FOREIGN DERIVED INTANGIBLE INCOME (FDII): WHAT YOU NEED TO KNOW

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With you today

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Agenda

- Overview of Section 250
- Taxpayers eligible for the FDII deduction
- Qualifying transactions
- Documentation requirements
- Calculating Qualified Business Asset Investment
- Other important computational and reporting considerations
Overview of Section 250
Section 250(a)

A domestic corporation allowed a deduction

\[=\]

37.5\% of its foreign-derived intangible income (FDII)
  - Reduced to 21.875\% for tax years beginning after 12-31-2025

+ 

50\% of its global intangible low-taxed income (GILTI) and section 78 gross up attributable to its GILTI
  - Reduced to 37.5\% for tax years beginning after 12-31-2025

Taxable income limitation in section 250(a)(2)
Section 250(b)

**FDII = Deemed Intangible Income (DII)**

**DII = DEI - Deemed Tangible Income Return (DTIR)**

**DTIR = 10% of Qualified Business Asset Investment (QBAI)**

**Foreign-Derived Deduction Eligible Income (FDDEI) = Deduction Eligible Income (DEI)**

- Various rules and definitions with regards to each item
Section 250(b)(3)

DEI = Gross income determined without regards to -
- Any amount included under section 951(a)(1),
- GILTI included under section 951A,
- Any financial services income (as defined in section 904(d)(2)(D)),
- Any dividend received from a CFC,
- Any domestic oil and gas extraction income
- Any foreign branch income (as defined in section 904(d)(2)(J))

Over

The deductions (including taxes) properly allocable to such gross income
Section 250(b)(4)

\[
\text{FDDEI} = \text{DEI derived in connection with -}
\]

property -
- which is sold by the taxpayer to any person who is not a U.S. person, and
- which the taxpayer establishes to the satisfaction of the Secretary is for foreign use

Or

services provided by the taxpayer which the taxpayer establishes to the Secretary are provided
- to any person, or
- with respect to property, not located within the United States
Taxpayers Eligible for the FDII Deduction
Proposed §1.250(a)-1

- Proposed §1.250(a)-1(b) allows a “domestic corporation” to claim a section 250 deduction.

- Proposed §1.250(a)-1(c) specifies that “domestic corporation” has the meaning set forth in section 7701(a), but does not include a regulated investment company, a real estate investment trust, or an S corporation.
Proposed §1.962-1: 962 Election

- For purposes of section 962, “taxable income” as used in section 11 of an electing individual is reduced by the portion of the section 250 deduction that would be allowed to a domestic corporation with respect to the individual’s GILTI and the section 78 gross-up attributable to the shareholder’s GILTI. See proposed §1.962-1(b)(1)(i)(B)(3)

- Proposed §1.962-1(b)(1)(i)(B)(3) is proposed to apply to taxable years of a foreign corporation ending on or after March 4, 2019, and with respect to a U.S. person, for the taxable year in which or with which such taxable year of the foreign corporations ends

- Taxpayers may rely on proposed §1.962-1(b)(1)(i)(B)(3) for taxable years ending before March 4, 2019
Proposed §1.250(b)-1: Treatment of Partnerships

- A domestic corporate partner of a partnership takes into account its distributive share of a partnership’s gross DEI, gross FDDEI, and deductions in order to calculate the partner’s FDII. See proposed §1.250(b)-1(e)(1)

- For purposes of determining a domestic corporate partner’s DTIR, a domestic corporation’s QBAI is increased by its share of the partnership’s adjusted basis in partnership specified tangible property. See proposed §1.250(b)-2(g)

- The section 250 deduction does not exempt the deducted income from tax for purposes of applying section 705(a)(1)(B)
  - As a result, a basis adjustment to a domestic corporate partner’s interest in a domestic partnership is not appropriate to account for a section 250 deduction

- Special rules for tax exempt corporations (only to the extent taken into account for UBTI)
  - See proposed §1.250(b)-1(g)
Qualifying FDDEI Transactions
Proposed §1.250(b)-3: FDDEI Transactions

- FDDEI transactions include the sale of property (proposed §1.250(b)-4) or provision of a service (proposed §1.250(b)-5)

- “Sale” defined to include a lease, license, exchange, or other disposition of property, including a transfer of property resulting in gain or an income inclusion under section 367. See proposed §1.250(b)-3(b)(7)

- Qualifying transactions generating a loss must generally be included in FDDEI
Proposed §1.250(b)-4: FDDEI Sales

- **FDDEI sales** means sales from property sold to a foreign person for foreign use.

