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What Role for Subpart F in a GILTI 2.0 World?

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INTRODUCTION: TAXING U.S. SHAREHOLDERS ON FOREIGN CORPORATE INCOME

The U.S. Congress has struggled for nearly a century with questions involving when and how to tax income earned by U.S. shareholders through foreign corporations. Special tax regimes along these lines have included the foreign personal holding company rules of prior-law §551–558 (enacted in 1937), the subpart F rules (enacted in 1962), the passive foreign investment company (PFIC) rules (enacted in 1986), and, most recently, the global intangible low-taxed income (GILTI) rules (enacted in 2017).[1] Broadly speaking, this history has been one of enacting a regime to target a perceived abuse, identifying new perceived abuses, and then layering on new regimes to target the new perceived abuses. The result has been a path-dependent thicket of rules that no one would have designed from scratch.

From time to time Congress has sought to trim back this thicket here and there in the interest of simplification. For example, the overlap between subpart F and the PFIC rules was substantially eliminated in 1997, and the foreign personal holding company and foreign investment company rules were repealed (with related changes to other regimes) in 2004. But the predominant story has been one of adding new special regimes to operate alongside the old ones.

Congress added the GILTI regime in the Tax Cuts and Jobs Act (TCJA)[2] as a supplement to, rather than a replacement of, subpart F. It could have been argued that the much broader but generally less disadvantageous GILTI rules could have served as a satisfactory replacement of subpart F as a way to address potential incentives to shift income into low-tax foreign subsidiaries, but — whether due to revenue concerns, time pressures of a particularly intense and rushed legislative process, or more fundamental tax policy concerns — this is not the path that Congress chose.

Now Congress is putting pen to paper in this area again, in connection with the Biden Administration's "Build Back Better" policy initiative. The primary goals of the international tax provisions of this initiative are to finance a part of the initiative's new spending, and to align the U.S. tax system with the systems that other countries are expected to adopt in connection with the ongoing multilateral work under OECD "Pillar Two." But policymakers, to their credit, are also spending some time pursuing a third goal, to clean up and rationalize various aspects of present law that have been identified as problematic for taxpayers, for the government, or both. Of particular note, the tax reconciliation legislation developed by House Ways and Means Committee Chairman Richard Neal and reported out of the Ways and Means and Budget Committees in September 2021 (the "Neal Bill") includes a rather significant (and perhaps unexpected)

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[1] Other regimes addressing these or similar issues have included the accumulated earnings tax of §531–§537 (enacted in 1921), the personal holding company rules of prior-law §541–§547 (enacted in 1934), and the foreign investment company rules of prior-law §1246–§1247 (enacted in 1962). Except as otherwise indicated, section references are to the Internal Revenue Code of 1986 as amended and currently in force, and "Reg. §" references are to the Treasury regulations promulgated thereunder.

[2] Pub. L. No. 115-97 (Dec. 22, 2017), tit. I, Sec. 14201(a).

rethink of subpart F alongside the main event of the bill's proposed changes to the GILTI regime.[3]

This article considers the Neal Bill's subpart F proposals and addresses what role, if any, subpart F should play in the U.S. international tax system in a scenario in which the United States and other countries adopt broad and relatively high-rate income inclusion regimes for foreign subsidiary income.

OVERVIEW: GILTI AND SUBPART F POST-TCJA AND UNDER THE NEAL BILL

Post-TCJA

Subpart F has long provided for current-basis, full-rate U.S. taxation of relatively narrow categories of income thought to be particularly mobile, and thus arguably prone to shifting to lower-tax jurisdictions. This generally includes ''passive'' income, such as certain kinds of dividends, interest, rents, and royalties, as well as certain sales and services income thought to have an insufficient connection to the locations where goods are produced or used, or where services are performed.[4]

With some exceptions, taxpayers are generally well-served to structure their supply chain and other business arrangements in such a way as not to trigger the application of subpart F. Prior to TCJA, this structuring would mean that U.S. tax on the foreign subsidiary's income would be deferred indefinitely, unless and until the earnings were repatriated to the U.S. parent, at which time full-rate U.S. tax would apply, subject to any available foreign tax credits. After TCJA, avoiding subpart F no longer means avoiding current-basis U.S. tax on the income, but instead entails placing the income into the much broader, intermediate-rate GILTI regime. This is a considerably worse U.S. tax answer than under prior law, but may be viewed as a relatively palatable trade-off for companies in light of the substantial elimination of U.S. repatriation tax under TCJA going forward.[5] In some cases, it may make sense for taxpayers to affirmatively plan into subpart F treatment (e.g., to obtain the benefit of foreign tax credit carryovers), but broadly speaking subpart F treatment is still better avoided due to the effective rate differential between the two regimes (currently 21% for subpart F and 10.5% for GILTI).[6]

Thus, for all the change that GILTI has brought for U.S.-based multinationals, the need to navigate subpart F has remained roughly constant.

