

Additional Guidance Under Section 965

Notice 2018-78

SECTION 1. OVERVIEW

On August 9, 2018, the Department of the Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) published in the Federal Register (83 FR 39514) a notice of proposed rulemaking (REG-104226-18), which contained proposed §§1.962-1 and 1.962-2, 1.965-1 through 1.965-9, and 1.986(c)-1 (the “proposed regulations”). The proposed regulations relate to section 965 of the Internal Revenue Code.

SECTION 2. BASIS ELECTION UNDER PROPOSED §1.965-2(f)(2)

Proposed §1.965-2(f)(2) allows a section 958(a) U.S. shareholder (as defined in proposed §1.965-1(f)(33)) to elect to make certain basis adjustments with respect to each deferred foreign income corporation (as defined in proposed §1.965-1(f)(17)) and each E&P deficit foreign corporation (as defined in proposed §1.965-1(f)(22)) (such election, the “basis election”). Proposed §1.965-2(f)(2)(iii)(B)(1)(i) provides the general rule that the basis election must be made no later than the due date (taking into account extensions, if any) for the section 958(a) U.S. shareholder’s return for the first taxable year that includes the last day of the last taxable year of a deferred foreign income corporation or E&P deficit foreign corporation of the section 958(a) U.S. shareholder that begins before January 1, 2018. If the due date referred to in proposed §1.965-2(f)(2)(iii)(B)(1)(i) occurred before September 10, 2018, proposed §1.965-2(f)(2)(iii)(B)(1)(ii) (the “transition rule”) provides that the basis election must be made by October 9, 2018.

The Treasury Department and the IRS have determined that requiring taxpayers to make a binding basis election before the proposed regulations are finalized would be too onerous for taxpayers. Accordingly, the Treasury Department and the IRS intend that when final regulations under section 965 are published in the Federal Register (the “final regulations”), the final regulations will provide that the transition rule will apply with respect to returns due (determined with regard to any extension) before the date that is 90 days after the date that the final regulations are published and that in such cases the basis election must be made no later than 90 days after the publication of the final regulations in the Federal Register. In addition, the final regulations will provide that if a basis election was made on or before the date the final regulations are published, the basis election may be revoked no later than 90 days after the publication of the final regulations in the Federal Register. Relevant tax returns must be filed consistently with an election that has been made and not revoked.

SECTION 3. APPLICATION OF PROPOSED §1.965-3(b) TO CONSOLIDATED GROUPS

Proposed §1.965-3(b) provides rules allowing a section 958(a) U.S. shareholder to disregard certain assets for purposes of determining its aggregate foreign cash position (as defined in proposed §1.965-1(f)(8)). Proposed §1.965-8(e) provides that all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation (as defined in proposed §1.965-1(f)(45)) are treated as a single section 958(a) U.S. shareholder for certain enumerated purposes that do not include proposed §1.965-3(b). To prevent the overstatement of the aggregate foreign cash position, the final regulations will provide that all members of a consolidated group that are section 958(a) U.S. shareholders of a specified foreign corporation are also

treated as a single section 958(a) U.S. shareholder for purposes of proposed §1.965-3(b).

SECTION 4. RELIEF IN CONNECTION WITH HURRICANE FLORENCE

On September 15, 2018, and September 24, 2018, in response to Hurricane Florence, the IRS announced (IR-2018-187, NC-2018-03, SC-2018-01) that certain individual and business taxpayers would have until January 31, 2019, to file certain tax returns and make certain tax payments. Questions have arisen as to whether that announcement applies to elections with respect to section 965 and transfer agreements required to be filed under the proposed regulations. This notice provides a postponement for affected taxpayers to make elections with respect to section 965 and file transfer agreements required to be filed under the proposed regulations. Affected taxpayers for whom elections with respect to section 965 or transfer agreements are due on or after September 7, 2018, and before January 31, 2019, are granted additional time to file such elections or transfer agreements until January 31, 2019.

An affected taxpayer is any taxpayer whose principal residence or principal place of business was located in a Hurricane Florence covered disaster area, as defined in §301.7508A-1(d)(2), or whose records necessary to meet its obligation were maintained in such a covered disaster area, or in the case of a transfer agreement, a taxpayer who intends to enter into a transfer agreement with such a taxpayer.

Taxpayers who believe they are entitled to this relief should mark “Hurricane Florence” on the top of the relevant section 965 election statement or transfer agreement, and, in the case of a transfer agreement, a notation of which party to the agreement is an affected taxpayer whose principal residence or principal place of

business was located in a Hurricane Florence covered disaster area, as defined in §301.7508A-1(d)(2), or whose records necessary to meet its filing obligation were maintained in such a covered disaster area.

SECTION 5. SUBMISSION OF COMMENTS

The Treasury Department and the IRS requested comments in the proposed regulations on all aspects of the proposed regulations, with a deadline of October 9, 2018, for comments to be submitted. The Treasury Department and the IRS are still considering all of the comments that have been submitted as of the date of this notice with respect to the proposed regulations in the course of developing final regulations under section 965. The Treasury Department and the IRS continue to welcome the submission of additional comments with respect to the proposed regulations by the October 9, 2018, deadline. This notice is being issued in advance of final regulations under section 965 due to the imminent filing deadlines that could otherwise apply to the forms and elections described herein.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Leni Perkins of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, contact Ms. Perkins at (202) 317-6934 (not a toll free call).