Tax Executives Institute
1200 G St NW, Suite 300
Washington, DC 20005
tei.org

October 20, 2025

Attn: Mark Terrell
Internal Revenue Service
IR-4619
1111 Constitution Ave. N.W.
Washington, D.C. 20224

Via electronic submission

RE: TEI Comments on Notice 2025-44

Dear Sir:

On August 20, 2025, the Internal Revenue Service (the "Service") and the U.S. Department of the Treasury ("Treasury," together with the Service, the "Government") published Notice 2025-44 (the "Notice"),[1] which announces the forthcoming withdrawal of final regulations regarding disregarded payment losses ("**DPLs**"), related changes to the dual consolidated loss ("**DCL**") rules under section 1503(d), and the interaction of the DCL regime and top-up taxes enacted in connection with the Organization for Economic Cooperation and Development (the "**OECD**") Pillar Two project ("**Top-Up Taxes**").[2] The Notice also requested comments on (1) potential revisions to the DCL rules' "all or nothing" principle, taking into account administrability concerns and (2) whether and how disregarded items should be taken into account for purposes of the DCL rules. On behalf of the Tax Executives Institute, Inc. ("TEI"), I am pleased to provide comments on the Notice.

About TEI

TEI was founded in 1944 to serve the needs of business tax professionals.[3] Today, the organization has 55 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting

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[1] 2025-37 I.R.B. 386.

[2] Unless otherwise indicated, all "§" and "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §," "Temp. Treas. Reg. §," and "Prop. Treas. Reg. §" references are to the final, temporary, and proposed regulations, respectively, promulgated or proposed thereunder (the "Regulations"), as in effect as of the date of this document.

[3] TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6). All "section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,800 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to the Notice.

TEI Comments

We have divided these comments into four sections:

- Revisions to the definition of foreign use, including elimination or limitation of the "all or nothing" principle;
- The DCL rules' treatment of disregarded payments;
- The interaction of the DCL regime and Top-Up Taxes; and
- Income arising from stock of foreign corporations.

We value the Government's continued openness in developing thoughtful rules under section 1503(d) that balance administrability and the burden placed on taxpayers. We also appreciate the Government's recent decisions that reflect a rule-making process that is responsive to stakeholder concerns and committed to administrable, principled outcomes. Notably, these decisions include the withdrawal of the DPL regime, the additional transitional relief with respect to Pillar Two Top-Up Taxes, and the restoration of the long-standing deemed ordering rule for measuring foreign use of DCLs. These developments lessen unwarranted reporting and substantive tax burdens on taxpayers, while continuing to safeguard the U.S. tax base.

We respectfully submit these comments to assist continued improvement of the DCL regulations. Our observations draw on extensive practical experience with the current regulations and are intended to assist the Government in crafting a balanced regime that curbs inappropriate double dipping while permitting the deduction of losses that do not offset income of foreign corporations.

I. Revisions to the definition of foreign use, including the "all or nothing" principle

A. Background

Section 1503(d) generally prohibits the DCL of a dual resident corporation or separate unit from reducing the taxable income of other members of a consolidated group.[4] A DCL is the net operating loss of a dual resident corporation or the net loss attributable to a separate unit; however, the statute provides that, as provided under regulations, a DCL "shall not include any loss which, under the foreign income tax law, does not offset the income of any foreign corporation."[5]

In enacting section 1503(d), Congress sought to curb double-dipping, the practice of using a single economic loss to offset two income streams, one that is and one that is not subject to U.S. tax.[6] Congress was concerned that the duplicative use of losses gave foreign investors an advantage in acquiring U.S. targets, because debt financing could offset taxable income in both countries despite the group as a whole being profitable. Two years later, Congress expanded section 1503(d) to also address losses incurred by separate units such as branches, as their losses could also offset taxable income in both the United States and a foreign country.

Today, the transactions that originally motivated enactment of the DCL rules are an artifact of history. Most large economies have enacted their own anti-hybrid rules, preventing their residents from double-dipping. At the same time, expanded U.S. anti-deferral rules generally subject the income of foreign subsidiaries to current U.S. tax. Instead of leveling the playing field, those rules impose disproportionate costs on U.S. multinationals. The current regulatory framework is a complex web of presumptions, elections, triggering events, and rebuttals. For large taxpayers, the DCL regulations impose disproportionate compliance costs and prevent optimal alignment and integration of foreign investments. For less sophisticated taxpayers, they contain traps for the unwary and broadly complicate attempts to operate in branch form.

As discussed in more detail below, we recommend the Government relieve this burden by eliminating the "all or nothing" principle. This principle operates through a presumption that groups income and expense items by jurisdiction and causes $1 of inadvertent double-dipping to disallow deductions for all the losses that a taxpayer incurs in a given jurisdiction. At worst,

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[4] Section 1503(d)(1). For this purpose, a separate unit is generally treated as a separate affiliated group member from its domestic owner and from its domestic owner's other separate units.

[5] Section 1503(d)(2)(B).

[6] Staff of Joint Committee on Taxation, 99th Cong., 2nd Sess., General Explanation of the Tax Reform Act of 1986, at 1064 (1987) ("Losses (however derived) that a corporation uses to offset foreign tax on income that the United States does not subject to current tax should not also be used to reduce any other corporation's U.S. tax.")

the "all or nothing" principle in the current regulations should be limited so taxpayers can identify and deduct expenses that do not offset income of foreign corporations.

