tax purposes only against the income of the dual resident corporation that incurred the loss but not against the income of any other member of the consolidated group).[7]

Section 1503(d) generally provides that a dual consolidated loss of a dual resident corporation cannot reduce the taxable income of any other member of the affiliated group unless, to the extent provided in regulations, the loss does not offset the income of any foreign corporation. Similar rules apply to losses of separate units of domestic corporations. A DCL is generally any net operating loss of a dual resident corporation that is incurred in a year in which the corporation is a dual resident corporation, and in the case of a separate unit (e.g., a foreign branch or hybrid entity), the net loss attributable to the separate unit under Treas. Reg. § 1.1503(d)-5(c)-(e).[8] The DCL rules provide certain exceptions, however, including the "domestic use election." This election allows taxpayers to certify that there has not been, and will

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[3] *See* S. Rep. No. 99-313, at 419–421 (1986). A "dual resident corporation" is generally defined as a domestic corporation that is subject to an income tax of a foreign country on its worldwide income or on a residence basis. *See* Treas. Reg. § 1.1503(d)–1(b)(2)(i).

[4] Dual Consolidated Loss Regulations, T.D. 9315, 72 Fed. Reg. 12902, 12902 (Mar. 19, 2007).

[5] Staff of Joint Comm. on Tax'n, 99th Cong., *JCS-10-87, General Explanation of the Tax Reform Act of 1986* 1063 (May 4, 1987).

[6] *See* Treas. Reg. § 1.1503(d)-1(b)(5).

[7] *See generally* Treas. Reg. § 1.1502-2, -4(b) and (c).

[8] *See* Treas. Reg. § 1.1503(d)-1(b)(5).

not be, a "foreign use" of the DCL during the certification period. Accordingly, the taxpayer would not be precluded from using a loss that would otherwise be considered a DCL.

The DCL rules also provide detailed rules for how to determine when there has been a foreign use (a "triggering event") of a DCL and DCL recapture rules. One type of triggering event is when any portion of the DCL is made available under the income tax laws of a foreign country to offset or reduce, directly or indirectly, the income of a foreign corporation or the direct or indirect owner of a hybrid entity that is not a separate unit. When calculating a DCL, a dual resident corporation or separate unit's foreign income tax liability must be calculated in accordance with U.S. tax principles.[9] A foreign use of a DCL may occur if any portion of a DCL is made available to offset income—even if there are no items of income to offset in that tax year, so long as the loss has been made available.[10]

Proposed Application to the Pillar Two Regime

Lack of Authority

The Chamber is deeply concerned that the proposed regulations attempt to implement administratively what Congress has not authorized statutorily: U.S. adoption of the GloBE Model Rules. Although Congress delegated authority to Treasury under the statute to explain specific areas of section 1503(d)(1), this authority simply does not contemplate Pillar Two—a novel global minimum tax regime that neither existed nor was considered by Congress during the legislative process. Like other executive agencies, Treasury "literally has no power to act . . . unless and until Congress confers power upon it."[11]

The proposed regulations would expand the universe of foreign income taxes to which the DCL rules must be applied to include qualified domestic minimum top-up taxes ("QDMTTs") and income inclusion rule ("IIR") taxes enacted by foreign countries under the GloBE Model Rules. Specifically, the proposed regulations would provide that an income tax may include a tax that is intended to ensure a minimum level of taxation on income or computes income or loss by reference to financial accounting net income or loss.[12] Therefore, a foreign jurisdiction's IIR or QDMTT could be considered an income tax for purposes of the DCL rules and a foreign use could occur

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[9] *See* Treas. Reg. § 1.1503(d)-5(c)(1).

[10] *See* Treas. Reg. § 1.1503(d)-3(a)(1).

[11] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 553 (D.C. Cir. 2020) (alteration in original) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

[12] *See* Prop. Teas. Reg. § 1.1503(d)-1(b)(6)(ii).

under such tax by reason of a loss being used in the calculation of net GloBE income or to qualify for the transitional country-by-country reporting ("CbCR") safe harbor. Such a result would contravene a longstanding tenet of the DCL rules, which apply only to a domestic corporation that is subject to an income tax of a foreign country on its worldwide income or on a residence basis. Treating top-up taxes imposed under a foreign country's QDMTT or IIR as being within the scope of the DCL rules would represent a paradigm shift in the DCL rules that cannot be justified absent legislation from Congress.