Under the Neal Bill

The Neal Bill would make a number of major changes to the GILTI regime, generally in a revenue-raising direction, but with some taxpayer-favorable adjustments as well. The headline effective tax rate on GILTI would increase from 10.5% to 16.5625% (i.e., a 37.5% GILTI deduction, at an increased general corporate income tax rate of 26.5%). In addition, the regime would apply on a country-by-country basis, and the tax-exempt net deemed tangible income return on qualified business asset investment (QBAI) would be reduced from 10% to 5%. On the taxpayer-favorable side, GILTI foreign tax credits and tested losses would be eligible for carryforward, the GILTI foreign tax credit haircut generally would be reduced from 20% to 5%, and indirect expenses such as interest would no longer be allocated and apportioned to the GILTI foreign tax credit basket. By and large, these changes can be explained as moving in the direction of aligning the U.S. GILTI regime with the model income inclusion regime that seems to be taking shape under OECD Pillar Two (although the proposed U.S. effective rate would be higher than the 15% rate that Pillar Two is targeting, and of course both the fact and the timing of other countries' implementation of Pillar Two remain uncertain).

The Neal Bill's proposed changes to the GILTI regime were and are of great interest to U.S.-based multinationals, and were generally within the range of widely held expectations of what the current Congress might do in this area. Somewhat less expected, and less widely remarked-upon, is the Neal Bill's fundamental rethink of the subpart F sales and services income provisions.

STARTING POINT: SUBPART F SALES AND SERVICES INCOME UNDER CURRENT LAW

Foreign Base Company Sales Income

General Rule Under §954(d)(1)

Foreign base company sales income (''FBC sales income'') generally consists of income derived by a controlled foreign corporation (CFC) in connection with: (1) the purchase of personal property from a related person and its sale to any person; (2) the sale of personal property to any person on behalf of a related person; (3) the purchase of personal property from any person and its sale to a related person; or (4) the purchase of personal property from any person on behalf of a related person.[7] A related person is defined as including a foreign or domestic corporation that controls or is controlled by the CFC, or is controlled

[3] *See* H.R. 5376, 117th Cong., 1st Sess. (reported out of the House Budget Committee on September 27, 2021), §138129.

[4] *See* §954(c), §954(d), and §954(e).

[5] *See* §951A(f)(1)(A), §959, and §245A.

[6] Although it should be noted that the 10.5% ''headline'' effective rate for GILTI can be misleading, as it does not capture the effect of the 20% ''haircut'' on foreign tax credits under §960(d), expense allocation and apportionment effects, and other design features that often operate to impose GILTI tax at effective rates considerably higher than 10.5%.

[7] §954(d); Reg. §1.954-3(a)(1)(i).

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by the same person or persons that control the CFC.[8] With respect to a corporation, control means the ownership, directly or indirectly, of stock possessing more than 50% of the total voting power of all classes of stock entitled to vote or of the total value of the stock of the corporation.[9]

However, income derived from these transactions involving related persons is not FBC sales income if the property is sold for use in the CFC's country of organization[10] or is manufactured in the CFC's country of organization.[11] Finally, a CFC's sales income is not FBC sales income under the general rule if the CFC manufactured the products resulting in the sales income (the ''CFC manufacturing exception'').[12] A CFC will have manufactured or produced property it sells if the CFC (through the activities of its own employees) meets either a physical manufacturing or production test, or substantially contributes to the physical manufacture or production of the property by another person.[13]

The original rationale behind the FBC sales income rule was to prevent the deferral of CFC income ''derived from the purchase and sale of property, without any appreciable value being added to the product by the selling corporation.''[14] The concern in these cases was that sales income was being ''separated from manufacturing activities of a related corporation merely to obtain a lower rate of tax for the sales income.''[15] More broadly, the FBC sales income regime has been defended as a sort of backstop to the transfer pricing system, and as a way to pursue capital export neutrality.[16] Even if the U.S. fisc may have no direct transfer pricing interest in a CFC-to-CFC transaction, proponents of capital export neutrality would suggest that the ability to erode a foreign tax base in a foreign-to-foreign transaction may serve as an incentive to locate activities, assets, and income abroad rather than in the United States. Others would argue that capital import neutrality (or competitiveness), and administrability should limit the degree to which U.S. tax policy should try to pursue capital export neutrality.[17]