The regulations divide the application of section 1503(d) into two primary steps – calculation of the DCL amount and determination of foreign use. First, the amount of a DCL is the net loss of a dual resident corporation or separate unit. Expenses are treated as part of a DCL solely under U.S. tax rules, without any reduction for amounts that do not offset income of a foreign corporation under foreign tax law. Second, the Government reduces the non-deductible portion of a DCL through a novel procedural framework. Although a DCL generally cannot offset the income of another affiliated group member (such offset, a "**domestic use**"), the regulations provide a series of exceptions to this general rule, each of which requires that no expense composing the DCL offsets income of foreign corporation under foreign tax law (such offset, a "**foreign use**").[7]

The regulations have strayed from the statutory framework and fail to balance administrability concerns with precision and fairness in two regards: (1) the use of U.S. tax principles to determine the amount of a DCL causes DCLs to include amounts that are not put to a foreign use, and (2) two presumptions deem an entire DCL to be put to a foreign use more often than is warranted, including in circumstances where there is no actual foreign use (*i.e.*, there is no offset of income of a foreign corporation under foreign tax law).

The first presumption determines when any foreign use occurs. An item of expense generally is deemed to be put to a foreign use in the year in which it is "made available" for such foreign use, regardless of whether such offset occurs.

However, various exceptions limit the impact of the "made available" standard. For example, an ordering rule applies when expenses that compose a DCL are made available under foreign tax law to offset both income that does create a foreign use and income that does not create a foreign use.[8] In that case, if foreign law does not provide rules to determine which income the deductions offset, then the expenses first are deemed to offset income that does not create a foreign use to the extent thereof before they offset income that does create a foreign use.[9] The 2025 Final Regulations modified the deemed ordering rule so that it only considered the potential offset of expenses against income that is regarded for U.S. tax purposes, while creating

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[7] For example, a domestic use is allowed by making a domestic use election under Treas. Reg. § 1.1503(d)-6(d) or by demonstrating there is no possibility of foreign use under Treas. Reg. § 1.1503(d)-6(c). The regulations expand the definition of foreign use to include the offset of income of a hybrid entity that is not a separate unit, essentially the portion of passthrough income that is not attributable to interests held by domestic corporations. For ease of discussion, the remainder of this letter only addresses foreign use via foreign corporations.

[8] Treas. Reg. § 1.1503(d)-3(c)(3).

[9] *Id.*

a separate deemed ordering rule under which the foreign use of disregarded payment losses was evaluated solely by reference to interest and royalty income that are disregarded for U.S. tax purposes.[10]

The second key presumption is the "all or nothing" principle, which prevents domestic use of an entire DCL if any portion of the DCL is put to a foreign use.[11] The "all or nothing" principle prevents taxpayers from deducting the amount of the DCL that does not currently and, in certain cases, cannot ever offset income of a foreign corporation.

B. Specific recommendations

We recommend eliminating the "all or nothing" principle from the DCL regulations. However, even if the Government does not accept this recommendation, targeted revisions to limit the application of the "all or nothing" principle would demonstrably improve the regulations. First, we recommend permitting taxpayers to reduce their DCLs by certain expenses never made available to offset income of a foreign corporation under foreign tax law. Second, we recommend permitting taxpayers to rebut the presumption that the foreign use of any expense composing a DCL is a foreign use of the entire DCL. Third, we recommend a self-executing de minimis exception to the "all or nothing" principle. Fourth and finally, we recommend a small revision to the deemed ordering rule to permit taxpayers to transfer foreign business operations into the U.S. tax net without triggering a foreign use.

1. Eliminate the "all or nothing" principle

We recommend eliminating the "all or nothing" principle. Currently, the foreign tax treatment of an item of income, gain, deduction or loss is irrelevant to whether it is part of a DCL.[12] There is little statutory or conceptual support for this position. Amounts that are not put to a foreign use do not raise double-dipping concerns, and Congress granted Treasury authority under section 1503(d)(2)(B) to exclude such amounts from DCLs.

Treasury should exercise the regulatory authority provided by Congress to define a DCL as the net loss attributable to a separate unit or dual resident corporation that is put to a foreign use. Such a rule would return the DCL regulations to preventing double-dipping, rather than

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[10] Rules Regarding Certain Disregarded Payments and Dual Consolidated Losses, 90 Fed. Reg. 3018 (Jan. 14, 2025) (the "**2025 Final Regulations**").

[11] Treas. Reg. § 1.1503(d)-3(a) ("[A] foreign use of a [DCL] shall be deemed to occur when any portion of a deduction or loss taken into account in computing the [DCL]" is put to a foreign use.")

[12] *See* Treas. Reg. § 1.1503(d)-5(c)(3)(i) ("The treatment of items for foreign tax purposes, including under any type of foreign anti-deferral regime, is not relevant for purposes of determining whether items are reflected on the books and records of the entity, or for purposes of making adjustments to such items to conform to U.S. tax principles.")

tracking items of income, gain, deduction, and loss that appear to have nexus to foreign countries systems under U.S. tax principles.[13]

Taxpayers and commentators have argued against the "all or nothing" principle since it was first proposed in 1989 because it produces unduly harsh results, but the Government has yet to revise the rule because of concerns over administrative complexity, including the potential need for detailed ordering rules. When promulgating the current final regulations, the Government expressed concern that departing from this standard and determining the amount of recapture based on actual foreign use would require taxpayers and the IRS to undertake a complex analysis of foreign law to "distinguish a permanent (or base) difference from a timing difference, in order to ensure that the portion of the [DCL] that is not being recaptured will not be available for a foreign use at some point in the future."[14] However, taxpayers have not been spared from this complexity during the more than 30 years under the "all or nothing" principle. Foreign use is the offset of income under foreign law, so it necessarily requires an analysis of foreign tax law.[15] To comply with the regulations, taxpayers have had to implement systems to track every expense composing their DCLs and undertake detailed analyses of foreign law to reconcile permanent and temporary differences. The "all or nothing" principle compels this, because any dollar of foreign use limits the taxpayer's domestic use of potentially material foreign operating losses. In this regard, the "all or nothing" principle only reduces the burden on the IRS, because once it can show that $1 of a DCL is put to a foreign use, the entire DCL is limited, and no additional tracking or analysis is required.