The Chamber is concerned that Treasury is seeking to exceed its limited grant of authority under section 1503(d) to enforce certain aspects of the Pillar Two regime without congressional authorization. The scope of Congress's delegation of authority in section 1503(d) simply does not support Treasury's proposed expansion of the term DCL to include a reduction in income under the GloBE Model Rules.

Congress, not Treasury, should decide whether and how U.S. law should interact with the GloBE Model Rules. Treasury, a department of the executive branch, lacks the authority to implement public policy decisions that Congress has not delegated. Congress enacted section 1503(d) to address its concerns that prior law gave "an undue tax advantage to certain foreign investors that made U.S. investments," determining that disallowing DCLs would permit U.S. and foreign investors to compete fairly in the U.S. economy.[13] The legislative history shows that Congress was primarily concerned with addressing the practice of double dipping in designing the DCL framework. Its potential application to a novel global minimum tax regime, however, was not a consideration.

To date, Congress has conspicuously failed to adopt the GloBE Model Rules in any way. Furthermore, in *Loper Bright Enterprises Inc. v. Raimondo*,[14] the Supreme Court of the United States limited the deference courts have generally provided to agency rulemaking under the *Chevron doctrine.*[15] The Supreme Court underscored that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is *fixed at the time of enactment*.'"[16] Treasury lacks authority to issue regulations without a clear statutory mandate. In this instance, Congress has neither adopted the

[13] Staff of Joint Comm. on Tax'n, *JCS-10-87, General Explanation of the Tax Reform Act of 1986* 1063 (May 4, 1987).

[14] *Loper Bright Enterprises Inc. v. Raimondo*, 144 S. Ct. 2244 (2024).

[15] *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

[16] *See Loper Bright* at 2266 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (emphasis added).

GloBE Model Rules nor authorized the inclusion of any type of Pillar Two top-up tax into the U.S. federal tax system.

Finalizing regulations that would expand the definition of a DCL to include reductions in income under the GloBE Model Rules would exceed Treasury's statutory authority. Legislative grants of regulatory authority "must be read in their context and with a view to their place in the overall statutory scheme."[17] Courts have routinely admonished executive agencies that fail to "stay[] within the bounds of [their] statutory authority" by vacating their unlawful rules.[18] Treasury simply does not have the authority to expand the scope of the DCL rules' application to include top-up taxes under Pillar Two without express consent from Congress. Accordingly, the Chamber respectfully urges Treasury and the IRS to remove these rules from the final regulations.

Disregarded Payment Loss Rules

Lack of Authority

The proposed regulations would also establish an entirely new and complex set of rules addressing "disregarded payment losses" ("DPLs")[19] that, like in the discussion above, have absolutely no statutory basis under sections 1503(d) and 7701 (entity classification rules). The proposed DPL rules are included in the proposed DCL regulations, yet those rules generally have no connection with one another.[20] The Chamber strongly urges Treasury and the IRS to withdraw the proposed DPL rules because Treasury lacks statutory authority to issue them.

The proposed DPL rules would generally address potential deduction/no-inclusion outcomes arising from certain disregarded payments that are deductible in a foreign country but disregarded for U.S. federal income tax purposes. Specifically, the proposed DPL rules would require consenting domestic corporations to include in

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[17] *Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 320 (2014) *(quoting FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000).

[18] *City of Arlington v. Federal Communications Commission*, 569 U.S. 290 (2013); *see also Util. Air Regulatory Grp*., 573 U.S. 302 (2014); *Inhance Technologies, L.L.C. v. Env't Prot. Agency*, 2024 WL 1208967 (5th Cir. 2024); *Heating, Air Conditioning & Refrigeration Distributors Int'l v. Env't Prot. Agency*, 71 F.4th 59 (D.C. Cir. 2023); *Chamber of Commerce of United States of America v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

[19] *See* Prop. Treas. Reg. § 1.1503(d)-1(d).