Branch Rules Under §954(d)(2)

In General

Section 954(d)(2) and the associated regulations provide branch rules that can treat as FBC sales income a portion of the income that is otherwise not FBC sales income under the general rule, where the CFC carries on purchasing, selling, or manufacturing activities by or through a foreign branch.[18] These impressively complex regulations provide two sets of rules. One set applies to a foreign branch that carries on purchasing or selling activities, and the second set applies when a foreign branch carries on manufacturing activities. The regulations also provide rules that address situations in which a CFC has more than one foreign branch that carries on purchasing, selling, or manufacturing activities.

The branch rules were intended to serve as a backstop to the general rule in cases in which ''the combined effect of the tax treatment accorded the branch, by the country of incorporation of the controlled foreign corporation and the country of operation of the branch, is to treat the branch substantially the same as if it were a subsidiary corporation organized in the country in which it carries on its trade or business.''[19] In other words, if a CFC's country of organization does not tax the income of the CFC's foreign branch, and the branch country does not tax the income of the CFC remainder, a tax rate benefit can be achieved by separating manufacturing and purchasing/selling activities within a CFC, just as such a benefit can be achieved by separating these activities between separate corporate entities. The branch rules seek to limit this benefit.

Purchase/Sales Branch Rule

Under the regulations, the purchase or sales branch rule is relevant if a CFC ''carries on purchasing or selling activities by or through a branch or similar establishment located outside the country under the laws of which such corporation is created or organized.''[20] The purchase or sales branch rule applies if the use of the branch for ''such activities has substantially the same tax effect as if the branch or similar establishment were a wholly owned subsidiary corporation'' of

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[8] §954(d)(3).

[9] Reg. §1.954-1(f)(2)(i).

[10] §954(d)(1); Reg. §1.954-3(a)(3).

[11] §954(d)(1); Reg. §1.954-3(a)(2).

[12] Reg. §1.954-3(a)(4).

[13] Reg. §1.954-3(a)(4)(ii), §1.954-3(a)(4)(iii), §1.954-3(a)(4)(iv).

[14] S. Rep. No. 1881, 87th Cong., 2d Sess. (Aug. 16, 1962), at XII.C.3.b.

[15] *Id.*

[16] *See, e.g.*, U.S. Dep't of the Treasury, *The Deferral of Income Earned Through U.S. Controlled Foreign Corporations: A Policy Study* (Dec. 2000).

[17] For a summary of this debate, see National Foreign Trade Council, *International Tax Policy for the 21st Century Vol. II: Conclusions and Recommendations* (Dec. 15, 2001), at 34–36 (describing and rejecting the policy rationales for retaining the FBC sales and services income rules).

[18] §954(d)(2); Reg. §1.954-3(b).

[19] S. Rep. No. 1881, 87th Cong., 2d Sess. (Aug. 16, 1962), at XII.C.3.b.

[20] Reg. §1.954-3(b)(1)(i)(a).

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such CFC.[21] The use of a branch to carry on purchasing or selling activities will be considered to have "substantially the same tax effect" as if it were a wholly owned subsidiary of the CFC if a tax rate disparity test is satisfied. The sales branch tax rate disparity test requires income allocated to the branch of the CFC to be taxed in the year when earned at an effective tax rate (the "actual effective tax rate") that is less than 90% of, and at least 5 percentage points less than, the effective rate of tax that would apply to such income under the laws of the country in which the CFC is organized (the "hypothetical effective tax rate").[22] For purposes of determining the effective rate of tax in the CFC's country of organization on "such income" allocated to the branch, the entire income of the CFC is considered as derived by such corporation from sources within such country from doing business through a permanent establishment therein, received in such country, and allocable to such permanent establishment, and the corporation were created or organized under the laws of, and managed and controlled in, such country.

If the sales branch rule applies, the branch and the remainder of the CFC are treated as separate corporations for purposes of determining the FBC sales income of such CFC under "special rules" provided by Reg. §1.954-3(b)(2).[23] If these circumstances apply, the branch, treated as a separate CFC, is considered as deriving its income from the purchase or sale of personal property on behalf of a related person (i.e., the home office treated as a separate CFC).

