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August 6, 2020

The Honorable Chuck Grassley
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate

The Honorable Richard Neal
Chairman
The Honorable Kevin Brady
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service: Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service (IRS) entitled "Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax" (RIN: 1545-BP15). We received the rule on July 21, 2020. It was published in the *Federal Register* as final regulations on July 23, 2020. 85 Fed. Reg. 44620. The effective date of the rule is September 21, 2020.

This final rule relates to changes made by the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017). IRS stated that the rule provides that the global intangible low-taxed income (GILTI) high-tax exclusion in section 951A(c)(2)(A)(i)(III) of the Internal Revenue Code (IRC) applies to high-taxed income of a controlled foreign corporation (CFC) that is excluded from foreign base company income (FBCI) or insurance income under section 954(b)(4) of the IRC regardless of whether the income would otherwise be FBCI or insurance income. According to IRS, the rule provides instructions to determine the effective rate of tax on foreign items of income for the purposes of applying the GILTI high-tax exclusion. IRS stated that the rule provides that the effective foreign tax rate is determined on a tested unit basis. Additionally, IRS stated that the rule provides instructions to determine the net amount of income and the foreign taxes paid or accrued with respect to such net amount of income that are used to compute the effective rate of tax. IRS further stated that the rule includes how to make a GILTI high-tax exclusion election, and provides that the election, if made, must be made consistently for certain related CFCs. Lastly, IRS noted that the rule provides that taxpayers can make the election annually.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* of receipt of the rule by Congress,

whichever is later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on July 23, 2020. 85 Fed. Reg. 44620. The *Congressional Record* indicates the Senate received the rule on July 29, 2020, but does not indicate when the House received the rule. 166 Cong. Rec. S4632 (daily ed. July 30, 2020). According to IRS, the rule was mailed to the House on July 22, 2020. Telephone Conversation with General Attorney of Office of Associate Chief Counsel (International), IRS (Aug. 5, 2020). The rule has a stated effective date of September 21, 2020. Therefore the rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of IRS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in cursive script that reads "Shirley A. Jones".

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Martin V. Franks
Chief, Publications and Regulations Branch
Department of the Treasury

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
ENTITLED
“GUIDANCE UNDER SECTIONS 951A AND 954 REGARDING
INCOME SUBJECT TO A HIGH RATE OF FOREIGN TAX”
(RIN: 1545-BP15)

(i) Cost-benefit analysis

The Department of the Treasury (Treasury), Internal Revenue Service (IRS), performed a qualitative analysis of the economic effects of this final rule relative to a no-action baseline and relative to alternative regulatory approaches. IRS stated that the rule provides certainty and clarity to taxpayers in applying section 954(b)(4) of the Internal Revenue Code to certain high-tax income. Additionally, IRS stated that the rule works to apply the global intangible low-taxed income high-tax exclusion in a way that treats income similarly across all international business activity and without favoring one type of income over another. Such equitable treatment of income-generating activities can, according to IRS, improve United States economic performance. IRS projects that the rule will have annual economic effects greater than \$100 million in 2020 dollars since many of the taxpayers potentially affected by the rule are large multinational enterprises and even modest changes in the treatment of their foreign-source income can lead to changes in patterns of economic activity. IRS noted that the rule may increase United States taxpayers' foreign investment in high-tax jurisdictions, since the rule may decrease the effective tax rate on high-tax foreign-source income for some United States taxpayers.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

IRS certified that this final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

IRS determined that this final rule would not have an effect on state, local, or tribal governments, in the aggregate, or on the private sector, of \$100 million in 1995 dollars, adjusted for inflation, or more.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On October 10, 2018, and June 21, 2019, IRS published proposed regulations. 83 Fed. Reg. 51072; 84 Fed. Reg. 29114, as corrected 84 Fed. Reg. 37807. IRS received written comments with respect to the proposed regulations. IRS responded to comments in the final rule, but also stated that it generally did not address comments outside the scope of the rulemaking, but that

those comments may be considered in connection with future guidance projects. A public hearing on the proposed regulations was not held because there were no requests to speak.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

IRS determined that this final rule contains information collection requirements (IRCs) under the Act. IRS stated that they have not identified the estimated burdens for the IRCs because specific estimates are not currently available. According to IRS, a future submission to the Office of Management and Budget (OMB) under OMB Control Numbers 1545-0123, 1545-0074, 1545-0092, and 1545-0047 will include, but not isolate, the estimated burdens for the IRCs in this rule.

Statutory authorization for the rule

IRS promulgated this final rule under the authority of section 7805 of title 26, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

According to IRS, this final rule has been designated as subject to review under the Order pursuant to an April 11, 2018, Memorandum of Agreement (MOA) between Treasury and OMB regarding review of tax regulations. IRS stated that the Office of Information and Regulatory Affairs within OMB has designated the rule as significant under MOA. Accordingly, IRS stated that OMB reviewed the rule.

Executive Order No. 13,132 (Federalism)

IRS determined that this final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Order.