- The rules applicable to the determination of whether a sale of property is for a foreign use depends on whether the property sold is:
  - General property, or
  - Intangible property
  - See proposed §1.250(b)-4(d) and (e)

- General property defined as property other than intangible property, a security (section 475(c)(2)), or a commodity (section 475(e)(2)(B) through (D)). See proposed §1.250(b)-3(b)(3)
  - A sale of a security or a commodity is not a FDDEI sale because such financial instruments are not subject to “any use, consumption, or disposition” outside the United States. See proposed §1.250(b)-4(f)

- Intangible property defined by cross-reference to section 367(d)(4). See proposed §1.250(b)-3(b)(4)
## Proposed §1.250(b)-4: FDDEI Sales & Foreign Use

<table>
<thead>
<tr>
<th>General Property</th>
<th>Intangible Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>▶ Foreign use if not subject to domestic use within 3 years of delivery of the product or the property is subject to manufacture, assembly, or other processing (MAP) outside the U.S. before domestic use</td>
<td>▶ Foreign use if revenue is earned from exploiting the IP outside the U.S.</td>
</tr>
<tr>
<td>▶ Domestic use is the use, consumption or disposition of property within the U.S., including MAP within the U.S.</td>
<td>▶ May establish foreign use for a portion of the income</td>
</tr>
<tr>
<td>▶ MAP if (1) physical and material change to property or (2) property incorporated as a component into a second product (special rules relating to components)</td>
<td>▶ Where revenue is earned generally based on location of end user customers licensing the IP or purchasing products for which the IP was used in development, manufacture, sale or distribution</td>
</tr>
<tr>
<td>▶ Minor assembly, packaging, or labelling not a physical and material change</td>
<td>▶ Determination generally made on an annual basis on the actual revenue earned</td>
</tr>
<tr>
<td>▶ Physical and material change is based on all relevant facts and circumstances</td>
<td>▶ Special rules apply to lump sum sales (based on relative NPV of revenue from exploiting the IP inside and outside the U.S.)</td>
</tr>
<tr>
<td>▶ Special rule for certain transportation property</td>
<td>▶ Documentation rules relating to foreign use</td>
</tr>
<tr>
<td>▶ Documentation rules to establish property is for a foreign use (including special rules for “fungible mass” and small business/small transactions)</td>
<td></td>
</tr>
</tbody>
</table>
Proposed §1.250(b)-5: FDDEI Services

- **FDDEI services** means services provided by a domestic corporation to any person, or with respect to property, not located within the United States.

- If both a sale component and service component, the transaction is classified according to the overall predominant character of the transaction for purposes of determining whether the transaction is subject to rules relating to sales or services. See proposed §1.250(b)-3(e).
Proposed §1.250(b)-5: FDDEI Services

For purposes of determining whether a service constitutes a FDDEI service:

- **Proximate services** (location of the performance of the service)
  - Service renderer and recipient are in physical proximity when the service is performed
- **Property services** (location of the property)
  - Services with respect to tangible property resulting in manipulation of property
- **Transportation services** (the origin and destination)
  - Services to transport people or property
- **General services** (the location of the recipient)
  - All other services

Each category of service is mutually exclusive and every possible service is described in a single category.
### Proposed §1.250(b)-4: FDDEI Services

<table>
<thead>
<tr>
<th>General Service</th>
<th>Proximate Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residual category</td>
<td>Service, other than a property or transportation service, substantially all (&gt;80%) of which is performed in the physical presence of the recipient</td>
</tr>
<tr>
<td>Recipient must be located outside the U.S.</td>
<td>Recipient located where service is performed</td>
</tr>
<tr>
<td>Consumer (individuals who purchase a service for personal consumption) vs. business recipients (any recipient other than a customer)</td>
<td>If part within and outside the U.S., based on corresponding portion of time spent providing proximate service outside the U.S.</td>
</tr>
<tr>
<td>For consumers - residence of consumer when service is provided</td>
<td></td>
</tr>
<tr>
<td>For business recipient - location of business operations (office or other fixed place of business) that receives a benefit (can be split)</td>
<td></td>
</tr>
<tr>
<td>• Includes related parties that receive a benefit</td>
<td></td>
</tr>
<tr>
<td>Service is generally provided to a business recipient located outside the U.S. to the extent that the renderer’s gross income is allocated to business recipient’s operations outside the U.S.</td>
<td></td>
</tr>
</tbody>
</table>
**Proposed §1.250(b)-4: FDDEI Services**