The regulations further provide that for purposes of determining whether the income derived by a branch is FBC sales income for purposes of §954(a)(1)(A), income derived by the branch is not FBC sales income to the extent the income would not be FBC sales income if derived by a separate CFC "under like circumstances."[24] For example, income derived by a branch in connection with purchasing or selling products on behalf of the CFC's home office would not be FBC sales income if the products were manufactured in the branch's country by a related or unrelated party under the same-country-of-manufacture exception discussed above.

Manufacturing Branch Rule

The regulations also provide a manufacturing branch rule that is relevant when a CFC carries on manufacturing activities by or through a branch or similar establishment outside of its country of organization.[25] The manufacturing branch rule applies if "the use of the branch or similar establishment for such activities with respect to personal property purchased or sold by or through the remainder of the controlled foreign corporation" has substantially the same tax effect as if the branch were a wholly owned subsidiary corporation of such CFC.[26]

For the manufacturing branch rule to apply, the CFC must manufacture or produce property that is purchased or sold by or through the remainder.[27] For this purpose, a CFC is considered as manufacturing property if it satisfies the physical manufacturing definition or the substantial contribution manufacturing definition as described above.[28] The use of a branch to carry on manufacturing activities will be considered to have substantially the same tax effect as if it were a wholly owned subsidiary of the CFC if a tax rate disparity test is satisfied. This test is similar to the tax rate disparity test that applies for purposes of the purchase/sales branch rule, except the actual effective tax rate in the purchasing/selling remainder is tested against the hypothetical effective tax rate in the manufacturing branch.

If a CFC remainder derives income from carrying on purchasing or selling activities with respect to products manufactured by a branch of the CFC, and the tax rate disparity test is met, the remainder, treated as a separate CFC, is considered as deriving its income from purchasing or selling property on behalf of a wholly owned CFC. As a result, such income derived by the purchasing or selling remainder generally would be FBC sales income because the operative rule deems the remainder, treated as a separate CFC, as deriving its income from purchasing or selling property on behalf of a related person. Again, the regulations further provide that for purposes of determining whether the income derived by a remainder is FBC sales income for purposes of §951(a)(1)(A), income derived by the remainder is not FBC sales income to the extent the income would not be FBC sales income if derived by a separate CFC under like

[21] *Id.*

[22] Reg. §1.954-3(b)(1)(i)(b).

[23] *Id.*; Reg. §1.954-3(b)(2)(ii).

[24] Reg. §1.954-3(b)(2)(ii)(e).

[25] Section 954(d)(2) itself does not specifically authorize the creation of a manufacturing branch rule, but Treasury and IRS obviously concluded early on (perhaps construing its authority fairly broadly) that the purchase/sales branch rule would be easily avoided without a manufacturing branch rule, because manufacturing and purchasing/selling activities can be separated in either direction as between a CFC home office and a branch, thus necessitating a manufacturing branch rule. The Tax Court recently upheld the validity of the manufacturing branch rule. *See Whirlpool Fin. Corp. v. Commissioner*, 154 T.C. No. 9 (2020) (appeal to 6th Cir. pending).

[26] Reg. §1.954-3(b)(1)(ii)(a).

[27] Reg. §1.954-3(b)(1)(ii)(a) (last sentence).

[28] *Id.* (cross-referencing Reg. §1.954-3(a)(4)(i)).

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circumstances.[29] For example, income derived by a remainder in connection with purchasing or selling products on behalf of a manufacturing branch of the CFC would not be FBC sales income if the products are also considered as manufactured in the CFC remainder's country of organization.

Foreign Base Company Services Income

Foreign base company services income (''FBC services income'') means income (whether in the form of compensation, commissions, fees, or otherwise) derived in connection with the performance of technical, managerial, engineering, architectural, scientific, skilled, industrial, commercial, or like services which are performed for or on behalf of any related person, and are performed outside the country under the laws of which the CFC is created or organized.[30] Accordingly, income from services performed entirely for or on behalf of unrelated persons is not FBC services income. And income from services performed for or on behalf of related persons is FBC services income only if and to the extent that it is derived from the performance of services outside the CFC's country of organization.

The original rationale for the FBC services income rules was ''to deny tax deferral where a service subsidiary is separated from manufacturing or similar activities of a related corporation and organized in another country primarily to obtain a lower rate of tax for the service income.''[31] Unlike in the FBC sales income area, Congress never enacted a branch rule for FBC services income purposes.