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[13] *See* Treas. Reg. § 1.1503(d)-5(c) (determining the DCL attributable to a hybrid entity separate unit by reference to the items recorded on the hybrid entity's books and records and applying section 864(c) principles to determine the DCL attributable to a foreign branch separate unit).

[14] Dual Consolidated Loss Regulations, 72 Fed. Reg. 12902, 12911 (Mar. 19, 2007) (the "**2007 Final Regulations**"). Notwithstanding these concerns regarding tracking actual foreign use, it should be noted that this is what the statute provides. *See* section 1503(d)(2)(B) ("the term 'dual consolidated loss' shall not include any loss which, under the foreign income tax law, *does not offset* the income of any foreign corporation") (emphasis added).

[15] The IRS has issued limited nonbinding guidance on foreign use, but it all considers foreign law treatment of expenses. *See*, *e.g.*, AM 2009-11 at 6 ("under Country X laws such deductions or losses are available to offset any item of income or gain incurred by FEX during year 2"); PLR 202110015 (Mar. 12, 2021) (including representations that (1) a portion of U.S. tax items of deduction that compose DCLs "will correspond to items of deduction or loss under [foreign] income tax law" and (2) certain liabilities "have not created, and will not create, items of deduction or loss under the tax laws of any country other than Country B and the United States"; Domestic Use Election, I.R.M. 4.61.13.2.4.1. ("The issue team should determine whether there was a foreign use of the DCL in the year it was incurred. The issue team may review the foreign income tax returns to determine this.").

a. The costs of the "all or nothing" principle have increased

In addition, developments since the current regulations were proposed upset the balance that the Government attempted to strike at that time.

First, the scope and cost of the "all or nothing" principle has expanded significantly. The 2007 Final Regulations adopted a broader version of separate unit combination than had been proposed. By requiring taxpayers to combine the DCLs of same-country separate units, the 2007 Final Regulations made the consequences of the "all or nothing" principle more severe.[16] If any expense of an individual separate unit is made available for a foreign use, the entire DCL of the combined separate unit is deemed to be put to a foreign use. This occurs regardless of whether the expenses of any other members of the combined separate unit are made available for foreign use.

Soon after the 2007 Final Regulations' combined separate unit rule increased the consequences of a foreign use, AM 2009-011[17] illustrated the broad scope of foreign use that applies to single items that are "made available" for use outside of foreign consolidation and other grouping regimes. As relevant there, the memorandum addressed a scenario in which USP, a domestic corporation, wholly owned the stock of FEX, which had been a foreign corporation since its formation. During the middle of its foreign taxable year, FEX elected to be disregarded as an entity separate from USP, and it incurred a DCL during the second half of the year. The memorandum concluded that there was a foreign use of the FEX DCL because expenses composing the DCL were made available to offset income that FEX recognized during the first half of the year when it was classified as a foreign for U.S. tax purposes. Further, the expenses were made available regardless of whether FEX recognized gross or net income during the period it was a foreign corporation.[18] Instead, the expenses were made available to offset

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[16] For completeness, we note that the 1992 regulations contained a "consistency rule" under which a foreign use of DCL attributable to one dual resident corporation or separate unit in a particular foreign country could trigger the deemed foreign use of DCLs attributable to dual resident corporations and separate units held by the consolidated group if those DCLs include items of expense or loss taken into account under the income tax laws of that country unless that country's tax laws did not permit the other DCLs to be put to a foreign use in that year. *See* Treas. Reg. § 1.1503-2(g)(2)(ii). However, an exception for DCLs that cannot be put to a current foreign use narrowed the impact of the consistency rule as compared to the 2007 regulations' separate unit combination rule.

[17] (Oct. 9, 2009).

[18] *See* AM 2009-011, note 31 (The expense is made available "regardless of whether any portion of the losses or deductions actually offsets or reduces any items of income or deduction under [foreign tax law], and regardless of whether items that may be offset or reduced are regarded as income under U.S. tax principles.")

income of a foreign corporation because FEX incurred them during a foreign tax year, and it was a foreign corporation for a portion of that foreign tax year.

The memorandum also suggested that foreign use may have occurred even if FEX elected to be disregarded effective on the first day of the foreign tax year. It argued that if timing differences between U.S. and foreign tax law permitted FEX to deduct an expense when it was a foreign corporation, but that expense was deductible for U.S. tax purposes after the entity became a separate unit, that expense which composed a DCL previously was put to a foreign use.[19]

In this regard, the existing foreign use framework unduly constrains taxpayers with material existing DCLs. The risk that a minor, inadvertent foreign use jeopardizes domestic use of an entire DCL inhibits taxpayers from bringing foreign business operations into U.S. taxing jurisdiction, including through ordinary post-acquisition integration. A more tailored rule would remove a needless deterrent while preserving anti-avoidance aims.

b. The burden of tracking individual expenses has decreased

Changes in foreign tax law require taxpayers to track both foreign and domestic use of expenses incurred through hybrid entities. In 2015, the OECD's Base Erosion and Profit Shifting ("**BEPS**") Project recommended that countries adopt legislation to mitigate double deduction outcomes.[20] Unlike the DCL rules, which identify the net loss attributable to a separate unit or dual resident corporation, BEPS Action 2 prescribed a regime that denies deductions for particular items of expense against income that is not subject to tax in both relevant jurisdictions. In the ten years since the OECD issued BEPS Action 2, more than 20 countries have adopted deduction disallowance rules that generally follow the report's recommendations, a group that comprises more than 25% of global GDP.[21] As a result, domestic corporations with foreign hybrid entities are already required to track (1) the expenses that are deductible both in the United States and another jurisdiction and (2) whether the income those expenses offset is subject to tax in both the United States and another jurisdiction.

Given the significant compliance and substantive tax costs imposed by the "all or nothing" principle and the fact that domestic corporations with hybrid entities already have significant

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[19] *See* AM 2009-011, note 34 (For example, a depreciation deduction that is included in the computation of the … DCL may be recognized for Country X tax purposes in … a year in which FEX is classified as a foreign corporation for U.S. tax purposes.")