<table>
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<tr>
<th>Property Service</th>
<th>Transportation Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>► Service, other than transportation service, provided with respect to tangible</td>
<td>► Service to transport person/property using any mode of transportation</td>
</tr>
<tr>
<td>property</td>
<td>► FDDEI based on origin and destination</td>
</tr>
<tr>
<td>► Substantially all of the service is performed at the location of the property</td>
<td>► Both origin and destination outside the U.S., then FDDEI service</td>
</tr>
<tr>
<td>► Results in manipulation of the property such as through assembly, maintenance</td>
<td>► If either origin or destination outside the U.S. (but not both), then 50% FDDEI service</td>
</tr>
<tr>
<td>or repair</td>
<td>►</td>
</tr>
<tr>
<td>► Location of performance</td>
<td></td>
</tr>
</tbody>
</table>
Proposed §1.250(b)-6: Related Party Sales

If a foreign related party resells the purchased property, the related party sale is a FDDEI sale if -

- An unrelated party transaction with respect to such sale occurs, and
  - The unrelated party sale generally must occur on or before the FDII filing date
  - If unrelated party sale occurs after FDII filing date, may amend if SOL otherwise open
- The unrelated party transaction is a FDDEI sale
Proposed §1.250(b)-6: Related Party Sales

- If foreign related party uses the purchased property to produce other property sold to unrelated parties or in the provision of a service to unrelated parties, the related party sale is a FDDEI sale if
  - As of the FDII filing date, the seller reasonably expects that more than 80 percent of the revenue earned by the foreign related party from the use of the property in all transactions will be earned from unrelated party transactions that are FDDEI transactions (determined without regards to the documentation requirements)

- Sales of intangible property, whether to a related or an unrelated party, are for a foreign use only to the extent that the intangible property generated revenue from exploitation outside the United States. See proposed §1.250(b)-4(e)(2)
Proposed §1.250(b)-6: Related Party Services

- Related party rule applies only to determine whether general services to business recipient that is a related party is FDDEI (minimal round tripping risk with other types of services)

- Provision of a general service to a related party business recipient qualifies as a FDDEI service only if the service is not substantially similar to a service provided by the related party to persons located within the United States. See proposed §1.250(b)-6(d)(1)
Proposed §1.250(b)-6: Related Party Services

- **Substantially similar** if related party uses renderer’s services to
  - Provide a service to a person located within the United States and
  - Either
    - The **benefit test** of proposed §1.250(b)-6(d)(2)(i)
      - 60% or more of the benefits conferred by the related party service are to persons located within the United States
      - If benefit test failed, the entire amount is disallowed
    - or
    - The **price test** of proposed §1.250(b)-6(d)(2)(ii) is satisfied
      - 60% or more of the price that persons located within the United States pay for the service provided by the related party is attributable to the renderer’s service
      - Partial disallowance (based on the benefits provided to persons in the United States)
Documentation Requirements
Proposed §1.250(b)-3: Documentation

- For documentation to be relied upon,
  - The seller or renderer must obtain the documentation by the FDII filing date,
  - The documentation must be obtained no earlier than one year before the sale or service, and
  - The seller or renderer must not know or have reason to know that the documentation is incorrect or unreliable

See proposed §1.250(b)-3(d); see also proposed §1.250(b)-3(b)(1) (defining the term “FDII filing date”)

- A seller or renderer has reason to know that documentation is unreliable or incorrect if its knowledge of all the relevant facts or statements contained in the documentation is such that a reasonably prudent person in the position of the seller or renderer would question the accuracy of the documentation. See proposed §1.250(b)-3(d)(1)

- Special rules for failure to provide documentation for a loss transaction. See proposed §1.250(b)-3(f)
Proposed §1.250(b)-4: FDDEI Sales Documentation

- A recipient is treated as a foreign person only if the seller obtains documentation of the recipient’s foreign status and does not know or have reason to know that the recipient is not a foreign person. See proposed §1.250(b)-4(c)(1)