FBC SALES AND SERVICES INCOME UNDER THE NEAL BILL

There have been several subpart F proposals in connection with the recent budget reconciliation activity. The Neal Bill would retain the subpart F foreign personal holding company income rules of §954(c), dealing with ''passive'' income. The bill also would retain the subpart F high-tax exception of §954(b)(4) (whereas the Biden Administration's FY 2022 Greenbook would repeal it). The bill also would make several technical changes to the operation of subpart F.[32]

The biggest subpart F development, though, is that the Neal Bill would significantly curtail the scope of both the FBC sales income and the FBC services income rules. First, for purposes of both rules, the definition of a relevant ''related person'' would be limited to a related U.S.-resident taxable unit (within the meaning of the country-by-country foreign tax credit basketing rules of newly proposed §904(e)). Thus, a CFC would have FBC sales income only if it purchased or sold personal property to, from, or on behalf of a related U.S. person, as opposed to a related foreign person. Similarly, a CFC would have FBC services income only if it performed services for or on behalf of a related U.S. person, as opposed to a related foreign person. Regulatory authority would be provided to expand the application of these provisions to a series of transactions involving a U.S.-resident taxable unit. In addition, the branch rule under the FBC sales income rules would be repealed.

The JCT technical explanation and the House Budget Committee report provide very little discussion of the rationale for these proposed changes (and indeed do not acknowledge the repeal of the branch rule at all). The JCT revenue table is inscrutable as to the projected revenue impact of these changes, because the table presents several different proposed changes in the aggregate on a single line.[33]

Possible policy reasons for the Neal Bill's FBC sales and services income changes include: (1) a conclusion that, under a higher-rate (16.5625%) and country-by-country GILTI regime, CFC income will already be subject to a relatively high rate of current-basis U.S. tax, without the benefit of foreign tax credit averaging between high-tax and low-tax foreign subsidiary income, thereby leaving less need for a separate, tougher regime like subpart F with respect to active business income; (2) a lingering concern about U.S. base erosion as distinct from foreign-to-foreign base erosion, to explain preserving the rules as between a CFC and a related U.S. taxable presence; and (3) a concern about taxpayer affirmative use of subpart F.

The first of these rationales is fairly straightforward, and indeed could support an even more significant change, simply repealing the FBC sales and services income rules altogether.

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[29] Reg. §1.954-3(b)(2)(ii)(e).

[30] §954(e)(1). Under §954(e)(1)(A), the definition of related person for FBC services income purposes is the same as the definition for FBC sales income purposes under §954(d)(3).

[31] S. Rep. No. 1881, 87th Cong., 2d Sess. (Aug. 16, 1962), at XII.C.3.c.

[32] These changes include proposals relating to §961, allocation of §951(a) items among shareholders, and others.

[33] *See* Jt. Comm. on Tax'n, *Estimated Budgetary Effects of an Amendment in the Nature of a Substitute to the Revenue Provisions of Subtitles F, G, H, I, and J of the Budget Reconciliation Legislative Recommendations Relating to Infrastructure Financing and Community Development, Green Energy, Social Safety Net, Responsibly Funding Our Priorities, and Drug Pricing Scheduled for Markup by the Committee on Ways and Means on September 14, 2021* (JCX-42-21) (Sept. 13, 2021). Specifically, line C.9 on p. 6 of the table shows a revenue increase of approximately $20.6B for ''Limitation on foreign base company sales and services income,'' but that line apparently also includes several other proposed changes under §138129 of the Neal Bill. In isolation, the changes to the FBC sales and services rules themselves presumably would reduce revenue, although possibly not by much if relatively baseline revenue is attributed to these rules.

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The second rationale makes sense at a very high level as an explanation for preserving the rules with respect to U.S. related persons, but it misses the key point that the related party necessary to trigger the application of the FBC sales and services rules is not necessarily the party ostensibly being eroded. If a low-tax CFC seller engages a high-tax CFC manufacturer to produce a product, and then sells the product to related U.S. and foreign distribution affiliates, the determination of the arm's-length return to the distribution affiliates may be relatively straightforward. Generally the subpart F policy concern has been that the high-tax manufacturer's tax base is being eroded in favor of the low-tax seller's tax base.[34] So in this example, the Neal Bill has unnecessarily (in light of enhanced GILTI) preserved a rule that serves mainly to police foreign-to-foreign base erosion, but has done so only in situations involving sales into the U.S. market, notwithstanding similar potential foreign-to-foreign base erosion concerns regardless of the market country.[35] In addition, by repealing the branch rule, the Neal Bill would permit a low-tax CFC with a high-tax manufacturing branch (or a low-tax sales branch of a high-tax manufacturing CFC) to sell to a related U.S. affiliate without triggering the FBC sales income rules, while continuing to apply the rules in otherwise similar non-branch situations.

