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# *International Tax Watch*

## *New Final and Proposed Regulations Under Code Sec. 163(j) and Their Application to Controlled Foreign Corporations*

By Joshua D. Odintz, Stewart Lipeles, and Julia Skubis Weber*

## I. Introduction

"[Credit is a system whereby] a person who can't pay, gets another person who can't pay, to guarantee that he can pay."[1]

P.L. 115-97,[2] better known as the Tax Cuts and Jobs Act of 2017 (TCJA), significantly changed the Federal income tax system's approach in limiting interest expense deductions. In July 2020, the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published final and proposed regulations (collectively, the 2020 Regulations) that interpret the seemingly simple statute. This column will address one facet of the changes in the 2020 Regulations: the application of Code Sec. 163(j) to controlled foreign corporations (CFCs). Initially, we will provide a background and overview of revised Code Sec. 163(j), followed by a discussion of the 2018 proposed regulations. Then we will dive deep into the 2020 Regulations, with a focus on the CFC group election and the anti-abuse rule.

This column is not exhaustive analysis of the 2020 Regulations, and will necessarily not address certain portions of the regulations that may be relevant to certain taxpayers and their advisors (*e.g.*, changes in the definition of interest solely for purposes of the Code Sec. 163(j) limitation). Given the sheer number of pages and complexity of the 2020 Regulations, we are confident others will take up the cause.

## II. Background

"The ideas of debtor and creditor as to what constitutes a good time never coincide."[3]

Prior to the TCJA, Code Sec. 163(j) applied to a perceived problem—cross-border earnings stripping using related party debt. In 1989, Congress amended the Internal Revenue Code (Code) to limit the deduction in the United States for related party interest expenses.[4] Under old Code Sec. 163(j), interest expense was limited if a corporation's debt to equity ratio exceeded 1.5 to 1 and its net interest expense exceeded 50% of its adjusted taxable income.[5] If a corporation met the two thresholds, then the corporation could not deduct any related party interest expense in excess of 50% of adjusted taxable income that was not subject to U.S. tax. Excess borrowing capacity could be carried forward three years, and denied interest expense could be indefinitely carried forward. Treasury and the IRS published proposed regulations in 1991 (the 1991 Regulations) that stated Code Sec. 163(j) did not apply to foreign corporations.[6] Treasury and the IRS never finalized the 1991 regulations.

In November 2007, Treasury published a report that addressed earnings stripping (the 2007 Treasury Report).[7] Pursuant to the American Jobs Creation Act, Congress ordered Treasury to study earnings stripping and provide legislative recommendations to address the issue. The 2007 Treasury Report studied earnings stripping, which it defined as "the shifting of income of domestic corporations offshore through related-party debt and associated interest payments."[8] The 2007 Treasury Report focused on foreign controlled domestic corporations (FCDCs) and inverted companies (ICs). It did not address or study the ability of U.S.-headquartered businesses to earnings strip because of the concern that FCDCs could strip income or jobs out of the United States, whereas U.S.-headquartered businesses are subject to subpart F income on the passive income their CFCs generate.[9]

At that time, the United States was a high tax jurisdiction, and Treasury noted that inverted companies could use related party debt where the United States was the borrower to reduce their U.S. tax liability. Treasury concluded that:

> [t]he earnings-stripping study did not find conclusive evidence of earnings stripping from FCDCs that had not inverted. However, there is strong evidence that ICs have engaged in earnings stripping.[10]

Treasury and the IRS issued Form 8926, *Disqualified Corporate Interest Expense Disallowed Under Section 163(j) and Related Information*, to collect information regarding the domestic activities of foreign corporations. To date, Treasury has not published any additional studies addressing the broader category of inbound corporations or U.S.-based multinational businesses.