[20] An IRS official confirmed such notion by indicating at a recent conference that while the DCL and DPL rules have some similarities and the DPL rules cross-reference the DCL provisions, the rules are best understood as *separate* regimes. *See* Andrew Velarde, *Disregarded Payment Loss Rules Shouldn't Come as a Surprise*, 115 Tax Notes Int'l 1899 (Sept. 16, 2024).

gross income any DPL that gives rise to a foreign use during a certification period. The proposed DPL rules would generally apply to payments from foreign disregarded entities to their domestic owners that are regarded for foreign tax purposes but disregarded for U.S. tax purposes.[21]

The proposed DPL rules would be implemented through revisions to the entity classification rules under section 7701 and the DCL rules under section 1503(d) in a manner consistent with the "domestic consenting corporation" approach under Treas. Reg. §§ 301.7701–3(c)(3) and 1.1503(d)–1(c) addressing domestic reverse hybrids. Under this approach, when certain eligible entities ("specified eligible entities") are treated as disregarded entities for U.S. tax purposes, a domestic corporation that acquires, or on the effective date of the election directly or indirectly owns, interests in such a specified eligible entity would consent to be subject to the proposed DPL rules.[22] It bears emphasizing, however, that while the proposed DPL rules are included in the proposed regulations under section 1503(d), these regulations would not link the DPL and DCL rules in any way.

Treasury and the IRS are attempting to implement the proposed DPL rules through deemed consent under the entity classification rules (i.e., section 7701 and the regulations thereunder) because they lack any express statutory authority to do so under section 1503(d) or section 7701. The relevant statutory language unambiguously does not provide Treasury the authority to promulgate this regulation. But even if there were some ambiguity, *Loper Bright* makes clear that "courts exercise independent judgment in construing statutes administered by agencies" and are not required to reflexively defer to an agency's interpretation of its own authority.[23] Treasury and the IRS have no congressional permission or statutory authority to write the proposed DPL rules within the DCL regulations. Only Congress has authority to address the policy concerns that Treasury is trying to address in the proposed DPL rules. The Chamber therefore respectfully urges Treasury and the IRS to withdraw the proposed DPL rules from the final regulations.

Exclusion of Items from Stock Ownership

General Issues

The Chamber is also troubled by the new rule in the proposed regulations with respect to items arising from ownership of stock.[24] Historically, an item of income,

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[21] *See* 89 Fed. Reg. at 64761.

[22] *See* Prop. Treas. Reg. § 301.7701–3(c)(4)(i).

[23] *Loper Bright Enterprises Inc. v. Raimondo*, 144 S. Ct. 2244 (2024).

[24] *See* Prop. Treas. Reg. §§ 1.1503(d)-5(b)(2)(iv)(A) and (c)(4)(iv)(A).

gain, deduction, or loss would generally be taken into account for purposes of computing income or a DCL to the extent it is likely that the relevant foreign country would take the item into account (assuming the item is recognized) for tax purposes.[25] However, the proposed regulations would revise this rule to provide that items arising from the ownership of stock—such as gain recognized on the sale or exchange of stock dividends, inclusions under section 951(a), and deductions with respect thereto—are not taken into account for purposes of computing income or a DCL.[26] According to the preamble, these rules are not limited to items arising from the ownership of stock of a foreign corporation because, for example, a dividend from a domestic corporation may be eligible for a participation exemption under the laws of the foreign country.[27]

This new proposed rule would ignore the fundamental policy behind the DCL rules, which is to prevent double deductions in both the foreign jurisdiction and the United States by surrendering the same loss to other members of the U.S./foreign group. Accordingly, whether an inclusion from stock ownership is taken into account for foreign tax purposes should not be determinative for establishing the amount of the DCL. Rather, the amount of the DCL should be based on the amount of loss determined under U.S. tax principles that is available for foreign use. The amount of loss based on U.S. tax principles that is available for foreign use is the amount giving rise to the policy concern that the DCL rules were intended to address. Consequently, the policy behind the DCL rules requires taking into account all items of income under U.S. tax principles that are properly attributable to a dual resident corporation/separate unit.