[20] OECD (2015), Neutralizing the Effects of Hybrid Mismatch Arrangements, Action 2 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris ("**BEPS Action 2**").

[21] All EU member states, the United Kingdom, Canada, Australia, Mexico, New Zealand have adopted various OECD recommendations to prevent double deduction outcomes.

item-by-item double deduction reporting obligations, a more balanced approach to foreign use would not impose significant incremental costs in taxpayers.

Although we believe the "all or nothing" principle has outlived its usefulness, if the Government believes it a key principle that must be retained, we have several alternative recommendations to limit its application, as outlined below.

2. Permit taxpayers to demonstrate that there is no possibility of foreign use of specific losses or expenses

If the "all or nothing" principle is not eliminated, it should be limited, both in determining the amount of a DCL and in evaluating foreign use. The regulations should permit taxpayers to remove expenses from a DCL if they can demonstrate that there has been no foreign use of the expenses and that there is no possibility that such expenses may be put to a foreign use in any other year by any means.[22] As the preamble to the 2007 Final Regulations acknowledges, expenses never taken into account under foreign tax law cannot be put to a foreign use.[23] Accordingly, if a taxpayer can show there is no possibility of certain expenses being put to a foreign use, those expenses should be removed from a DCL.[24] Similarly, an item or gain not taken into account under foreign tax law may be removed to increase the DCL.

The current regulations already contain procedural and evidentiary standards for taxpayers to substantiate their assertions. Treas. Reg. § 1.1503(d)-6(c) provides an exception to the domestic use limitation for DCLs for which the taxpayer demonstrates there is no possibility of foreign use. Such a demonstration requires analysis of all expenses composing the DCL, which is significantly more burdensome than the proposed showing for individual expense items. TEI's proposal imposes a lesser burden on taxpayers and the IRS than the current exception; therefore, the proposal would reduce administrative burdens. Potential examples of items for which there is no such possibility include stock-based compensation expense that is not deductible under foreign tax law, expenses that foreign tax law specifically disallows as a deduction, and other permanent (or base) differences.

3. Permit taxpayers to rebut deemed foreign use

If any expense composing a DCL is put to a foreign use, the current regulations treat the entire DCL as being put to a foreign use. As discussed above, only those expenses made available to

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22 *Cf.* Treas. Reg. § 1.1503(d)-6(c)(1)(i).

23 72 Fed. Reg. 12910, 12911 (March 19, 2007).

24 Conforming changes also should be made to remove these items from consideration in the separate unit or dual resident corporation's Separate Return Limitation Year ("**SRLY**") register under Treas. Reg. § 1.1503(d)-4(c)(3).

offset income of a foreign corporation should be treated as put to a foreign use. To balance the administrative burden of identifying which expenses are put to a foreign use each year, the regulations could continue to apply the "all or nothing" principle to the expenses composing the DCL unless a taxpayer rebuts the presumption by demonstrating that certain expenses were not made available to offset income of a foreign corporation. Therefore, we recommend that the regulations permit taxpayers to make domestic use elections and apply other exceptions to the domestic use limitation rule for the portion of a DCL that they can demonstrate were not made available for a foreign use. Any of the following options would permit taxpayers to limit application of the "all or nothing" principle where it leads to inappropriate results.

a. Item-by-item rebuttal

The Government should revise the regulations to permit taxpayers, on an elective basis, to demonstrate that certain expense items were not made available to offset income of a foreign corporation. The most straightforward application of this principle is an item-by-item rebuttal to foreign use.

For example, if a DCL includes interest expense, a portion of which is subject to permanent disallowance under foreign tax law, then the nondeductible portion of that expense cannot be made available for a foreign use, and thus it should not be deemed to be put to a foreign use.

TEI's recommendation would modify, rather than replace, the existing rules for domestic use elections. The new election should permit the domestic use of all expenses not made available for foreign use during the certification period. However, the recapture mechanics of the existing domestic use election would be maintained.[25] Therefore, if an expense that composes a DCL is made available for foreign use after the U.S. taxable year for which the taxpayer makes an election, the taxpayer would be required to recapture the expense into income.[26]

For example, if a DCL includes interest expense and foreign tax law takes the expense into account but applies different timing rules, including temporary disallowance rules (*e.g.*, differences in asset recovery periods and interest expense limitations similar to section 163(j)), then the Government should permit the taxpayer to rebut foreign use in the year the expense is deductible for U.S. tax purposes. The taxpayer's rebuttal would not be permanent; the taxpayer would need to track foreign use of the expense throughout the certification period as the current regulations require.

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25 *See* Treas. Reg. § 1.1503(d)-6(e), (f), and (h).

26 Cf. Treas. Reg. § 1.1503(d)-6(h)(1).

b. Pro rata rebuttal

The Government should also revise the regulations to permit taxpayers to demonstrate the pro rata portion of a DCL not available to offset income of a foreign corporation in the current year or a prior year. This determination would be made by reference to the loss that is put to foreign use on a foreign tax return. For example, if a taxpayer incurs a DCL through a hybrid entity that consolidates with a foreign corporation under foreign tax law, the amount of foreign use would be determined based on the hybrid entity's loss as reported on a foreign tax return for the relevant tax year.

Using a pro rata methodology to determine foreign use would significantly simplify the analysis, while continuing to prevent double-dipping by denying domestic use of the same amount of loss that is put to a foreign use under foreign tax law.

c. Individual separate unit rebuttal

The item-by-item and pro rata rebuttals discussed above should be broadly applicable. However, combined separate units warrant targeted relief. The separate unit combination rule deems there to be a single DCL attributable to a combined separate unit, even when foreign tax law does not comingle individual separate units' income and expense items. Accordingly, the Government should revise the regulations to permit taxpayers to demonstrate that none of the expenses or losses attributable to an individual separate unit were made available to offset income of a foreign corporation. The portion of any DCL for which the taxpayer makes this demonstration would not be treated as put to a foreign use and would be eligible for exceptions to the domestic use limitation.