- Several types of documentation are permissible for this purpose, such as a written statement by the recipient indicating that the recipient is a foreign person. See proposed §1.250(b)-4(c)(2)(i)

- Documentation is also required to establish that general property is for foreign use; examples include a binding contract providing that the recipient’s use or intended use of the property is for a foreign use, or documentation of shipment of the general property to outside the United States (e.g., export bill of lading or customs documentation)

- Exception for small businesses (less than $10,000,000 of gross receipts in the prior taxable year) and small transactions (less than $5,000 in gross receipts from a single recipient during the current taxable year). See proposed §1.250(b)-4(c)(2)(ii)
  - Treats a recipient as a foreign person and sale of property as meeting the foreign use requirement if seller has a shipping address for the recipient that is outside the United States
Proposed §1.250(b)-5: FDIll Services Documentation

- Document the location of the consumer for general services. See proposed §1.250(b)-5(d)(1) and (3)
  - Several types of permissible documentation for this purpose, including a written statement by the consumer indicating the residence of the consumer when the service is provided. See proposed §1.250(b)-5(d)(3)(i)
  - Exception for certain small businesses and small transactions (may rely on foreign billing address for consumer). See proposed §1.250(b)-5(d)(3)(ii)
Proposed §1.250(b)-5: FDEII Services Documentation

Documentation sufficient to establish the location of a business recipient’s operations that benefit from the general service. See proposed §1.250(b)-5(e)(1) and (3).

• A statement from the recipient specifying the location of the operations that will benefit from the service or include a similar statement in a binding contract. See proposed §1.250(b)-5(e)(3)(i)(A) and (B)

• A domestic corporation may also establish the location of the business recipient using information provided in the ordinary course of the provision of a service or publicly available information. See proposed §1.250(b)-5(e)(3)(i)(C) and (D)

• Exception for certain small businesses and small transactions (may rely on foreign billing address of business recipient). See proposed §1.250(b)-5(e)(3)(ii)
Documentation Requirements

For tax years beginning on or before March 4, 2019, taxpayers may use “any reasonable documentation” maintained in its ordinary course of business to establish foreign requirements. See proposed §1.250-1(b). Examples may include the following:

- Invoice with shipping address
- Tracking information
- Billing address for service recipients

Taxpayers should begin planning how they will comply once proposed regulations are applicable for future tax years

- Information should be gathered and stored contemporaneously as part of tax return workpapers
- Consider possibility of statistical sampling
Determining QBAI
Proposed §1.250(b)-2: Determination of QBAI

✓ **QBAI** means -
  - The average of a domestic corporation's aggregate adjusted bases as of the close of each quarter of a domestic corporation's taxable year in specified tangible property that is used in a trade or business of the domestic corporation and
  - is of a type with respect to which a deduction is allowable under section 167

See proposed §1.250(b)-2(b)

✓ **Specified tangible** property means tangible property used in the production of gross DEI.

See proposed §1.250(b)-2(c)(1)

  - Subject to dual use property rules in proposed §1.250(b)-2(d)
Tangible property means property for which the depreciation deduction provided by section 167(a) is eligible to be determined under section 168 without regard to section 168(f) (1), (2), or (5) and the date placed in service. See proposed §1.250(b)-2(c)(2)

- The adjusted basis in specified tangible property is determined by using the alternative depreciation system (ADS) under section 168(g), and by allocating the depreciation deduction with respect to such property for the domestic corporation's taxable year ratably to each day during the period in the taxable year to which such depreciation relates. See proposed §1.250(b)-2(e)(1)
- ADS generally provides for longer recovery periods as compared to GDS; thus, tax basis under ADS will likely be higher (resulting in higher DTIR, and lower DII)

- Rules for dual use property, calculating QBAI in a short taxable year, and calculating a domestic corporate partner’s share of partnership QBAI. See proposed §1.250(b)-2(d), (f), and (g)

- Anti-avoidance rules apply
QBAI Considerations

- Capital-intensive taxpayers may benefit from cost segregation studies and depreciation “scrubs” to apply shorter recovery lives on depreciable property

- Some uncertainties surrounding QBAI persist:
  - If taxpayer has little to no additions/dispositions in a given year, can the quarterly calculation be streamlined?
  - If an asset has been improperly classified for GDS purposes, does the improper classification carry over into the ADS computation?
Computational and Reporting Considerations
Proposed §1.250(b)-1: DEI and FDDEI

- Once a taxpayer determines the amount of gross receipts from qualifying FDDEI transactions, cost of goods sold (COGS) must be attributed to gross receipts to arrive at gross DEI and gross FDDEI.