To exclude items of stock ownership where the separate unit is in the same jurisdiction as the underlying corporation giving rise to the excluded items would be a significant misalignment with the policy behind the DCL rules. As acknowledged in the preamble, there is no policy concern in this fact pattern, as in fact, the inclusion is taken into account in the foreign jurisdiction (at the level of the underlying corporate subsidiary). For example, in certain industries, there are regulatory requirements to own separate subsidiaries in the same jurisdiction, such that the holding structure forms an integrated business. Such corporate structures are not aimed at avoiding the purposes of the DCL rules, and these industries with regulated structures will be unable to restructure their operations, as a general matter, to avoid the impact of the proposed regulations. The result under the proposed regulations in the case of a separate unit and corporate subsidiary in the same jurisdiction would be so inconsistent with the policy behind the DCL rules that it cannot be justified by

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[25] *See* Treas. Reg. § 1.1503(d)-5(c).

[26] *See* Prop. Treas. Reg. §§ 1.1503(d)-5(b)(2)(iv)(A) and (c)(4)(iv)(A).

[27] *See* 89 Fed. Reg. at 64755–56.

administrability concerns that come with an exception for same-country separate unit/corporate investments. Additionally, Treasury and the IRS have successfully overcome similar administrability challenges in the context of the high-tax kick-out regulations for Global Intangible Low-Taxed Income (GILTI).[28]

Insurance Company Issues

The proposed rule is especially egregious with respect to insurance companies in certain circumstances. For instance, one issue for insurance companies arises because insurance companies are per se corporations for U.S. federal income tax purposes under section 7701(a)(3) and Treas. Reg. § 301.7701-2(b)(4). Like the discussion above, and unlike other companies, there is no opportunity to elect to treat insurance company subsidiaries as disregarded or flow-through entities to alleviate the impact of the proposed regulations. Another issue for insurance companies arises under section 953(d), which allows certain foreign insurance corporations to elect to be taxed as domestic insurance companies for all purposes of the Code. As a consequence of this election, however, such corporations are treated as dual resident companies under Treas. Reg. § 1.1503(d)-1(b)(2)(ii), and a domestic use election is unavailable to losses of a foreign insurance company that is a dual resident company under Treas. Reg. § 1.1503(d)-6(a)(3). As a result, application of the current DCL rules is already particularly harsh with respect to insurance companies, which do not have the same options as other companies may have to avoid the sting of the DCL rules. The Chamber respectfully recommends that Treasury and the IRS revise this rule in the final regulations to provide that items arising from the ownership of stock are taken into account for purposes of computing income or a DCL.

Intercompany Transactions – Special Status Rules

Lack of Authority

Another significant issue addressed in the proposed regulations is the treatment of intercompany transactions (i.e., transactions among members of a

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[28] Treas. Reg. § 1.951A-2(c)(3)(ii) provides detailed rules on how certain high-taxed income of a CFC can be excluded from the GILTI calculation. Specifically, the regulation allows U.S. shareholders of a CFC to elect to exclude from their GILTI calculation any income that is subject to a sufficiently high effective foreign tax rate. Taxpayers must measure the effective tax rate on the income of each 'tested unit' of a CFC by identifying the income associated with the 'tested unit' and determining the amount of taxes associated with such income. Tested units that are residents of, or located in, the same foreign country must be combined for purposes of determining whether the combined income is eligible for the GILTI high-tax exclusion. A similar methodology could be adopted by the regulations to determine what portion of the taxable income or loss of an underlying corporation, which is a resident or located in the same country as the separate unit and is directly or indirectly owned by such a separate unit, should be taken into account under the ownership of stock rule.

consolidated group for DCL purposes). Under the proposed regulations, a section 1503(d) member would be treated as having "special status" for purposes of the Treas. Reg. § 1.1502-13 intercompany transaction rules, with the effect that transactions included within the DCL computations could not be redetermined under that regime's matching rule to produce a single entity result.[29]