Consider the following example: USP, a domestic corporation, wholly owns F1, a disregarded entity that is subject to worldwide taxation in Country X. In Year 1, F1 recognizes a $50 million loss for U.S. and Country X tax purposes.

Also in Year 1, USP acquires F2, a foreign corporation that is also subject to worldwide taxation in Country X. USP wishes to integrate the operations of F2 and F1 and elects to treat F2 as a disregarded entity, effective July 1, Year 1. During the portion of Year 1 that F2 is a disregarded entity, it recognizes a $1,000 loss. Accordingly, there is a $50,001,000 DCL attributable to the combined separate unit comprising USP's interests in F1 and F2.

The foreign use of expenses incurred through F2 causes the $1,000 net loss attributable to F2 to be ineligible for a domestic use election. However, if USP can demonstrate that none of the expenses that compose the $50 million loss attributable to F1 were put to a foreign use, it may make a domestic use election with respect to the F1 portion of the DCL.

Separate unit-specific rebuttal would not impose any of the burdens that concerned the Government in 2007. It would require no greater analysis of foreign tax law than is required currently: is a single item of expense made available to offset income of a foreign corporation? If so, then the entire portion of the DCL that is attributable to the individual separate unit is deemed to be put to a foreign use. Portions of the DCL could be attributed to individual separate units for this purpose under the existing rules that attribute items of income, gain, deduction, and loss to individual separate units.[27] No ordering, stacking, or tracing of foreign law attributes would be required. This limitation represents something of a compromise between the separate unit combination rules in the 1992 and 2007 regulations. The 1992 regulations only permitted the combination of separate units if losses of each separate unit were available to offset income of the other under foreign tax law.[28] By contrast, the 2007 Final Regulations combine all separate units that are subject to tax in the same foreign country.[29] This recommendation would continue to combine individual separate units but it would permit taxpayers to measure foreign use by reference to individual separate units, similar to the results that would have been obtained through the 1992 regulations' combination rule.

Any of these rebuttals would provide taxpayers significant flexibility in comparison to current law without imposing disproportionate administrative burdens. This would create significant benefits. It would align limitations under the DCL rules with potential double dipping, consistent with Congressional intent. It would also mitigate the disproportionate impact that the DCL regulations have on taxpayers that choose to bring foreign business operations within U.S. taxing jurisdiction.[30] The "all or nothing" principle effectively prevents certain taxpayers with significant DCLs from doing so.

4. De minimis exception to deemed foreign use

Each of the limitations on the "all or nothing" principle discussed above leaves in place a rebuttable presumption of deemed foreign use. In other words, if there is a foreign use of some of the expenses composing a DCL, and the taxpayer does not rebut foreign use of other items, the entire DCL would still be deemed put to foreign use. However, we recommend the burden not shift when only a de minimis portion of a DCL is made available for foreign use. For this

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[27] *See* Treas. Reg. § 1.1503(d)-5(c)(4)(ii) ("If two or more individual separate units … are treated as one combined separate unit …, [i]tems of income, gain, deduction, and loss are first attributed to each individual separate unit without regard to [the separate unit combination rule], pursuant to the rules of [Treas. Reg. § 1.1503(d)-5](c) through (e)[.] The combined separate unit then takes into account all of the items of income, gain, deduction, and loss attributable to its individual separate units[.]")

[28] *See* Treas. Reg. § 1.1503-2(c)(3)(ii).

[29] Treas. Reg. § 1.1503(d)-1(b)(4)(ii). For this purpose, foreign branch separate units are subject to combination in the foreign country in which they are located.

[30] For a more detailed discussion of acquisition and/or integration transactions, see infra part I.B.5.

purpose, de minimis could be defined by reference to both an absolute amount and a relative amount of the DCL (e.g., 10% of the DCL and $10 million).[31]

As discussed above, the "all or nothing" principle is a rule of administrative convenience designed to balance the risk of double dipping against the cost and complexity of ordering and tracking the use of expenses under foreign law. Although we believe that the weight given to these considerations should be rebalanced in all cases, de minimis foreign uses pose smaller risks of double dipping. Therefore, if the amount of a DCL made available for use is de minimis, then, by default, only the expenses made available for foreign use should be treated as such, while the remaining portion of the DCL should not be deemed to be put to a foreign use, regardless of whether the taxpayer files a rebuttal or demonstrates which expenses were not put to a foreign use to the satisfaction of the Commissioner. To be clear, the recommended de minimis exception would change the burden of proof, but it would not permit the domestic use of any expense that is put to a foreign use

5. Deemed Ordering Rule

    a. Restoring Treas. Reg. § 1.1503(d)-3(c)(3)

We commend the Government for their thoughtful consideration of stakeholder comments, as described in the Notice, and the resulting decision to revert to the deemed ordering rule in effect before January 2025. This approach restores consistency with longstanding principles under section 1503(d) and ensures that the DCL rules operate as intended—targeting only circumstances that present a meaningful risk of double dipping a single economic loss against two income streams.

The deemed ordering rule is a necessary constraint on the broad "made available" standard for testing foreign use. The made available standard, by itself, presents a highly unfavorable ordering rule, under which a foreign use occurs if any expense composing a DCL is made available to offset income of a foreign corporation, even if no offset occurs. If an expense composing a DCL offsets income of a foreign corporation, the DCL is deemed to be put to a foreign use even if the income being offset is disregarded for U.S. tax purposes.[32] In this regard, the regulations clearly respect offsets under foreign tax law irrespective of whether the income being offset is disregarded for U.S. tax purposes. Reversion to the prior deemed ordering rule

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[31] *Cf* Treas. Reg. § 1.901(m)-7 (applying a de minimis exception to covered asset acquisitions in which the total basis difference is less than the greater of $10 million or 10 percent of the total U.S. tax basis in the relevant foreign assets immediately thereafter).