- Next, deductions must be allocated to gross DEI and gross FDDEI under the rules set forth in §§1.861-8 through 1.861-14T and 1.861-17. See proposed §1.250(b)-1(d)(2)(i)
  - To avoid circularity, the section 250 deduction is not treated as giving rise to exempt income or assets. See proposed §1.861-8(d)(2)(ii)(C)(4)
  - Research and experimental expenditures are allocated and apportioned in accordance with §1.861-17 without taking into account the exclusive apportionment rule of §1.861-17(b)

- **Foreign derived ratio** means the ratio (not to exceed one) of the corporation's FDDEI for the year to the corporation's DEI for the year. See proposed §1.250(b)-1(c)(13)
Consolidated Groups

▼ A member’s section 250 deduction is determined by reference to the relevant items of all members of the same consolidated group

▼ Definitions in proposed §1.1502-50(f) result in the aggregation of the DEI, FDDEI, DTIR, and GILTI of all members

▼ These aggregate numbers and the consolidated group’s consolidated taxable income are then used to calculate an overall deduction amount for the group
  • Proposed §1.1502-50(b) then allocates this overall deduction amount among the members on the basis of their respective contributions to the consolidated group’s aggregate amount of FDDEI and the consolidated group’s aggregate amount of GILTI

▼ Special rules regarding intercompany transactions. See proposed §1.1502-50(c)(1) and new example in §1.1502-13
## Ordering Rules and Interaction with Other Provisions

**Ordering rules for purposes of sections 163(j), 172(a) and 250**

1. **Calculate tentative section 250**
   - taking into account all deductions
   - but w/o 163(j) carryforwards/disallowances, 172(a) or 250(a)(2) TI limitation

2. **Calculate disallowed interest under section 163(j)**
   - w/ tentative section 250 deduction
   - but w/o 172(a)

3. **Calculate NOL under section 172(a)**
   - w/ 163(j) and 172(a)(2) TI limitation
   - but w/o section 250 deduction (including tentative section 250 deduction)

4. **Calculate FDII**
   - w/ 163(j) and 172(a)

5. **Calculate section 250 deduction**
   - w/ 250(a)(2) TI limitation taking into account 163(j) and 172(a)

See proposed §1.250(a)-1(f)(2) (Example 2)
Reporting Requirements

- Form 8993, Section 250 Deduction for Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI). See proposed §1.250(a)-1(d)

- A partnership that has one or more direct or indirect partners that are domestic corporations and that is required to file a return under section 6031 must furnish on Schedule K-1 (Form 1065) the partner’s share of the partnership’s gross DEI, gross FDDEI, deductions that are definitely related to the partnership’s gross DEI and gross FDDEI, and partnership QBAI for each taxable year in which the partnership has gross DEI, gross FDDEI, or partnership specified tangible property. See proposed §1.250(b)-1(e)(2)
  - However, more information may be necessary if partner must allocate expenses between DEI and FDDEI under section 861 principles; for instance:
    - R&D expenses (SIC code information)
    - Interest expense (asset information - different from QBAI)
Questions?
Section 250(b)(5)(C)(i)

**Related Party Sales**

If property is sold to a non-U.S. related party, such sale is not for a foreign use unless:

- such property is ultimately sold by a related party, or
- used by a related party in connection with property which is sold or the provision of services, to another person who is an unrelated party that is a non-U.S. person

And

- the taxpayer establishes to the satisfaction of the Secretary that such property is for a foreign use
Section 250(b)(5)(C)(ii)

Related Party Services

If a service is provided to a related party who is not located in the United States, such service shall not be treated as a FDDEI service unless -

The taxpayer established to the satisfaction of the Secretary that such service is not substantially similar to services provided by such related party to persons located within the United States.
Section 250(b)(5)(B)

Property or services provided to domestic intermediaries -

Property. If a taxpayer sells property to another person (other than a related party) for further manufacture or other modification within the United States, such property shall not be treated as sold for a foreign use even if such other person subsequently uses such property for a foreign use.