As a threshold matter, there are serious questions about the appropriateness of this decision, which would explicitly sanction differing treatment for intercompany transactions as compared with transactions between a group member and its separate unit branch or division. This would contravene the core single-entity principle of the consolidated return regulations. Additionally, it appears that Treasury is focused on ensuring that the DCL rules would fully apply to losses deducted against Pillar Two taxes. Like in the discussion above regarding Treasury's lack of authority to issue rules regarding Pillar Two and section 1503(d), Treasury lacks authority to issue intercompany transaction rules under section 1502 to attempt to apply any portion of the Pillar Two tax regime. Although Congress granted Treasury broad authority to issue regulations under section 1502, this authority extends only to implementing regulations that are necessary to clearly reflect the U.S. tax liability of affiliated groups filing U.S. consolidated returns. Section 1502 does not include any foreign income tax computations or foreign taxing regimes.[30]

By broadening the application of the special status rules under Treas. Reg. § 1.1502-13 to address Pillar Two concerns, Treasury would create new instances in which potentially distortive adjustments to the income tax liability will arise by denying application of the matching principle to transactions between members of a consolidated group. Such distortions cannot not be explained as attempts to clearly reflect U.S. income tax liability. Rather, they are the product of Treasury's desire to implement Pillar Two policy initiatives. The proposed regulations appear to be motivated by an underlying policy purpose to support a foreign tax regime. Accordingly, the Chamber respectfully urges Treasury and the IRS to withdraw the new section 1502 intercompany transaction rules from the final regulations for want of proper authority.

Intercompany Transactions – Effective Date

Equally alarming is the fact that if the proposed regulations were to be finalized by April 15, 2025, Treasury would be implementing this rule on a retroactive basis[31]

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[29] *See* Prop. Treas. Reg. § 1.1502-13(j)(10).

[30] *See* I.R.C. § 1502.

[31] The proposed changes would be retroactively effective for the 2024 calendar year if the proposed regulations are finalized by April 15, 2025. *See* Prop. Treas. Reg. § 1.1502-13(l)(11).

rather than offering a proposal that could be meaningfully commented on, considered, and reacted to by taxpayers. There is no U.S. tax policy justification for such an immediate effective date. Rather, it appears that Treasury and the IRS sought to address potential U.S. taxpayer positions that may facilitate management of Pillar Two tax liabilities. To say the least, this would an inappropriate basis for Treasury to issue these rules in a retroactive manner. The Chamber therefore urges Treasury and the IRS to delay the effective date of the proposed intercompany transaction rules by at least a year to allow taxpayers the opportunity to comment on and adjust their affairs in response to the proposed regulations.

Anti-Avoidance Rule

The proposed regulations would establish an unclear and ambiguous anti-avoidance rule. Specifically, the proposed regulations would provide that "if a transaction or series of transactions, plan, or arrangement is engaged in with a view to avoid the purposes of section 1503(d) . . . then appropriate adjustments will be made."[32] The "with a view" standard is far less clear than other anti-avoidance standards in the Code or regulations (e.g., a principal purpose standard) and risks ambiguity to taxpayers in discerning whether the anti-avoidance rule should apply. The anti-avoidance rule in the proposed regulations is drafted in such a broad manner that it could potentially implicate transactions undertaken to eliminate the very policy concern underlying the DCL or DPL rules. Accordingly, the Chamber respectfully recommends that Treasury and the IRS clarify the scope of the anti-abuse rule in the final regulations.

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The Chamber appreciates the opportunity to comment on the proposed DCL and DPL regulations. We would welcome the opportunity to discuss our comments with you or your colleagues in further detail and provide whatever additional information you may require. Please contact Sarah Corrigan, the Chamber's Tax Counsel and principal drafter, at (202) 680-8008 or SCorrigan@USChamber.com. Thank you for your time and attention.

Sincerely,

Watson M. McLeish
Senior Vice President, Tax Policy
U.S. Chamber of Commerce

[32] Prop. Treas. Reg. § 1.1503(d)-1(f).