[32] Treas. Reg. § 1.1503(d)-3(b) ("A foreign use shall be deemed to occur … regardless of whether it actually offsets or reduces any items of income or gain under the income tax laws of the foreign country … , and regardless of whether any of the items that may be so offset or reduced are regarded as income under U.S. tax principles.")

reinstates the balance between offsets that trigger foreign use and offsets that are eligible for this key exception to foreign use.

b. Further revisions to accommodate acquisition/integration transactions

We also recommend further revisions to the deemed ordering rule to target additional circumstances in which expenses are made available for foreign use without an actual foreign use. AM 2009-011 concludes that a foreign use occurs when expenses composing a DCL are incurred in a foreign tax year in which the foreign entity makes an entity classification election. More specifically, the memorandum concludes that when expenses are made available for use via an entity classification election, a foreign use occurs even if the foreign corporation did not recognize income that could be offset by DCL expenses.

We recommend expanding the deemed ordering rule to prevent a deemed foreign use when the expenses made available because of a mid-year transaction do not in fact reduce income of a foreign corporation. More specifically, if an expense composing a DCL is made available to offset income of a foreign corporation in the first taxable year that a separate unit is treated as such, the regulations should permit the taxpayer to demonstrate that the expenses composing the DCL do not actually reduce income of a foreign corporation in the year of the loss, any prior taxable year, and any future year.

The example on page 11 also illustrates this revision to the deemed ordering rule. The facts involving F2 mirror AM 2009-011, Scenario 1. F2 is a foreign corporation for a portion of its Country X Year 1 tax year, so, under the memorandum's interpretation of the current regulations, expenses incurred while F2 was a separate unit were made available to offset income of a foreign corporation and there is a foreign use of the DCL that those expenses compose. However, unlike in AM 2009-011, F2 is part of a combined separate unit, so if its expenses are made available for use, the entire $50,001,000 DCL is treated as being put to a foreign use.

If the recommended change to the deemed ordering rule for acquisitions is adopted, then it would allow USP to test whether the F2 expenses were actually put to a foreign use (*i.e.*, whether they offset income recognized during F2's foreign corporation period), not just whether they were made available for foreign use. F2 incurred a net loss for Country X tax purposes during the period it was treated as a foreign corporation, so the foreign corporation had sufficient expenses to offset all its income, and the expenses incurred in F2's separate unit period do not actually offset any income recognized in the foreign corporation period. For the expanded exception to apply, USP would also need to demonstrate that the expenses would not be put to a foreign use in a prior tax year (*e.g.*, through a County X loss carryback) or a future tax year. The tracking of loss carryforwards was a primary concern of the drafters of the 2007

Final Regulations. However, the regulations do not create incremental complexity when the relevant entity is a separate unit, so the use of a loss carryforward would not be a foreign use.

As illustrated in the above example, an analysis of actual foreign use requires probing more deeply into whether any portion of the DCL in fact offsets the foreign corporation's taxable income. The present "made available" standard presumes foreign use whenever the loss technically could offset income earned while the entity was still treated as a corporation, even if there is no positive foreign taxable income for the loss to absorb. A taxpayer will have difficulty defending the presumption when an entity classification election occurs halfway through the foreign taxable year and the corporation actually incurs a loss during the pre-election period. In such circumstances, the consolidated group has not realized any double dip, and the policy concern underlying section 1503(d) is absent.

II. Treatment of disregarded payments

A. Policy support for disregarded payment rules is unclear

The DCL regime prevents the domestic use of DCLs to prevent double dipping. Disregarded expenses and losses are not deductible for U.S. tax purposes and therefore do not facilitate double dipping. Rather, disregarded payments solely impact foreign tax bases.

The 2024 Proposed Regulations justified the DPL rules as necessary to address deduction/no inclusion ("D/NI") outcomes, consistent with BEPS Action 2.[33] However, while Congress has enacted multiple anti-hybrid regimes, none of them require taxpayers to include amounts in income as a defensive measure to prevent D/NI outcomes.[34] Rather, sections 267A and 245A(e) address D/NI outcomes by denying deductions. There is no indication that Congress intended for the Government to use the DCL regulations to police D/NI outcomes effectuated through disregarded payments. Accordingly, the DCL regulations should not police disregarded payments.

However, if the Government nonetheless chooses to incorporate disregarded payments into the DCL regime, we recommend not applying rules similar to Treas. Reg. § 1.904-4(f).

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[33] Rules Regarding Dual Consolidated Losses and the Treatment of Certain Disregarded Payments, 89 Fed. Reg. 64750, 64761-62 (Aug. 7, 2024) (the "2024 Proposed Regulations") (Addressing "the paradigm structure involving only disregarded deductions that give rise to D/NI outcomes").

[34] *See* sections 267A (denying deductions for certain expenses paid or accrued pursuant to a hybrid transaction or by, or to, a hybrid entity), 245A(e) (denying a dividends-received deduction with respect to a dividend that is a hybrid dividend), 1503(d).

B. Treas. Reg. § 1.904-4(f) is not fit for purpose.

The Notice asks for comments on whether disregarded payments should be taken into account for DCL purposes, including through the principles of Treas. Reg. § 1.904-4(f). As described below, Treas. Reg. § 1.904-4(f) is not suitable for reattributing expenses between separate units and domestic owners.