Services. If a taxpayer provides services to another person (other than a related party) located within the United States, such services shall not be treated as described in section 250(b)(4)(B) even if such other person uses such services in providing services which are so described.
Proposed §1.250(a)-1

A domestic corporation’s taxable income for purposes of applying the taxable income limitation of section 250(a)(2) is determined after all of the corporation’s other deductions are taken into account. See proposed §1.250(a)-1(c)(4)

A domestic corporation’s taxable income for purposes of section 250(a)(2) is its taxable income determined without regard to section 250, but taking into account the application of sections 163(j) and 172(a), including amounts permitted to be carried forward to such taxable year by reason of sections 163(j)(2) and 172(b)
Proposed §1.250(b)-1: DEI and FDDEI

- **DEI** means, the excess (if any) of the corporation's gross DEI for the year, over the deductions properly allocable to gross DEI for the year, as determined under proposed §1.250(b)-1(d)(2). See proposed §1.250(b)-1(c)(2)

- **FDDEI** means the excess (if any) of the corporation's gross FDDEI for the year, over the deductions properly allocable to gross FDDEI for the year, as determined under proposed §1.250(b)-1(d)(2). See proposed §1.250(b)-1(c)(12)

- COGS is attributed to gross receipts with respect to gross DEI and gross FDDEI using any reasonable method. See proposed §1.250(b)-1(d)(1)
  - COGS that is associated with activities undertaken in an earlier taxable year cannot be segregated into component costs and attributed disproportionately to amounts excluded from gross FDDEI or to amounts excluded from gross DEI
Proposed §1.250(b)-1: DEI and FDDEI

- For purposes of determining gross DEI, a dividend includes any amount treated as a dividend under the Code, including the section 78 gross-up attributable to inclusions under sections 951(a) and 951A(a), along with sections 356(a)(2), 367(b) and 1248. See proposed §1.250(b)-1(c)(5)

- Foreign branch income defined by reference to proposed §1.904-4(f), except that it also includes the sale, directly or indirectly, of any asset (other than stock) that produces gross income attributable to a foreign branch, including by reason of the sale of a disregarded entity or partnership interest. See proposed §1.250(b)-1(c)(11)
  - The result is that income from the sale of any such asset is not included in gross DEI

- All income included in gross DEI is included in either gross FDDEI or gross non-FDDEI, and all income included in either gross FDDEI or gross non-FDDEI is included in gross DEI
Proposed §1.250(b)-2: Determination of QBAI

- Anti-avoidance rule disregarding certain transfers that would otherwise reduce the domestic corporation’s DTIR

- General anti-avoidance rule for transactions with specified related parties. See proposed §1.250(b)-2(h)(1) and (h)(4)(i) through (iv)
  - If a domestic corporation -
    - transfers specified tangible property to a related party (whose QBAI not taken into account in determining the corporation’s DTIR),
    - within a two year period beginning one year before the transfer, the corporation (or certain related parties) leases same/substantially similar property from a related party, and
    - transfer/lease pursuant to a principal purpose of reducing the corporation’s DTIR,
  - then disregard the transfer for purposes of calculation the corporation’s QBAI
Proposed §1.250(b)-2: Determination of QBAI

- Anti-avoidance rule does not apply to transactions with unrelated parties unless it is a **structured arrangement**. See proposed §1.250(b)-2(h)(2)

- **Structured arrangement**, exists only if either
  - A reduction in the domestic corporation’s DTIR is a material factor in the pricing of the arrangement; or
  - The reduction in the domestic corporation’s DTIR is a principal purpose of the arrangement (all facts and circumstances)

- Per se rule for both the general rule and structure arrangements where transactions are treated per se as occurring pursuant to a principal purpose of reducing the domestic corporation’s DTIR. See proposed §1.250(b)-2(h)(3)
  - Transfer and lease both occur within a 6-month period
Proposed §1.250(b)-3: General Rules

- “Sale” defined to include a lease, license, exchange, or other disposition of property, including a transfer of property resulting in gain or an income inclusion under section 367. See proposed §1.250(b)-3(b)(7)

- A foreign person is a person that is not a U.S. person. See proposed §1.250(b)-3(b)(2)
  - Includes a foreign government or international organization

- United States has the same meaning as under section 7701(a)(9), as expanded to include certain mines, oil and gas wells, and other natural deposits. See proposed §1.250(b)-3(b)(9)