In the case of FBC services income, the rationale for the rule is again all about the separation of services income from services activity.[36] The mere fact that a CFC provides services for or on behalf of a U.S. related person does not mean that it is the U.S. base that is ostensibly being eroded — rather, it may be another foreign location where a higher-tax CFC carries out some of the service activities. A low-tax CFC service provider could perform services for both U.S. and foreign affiliates, subcontracting some of the work to higher-tax CFC service providers. The intercompany service fee owed by the service recipient to the low-tax CFC service provider might be readily priced based on third-party comparables, whereas the CFC subcontractor pricing might be less straightforward, if the CFC affiliates choose to divide various responsibilities in a way not observed in uncontrolled transactions. In such a case, the Neal Bill again has unnecessarily preserved a rule that serves mainly to police foreign-to-foreign base erosion, but only in situations involving the provision of services for or on behalf of a related U.S. person, notwithstanding similar potential foreign-to-foreign base erosion concerns regardless of the residence of the service recipient.

The third possible rationale for the Neal Bill's approach to the FBC sales and services income rules, curtailing taxpayer affirmative use of subpart F, also is unsatisfying. First, affirmative use of subpart F may be less of a need in light of some of the Neal Bill's taxpayer-favorable changes to GILTI, such as reducing the foreign tax credit haircut and allowing foreign tax credit and tested loss carryforwards. Second, to the extent that affirmative use of the FBC sales and services rules remains appealing in some circumstances, it would continue to be possible under the Neal Bill, simply by inserting a related U.S. person or unit into the transaction chain.

SO WHAT ROLE SHOULD SUBPART F PLAY AT THIS POINT?

The first rationale for the Neal Bill's FBC sales and services income proposals is fairly compelling. A higher-rate and country-by-country GILTI regime will already impose a high rate of current-basis U.S. tax on a CFC's active business income, without the benefit of foreign tax credit averaging between high-tax and low-tax foreign subsidiary income. In this environment, the United States will have gone a good part of the distance toward the simple "repeal deferral" option long favored by capital export neutrality advocates pre-TCJA, and will have done so at some risk to U.S.-based multinationals' competitiveness to the extent that the U.S. GILTI changes go further or are adopted earlier than other countries' Pillar Two income inclusion regimes. In light of these considerations, there is much less need for a separate, tougher regime like subpart F with respect to such income. With all the new complexity being added under the revised GILTI regime, and with developments around the world making it ever more difficult to achieve foreign-to-foreign base erosion, it may not be worth maintaining the highly complex FBC sales and services income regimes to police what is at best a rapidly shrinking tax policy concern. This rationale applies equally to CFC transactions with related U.S. persons/units and with related foreign persons/units, and thus supports simply repealing the two regimes altogether.[37]

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[34] *See* S. Rep. No. 1881, 87th Cong., 2d Sess. (Aug. 16, 1962), at XII.C.3.b (discussed above).

[35] Legislation introduced in 2002 (in the lead-up to the American Jobs Creation Act of 2004) would have repealed the FBC sales and services income rules and replaced them with a much narrower sales income rule applicable only where the personal property was both manufactured in the United States and sold for use in the United States. *See* American Competitiveness and Corporate Accountability Act of 2002, H.R. 5095, 107th Cong., 2d Sess. (July 11, 2002), §301 (introduced by Rep. Bill Thomas, then chairman of the House Ways and Means Committee). This proposal was ultimately abandoned.

[36] *See* S. Rep. No. 1881, 87th Cong., 2d Sess. (Aug. 16, 1962), at XII.C.3.c (discussed above).

[37] If, on the other hand, revenue or lingering policy concerns

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lead the Congress to preserve the FBC sales and services income rules, it probably would make sense to further refine the Neal Bill's approach, or simply preserve the rules in their current state, rather than introducing a new U.S./foreign related-party distinction and repealing the branch rule, in light of the somewhat arbitrary outcomes created by that approach, as described above.

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