Treas. Reg. § 1.904-4(f)(2)(vi) reattributes income between foreign branches and foreign branch owners based on the income to which the disregarded expense would be apportioned if it were regarded. This structure could be used to reattribute income between separate units and domestic owners, but it does not reattribute expenses, which are the primary focus of the DCL rules. Using the principles of Treas. Reg. § 1.904-4(f) to reattribute expenses would require a mechanism to determine the expenses to which a disregarded payment relates. This could be done by either (i) treating a disregarded payment as if it were regarded and reattributing regarded expenses to the extent those expenses would be apportioned to the disregarded income if that income were regarded or (ii) reattributing aggregate amounts of expense and loss without identifying the particular expenses to be reattributed.[35]

Alternatives for reattributing expenses raise many questions. If the Government is most concerned about the impact of disregarded interest and royalty expense, as expressed through prior guidance addressing DPLs, section 861 is unlikely to reattribute the expenses that bear a direct economic relationship to a separate unit's disregarded expenses. Treas. Reg. § 1.861-9 and -9T apportion interest expense to income in proportion to the tax book value of assets that generate it. The section 861 regulations generally do not trace the source of funding (*e.g.*, through back-to-back financing arrangements), so applying them to disregarded interest generally would reattribute a wide range of operating expenses in addition to interest expense between separate units and domestic owners.

Similarly, the use of section 861 principles to reattribute expenses that "fund" disregarded royalties would rely in significant part on Treas. Reg. § 1.861-17, a similarly complex and mechanical regulation that is not fit to trace disregarded payments. Treas. Reg. § 1.861-17 generally allocates R&E expense to gross intangible income in the same SIC code as the underlying research and apportions the expense to groupings based on gross receipts.[36] Similar to interest, the mechanical R&E apportionment rules would reattribute a wide range of

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[35] Note that if future DCL regulations adopt a revised version of Treas. Reg. § 1.904-4(f), it would significantly increase the complexity and administrative burden imposed on taxpayers, as it would provide yet another major difference between the separate rules under sections 904, 987, and 1503(d) for tracking income/loss attributable to branches and/or separate units.

[36] *See* Treas. Reg. § 1.861-17(b) and (d).

operating expenses in addition to R&E and/or royalty expense between separate units and domestic owners.

In summary, Treas. Reg. § 1.904-4(f) does not reattribute expenses, and if it were adapted to do so, the results are unlikely to track the foreign law deductions that raise policy concerns. If, alternatively, future DCL regulations were to reattribute a portion of a separate unit or domestic owner's expenses in the aggregate, without concern for which expenses are being reattributed, significant changes to the definition of foreign use in Treas. Reg. § 1.1503(d)-3 would be required to test whether the reattributed expenses offset income of a foreign corporation. If a regarded expense of a domestic owner were reattributed to a separate unit, the regarded expense is unlikely to be put to a foreign use because that expense is not included in the computation of taxable income under foreign tax law. Instead, whether a regarded expense is put to a foreign use would likely need to be tested by reference to the foreign law treatment of the disregarded expense.

C. Increased compliance burden

Adding disregarded payment rules to the DCL regulations would significantly increase the complexity and administrative burden that they impose. Adding rules similar to Treas. Reg. §1.904-4(f) would substantially sacrifice administrability in the attempt to police a notional double-dip. The branch/disregarded-payment rules require granular reattribution tracking, cross-category movements, and return reporting (for example, Form 1118 instructions tell taxpayers to reattribute income with special FB "G2B/B2G" codes). Certain aspects of the rules are highly uncertain, such as the application of the rules to offsetting payments. Imposing that reporting framework onto DCLs would multiply compliance and controversy risk.

Alternatively, reattributing aggregate deductions would create significant burdens for testing foreign use as it would break the connection between U.S. and foreign law use of particular expenses and would instead require analysis of deemed double dipping.

Finally, we note that the reattribution rules cut both ways. For every disregarded payment that reduces foreign taxable income, another disregarded payment increases foreign taxable income. In the aggregate, the revenue effect of incremental DCLs attributable to the introduction of disregarded expenses is unlikely to outweigh the revenue effect of reduced DCLs due to the introduction of disregarded income.

III. Pillar 2

We commend the Government for extending the transition period during which Pillar Two is not relevant to the application of the DCL regulations to taxable years beginning before January

1, 2028.[37] This prevents the DCL regulations from imposing harsh consequences on U.S. taxpayers while the Inclusive Framework takes up the side-by-side system contemplated by the Group of Seven.

During the time granted by the Notice, the Government should permanently prevent the DCL rules from considering Qualified Domestic Minimum Top-Up Taxes ("**QDMTT**s"), which may or may not continue to apply to U.S.-based multinationals.

The 2024 Proposed Regulations proposed significant changes to the DCL regulations to coordinate with Pillar Two, including new definitions of separate units and specific rules for testing foreign use in interaction with the Pillar Two transitional CbCR safe harbor. However, in an executive order issued January 20, 2025, President Trump stated that the OECD Global Tax deal was not binding on the United States and ended any commitments regarding Pillar Two that the prior administration had made to the OECD.[38] Whether or not the 2024 Proposed Regulations represented a commitment to the OECD, they represented an effort to coordinate the DCL rules with Pillar Two and to use the DCL rules to address tax planning to reduce Top-Up Taxes. Thus, the portions of the 2024 Proposed Regulations that address Pillar Two appear to be inconsistent with the administration's current Pillar Two policy, which would instead support a permanent exemption from considering QDMTTs and other Top-Up Taxes for DCL purposes.

Aside from their general relationship with U.S. tax policy, Top-Up Taxes differ in significant ways from the foreign income taxes that Congress considered when enacting section 1503(d). Top-Up Taxes are minimum taxes that only apply where the effective tax rate in a jurisdiction is below 15 percent. Where a DCL is "made available" to offset the income of a foreign corporation, it is likely to produce a current or future benefit under an ordinary foreign income tax. In this context, administrability arguments for the "made available" are at least colorable. That presumption is not appropriate in the context of a top-up tax, however. There, a DCL will frequently not impact a taxpayer's liability under a top-up tax where the foreign income is subject to a sufficiently high rate of tax.