- A U.S. person has the same meaning as under section 7701(a)(30), except that an individual that is a bona fide resident of a U.S. territory within the meaning of section 937(a) is excluded. See proposed §1.250(b)-3(b)(10)
Proposed §1.250(b)-3: General Rules

- In determining whether a sale of property to or by a partnership qualifies as a FDDEI sale, or the provision of a service to or by a partnership qualifies as a FDDEI service, a partnership is treated as a person. See proposed §1.250(b)-3(g)

- Special favorable rules regarding foreign military sales. See proposed §1.250(b)-3(c)

- The proposed regulations do not contain specific rules corresponding to the domestic intermediary rules because those rules are encompassed within the general rules relating to FDDEI sales and FDDEI services in the proposed regulations
Proposed §1.250(b)-1: Related Party Definition

Related party means any member of an affiliated group (section 1504(a)) determined -
• By substituting “more than 50%” for “at least 80%” each place it appears, and
• Without regard to section 1504(b)(2) and (3)
See proposed §1.250(b)-1(c)(17)(i)

Any person (other than a corporation) shall be treated as a member of such group if such person is controlled by members of such group (including any entity treated as a member of such group by reason of this sentence) or controls any such member
• For purposes of the preceding sentence, control shall be determined under the rules of section 954(d)(3) (>50%)
See proposed §1.250(b)-1(c)(17)(ii) and (19)
Proposed §1.250(b)-6: Related Party Sales

Unrelated party transaction means, with respect to property purchased in a related party sale from a seller -

- A sale of the property by a foreign related party to a foreign unrelated party with respect to the seller;
- A sale of property by a foreign related party to a foreign unrelated party with respect to the seller if the property sold in the related party sale is a component of the property sold to the foreign unrelated party;
  - For purposes of this rule, whether property is a component of another property that is subsequently sold in an unrelated party transaction is determined without regard to the rule defining a “component” for purposes of determining whether general property is subject to manufacturing, assembly, or other processing in proposed §1.250(b)-4(d)(2)(iii)(C)
- A sale of property by a foreign related party to a foreign unrelated party with respect to the seller, other than a sale described in paragraph (b)(5)(ii) of this section, if the property sold in the related party sale is used in connection with the property sold to the foreign unrelated party; or
- A provision of a service by a foreign related party to a foreign unrelated party with respect to the seller, if the property sold in the related party sale was used in connection with the provision of the service
Additional Reporting Requirements

- The proposed regulations provide that controlling U.S. persons or reporting corporations, that claim a deduction under section 250 determined by reference to FDII with respect to amounts reported on Form 5471, 5472, or 8865 must report certain information relating to transactions with foreign business entities or related parties in accordance with sections 6038 and 6038A. See proposed §§1.6038-2(f)(15), 1.6038-3(g)(4), and 1.6038A-2(b)(5)(iv)

- Controlling ten-percent partners and controlling fifty-percent partners (as defined in §1.6038-3(a)(1) and (2)) of certain foreign partnerships controlled by U.S. persons to report on Schedule K-1 (Form 8865), “Partner’s Share of Income, Deductions, Credits, etc.,” the partner’s share of the partnership’s gross DEI, gross FDDEI, deductions that are definitely related to the partnership’s gross DEI and gross FDDEI, and partnership QBAI. See proposed §1.6038-3(g)(4)
Applicability Dates

- Proposed §§1.250(a)-1 through 1.250(b)-6 are proposed to apply to taxable years ending on or after March 4, 2019. See section 7805(b)(1)(B)

- Taxpayers may rely on proposed §§1.250(a)-1 through 1.250(b)-6 for taxable years ending before March 4, 2019

- See slide 30 for documentation for taxable years beginning on or before March 4, 2019
Applicability Dates

- Proposed §1.1502-50 is proposed to apply to consolidated return years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register. See sections 1503(a) and 7805(b)(1)(A)

- Taxpayers may rely on proposed §1.1502-50 for taxable years ending before the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register

- Proposed §§1.6038-2(f)(15) and 1.6038A-2(b)(5)(iv) are proposed to apply with respect to information for annual accounting periods beginning on or after March 4, 2019. See sections 6038(a)(3) and 7805(b)(1)(B)

- Proposed §1.6038-3(g)(4) is proposed to apply to taxable years of a foreign partnership beginning on or after March 4, 2019. See section 7805(b)(1)(B)
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