Finally, Top-Up Taxes are designed to apply separately from, and after, the ordinary corporate tax system. Foreign countries with anti-hybrid rules generally respect this ordering and therefore do not apply their anti-hybrid rules to perceived double-dipping under Top-Up Taxes. If the DCL rules apply to Top-Up Taxes (including QDMTTs), they will apply more harshly than other countries' anti-hybrid rules, putting U.S. multinationals at a competitive disadvantage.

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[37] Notice 2025-44, section 3.03.

[38] Exec Order, The Organization for Economic Co-Operation and Development (OECD) Global Tax Deal (Global Tax Deal), 90 Fed. Reg. 8483 (Jan. 30, 2025).

If the Government opts not to provide a blanket exemption of the DCL rules with Pillar Two, then it should at least consider a more targeted exemption for foreign jurisdictions with a statutory income tax rate that exceeds 15 percent. Even with incentives, in a country with a sufficient statutory rate most QDMTTs are likely to be eliminated through covered taxes rather than excessive deductions.

IV. Income arising from stock of foreign corporations

The 2007 Final Regulations attribute inclusions for stock (*e.g.*, under sections 951, 986(c), and 78) in the same manner as dividends. Such an inclusion is attributable to a separate unit to the extent that a dividend from a subsidiary would be so attributable.[39] However, many foreign countries have enacted participation exemptions or other regimes that effectively exempt from tax dividends from certain controlled subsidiaries. Noting this change, the 2024 Proposed Regulations proposed to exclude from the determination of DCLs all income from stock other than portfolio stock.[40]

However, when considering the interaction of the DCL and various controlled foreign corporations ("**CFCs**") regimes, it is important to note that significant changes to the taxation of U.S.-based multinationals has reduced the difference between income earned through branches and CFCs. When the DCL regulations were first crafted in 1992 and expanded in 2007, most CFC earnings were deferred indefinitely from the U.S. tax base. That premise no longer holds. Since 2018, sections 951 and 951A have subjected the majority of CFCs' income to current U.S. taxation, creating what is now essentially dual-inclusion income.[41]

Therefore, instead of eliminating income arising from stock from the computation of DCLs, we recommend recognizing CFC inclusions as dual inclusion income for purposes of the DCL regime. However, this dual inclusion income should be credited to the foreign jurisdiction in which it is subject to tax. To that end, an inclusion under section 951 or section 951A should be attributed to the consolidated group's separate unit from the same jurisdiction as the CFC (or

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39 Treas. Reg. § 1.1503(d)-5(c)(4)(iv).

40 *See* Prop. Treas. Reg. § 1.1503(d)-5(b)(2)(iv) and 1.1503(d)-5(c)(4)(iv) (2024).

41 *See generally* sections 951 (requiring a U.S. shareholder to include currently its pro rata share of a CFC's subpart F income and 951A (subjecting U.S. shareholders to current U.S. tax on their pro rata share of tested income, which generally comprises all gross income except for effectively connected income, gross subpart F income, income subject to a high rate of tax, related party dividends, and foreign oil and gas extraction income). Following the enactment of the One Big Beautiful Bill Act, inclusions under section 951A are no longer reduced by a deemed tangible income return. *See* Pub. L. 119-21 § 70323(a)(1). This change makes subpart F and net CFC tested income (formerly global intangible low-taxed income) inclusions more clearly dual inclusion income.

the jurisdictions of the CFC's tested units[42]), rather than the separate unit that owns the CFC stock (if any). In 2007, the Government justified the separate unit combination rule by pointing to the commonality between the U.S. and foreign tax bases.[43] That justification for grouping applies equally to tested units of CFCs that are subject to tax in the same jurisdiction as related separate units. Furthermore, if individual same-country separate units are combined solely based on ownership by a U.S. consolidated group, that level of relatedness can support attribution of CFC inclusions as well.

When a loss incurred by a separate unit or dual resident corporation offsets the income of a CFC already subject to immediate U.S. tax, the traditional "double-dip" concern of section 1503(d) is absent; the income being sheltered abroad is also included in the U.S. tax base in the same taxable year by operation of sections 951 and 951A. To the extent the perceived double-dip reduces foreign tax, it also reduces the deemed paid foreign tax credit for which a U.S. shareholder of the CFC is eligible. As some have argued, because the foreign use of a DCL is unlikely to reduce the federal income tax of U.S.-based multinationals, Congress should exempt U.S.-based multinationals from the DCL rules entirely.[44] But even if the Government declines to provide that relief, it can update the DCL regulations' accounting for dual inclusion income in a jurisdiction by rationalizing the impact of sections 951 and 951A on DCLs.

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[42] A tested unit includes a CFC, an interest held directly or indirectly by a CFC in a passthrough entity that is tax resident in a foreign country, and a branch in another foreign country. Treas. Reg. § 1.951A-2(c)(7)(iv).

[43] 2007 Final Regulations at 12903 ("The IRS and Treasury Department believe that combining same-country separate units of domestic corporations that are members of the same consolidated group is consistent with the policies underlying section 1503(d) because, in general, all of the items of income, gain, deduction, and loss of such combined separate units are taken into account in both the United States and the foreign country.")

[44] Wade Sutton, Updating the U.S. Dual Consolidated Loss Rules After TCJA: A Revenue-Raising Proposal, 118 Tax Notes Int'l 1105 (May 26, 2025).

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TEI appreciates the opportunity to comment on the Notice. TEI's comments were prepared under the aegis of the Tax Reform Task Force, whose Chair is Andreia Verissimo. Should you have any questions regarding TEI's comments, please do not hesitate to contact Andreia Verissimo at alveriss@amazon.com or TEI Tax Counsels Kelly Madigan at kmadigan@tei.org and Ben Shreck at bshreck@tei.org.

Respectfully submitted,

Walter B. Doggett

Walter B. Doggett
International President
TAX EXECUTIVES INSTITUTE
Washington, DC

Copies:

The Honorable Kenneth Kies
Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Rebecca Oakes Burch
Deputy Assistant Secretary (International Tax Affairs)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Kevin Salinger
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Scott Bessent
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224