Although different administrations and Congress proposed modifying Code Sec. 163(j) to tighten the limitations, the Great Leap Forward[11] came from the Organization of Economic Cooperation and Development (OECD) and the G-20's Base Erosion and Profit Shifting (BEPS) project. The OECD final report for Action Item 4, Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, recommended different tools for countries to address interest. The first recommendation was a limitation on interest expense based on a fixed ratio or percentage of EBITDA (the forefather of amended Code Sec. 163(j)).[12] The BEPS Action Item 4 final report also recommended a group ratio rule that may allow an entity to deduct more interest expense depending on the relative net interest/EBITDA ratio of the worldwide group, and a series of targeted rules to address specific risks. Action Item 4 was not mandatory for member states. Action Item 4 was a best practice for those countries adopting the BEPS project.[13]

As part of tax reform, Congress proposed two revisions to address interest. The first, revised Code Sec. 163(j), effectively adopted the BEPS Action Item 4 approach by repurposing Code Sec. 163(j) to function as a thin capitalization rule. The second, proposed Code Sec. 163(n), would have imposed a global cap on interest expense. Unlike the recommendation in Action Item 4, the global cap rule was not a safe harbor that could apply where a local entity had a debt level consistent with its global group's level of debt. Rather, the interest expense limitation would have been the lower of the two limitations. Both Code Sec. 163(j) and proposed Code Sec. 163(n) would apply to both third party and related party debt, a fundamental difference from the prior version of Code Sec. 163(j). Congress ultimately rejected proposed Code Sec. 163(n).

Code Sec. 163(j), as contained in the TCJA, applies a business interest expense limitation (the 163(j) limitation) equal the sum of floor plan financing interest, business interest income (BII), and 30% of adjusted taxable income (ATI).[14] Denied business expenses generally can be indefinitely carried forward, but Congress completely eliminated the carry forward of excess ATI.[15] The legislative history and statute do not discuss whether Code Sec. 163(j) applies to CFCs, nor do they refer to the 2007 Treasury Report.[16] The legislative history does refer to foreign corporations in one situation: the carry forward of disallowed business interest. The House version of the bill contained a coordination rule for the limitation on the ability of domestic corporations in international financing reporting groups to deduct interest.[17] "Whichever rule imposes the lower limitation (and therefore the greatest amount of interest to be carried forward) governs."[18] The Senate version of the bill did not contain this reference, and the conference agreement followed the Senate bill.

## III. The 2018 Proposed Regulations

"How ridiculous and how strange to be surprised at anything which happens in life."[19]

On November 26, 2018, Treasury and the IRS published proposed regulations regarding revised Code Sec. 163(j). The 2018 regulations stated that a U.S. shareholder did not include its share of subpart F income, global low taxed intangible income (GILTI), or the Code Sec. 78 gross up as part of ATI. This rule had the potential to reduce the amount of deductible interest expense in the United States for both a domestic and foreign-headquartered group with a sandwich structure.

For those who had not spoken with Treasury, the 2018 regulations contained a surprise: Code Sec. 163(j) would apply to foreign corporations. The 2018 regulations applied the 163(j) limitation on an entity-by-entity approach. A U.S. group would need to compute potentially hundreds of Code Sec. 163(j) limitations for its CFCs.[20]

The 2018 regulations provided some relief in the form of a group election. A group of highly related CFCs (80% or greater ownership by value) could make an irrevocable election to be treated as a CFC group. Each CFC electing into the group had a Code Sec. 163(j) limitation equal to its allocable share of net business interest expense. The benefit of the group election was the ability to tier up excess ATI, potentially permitting the tiering up of excess ATI to a U.S. shareholder. An entity with any amount of U.S. effectively connected income (ECI), no matter how small, could not be included in the CFC group. For example, if an entity were audited by the IRS and the IRS determined a CFC has $10 of ECI, then the CFC would be removed from the group, and its excess ATI could not tier up to a U.S. shareholder.

This bottom-up approach was cumbersome and created significant complexity.[21] Taken into account with the additional allocation and apportionment of interest for the GILTI foreign tax credit basket, this approach required taxpayers with CFCs to undertake additional calculations. Treasury could have taken a top-down approach, which could have simplified the group election. Also, the location of the debt for a bottom-up calculation of the CFC group's ATI mattered, as each CFC would receive its allocable share of the limitation. Many U.S.-parented groups borrow at the parent level and on-loan to their subsidiaries. The CFC group election would require additional complexity in managing an entity-by-entity limitation, in addition to any foreign law limitation. For example, it is possible a CFC could have a higher limitation under foreign law (30% of EBITDA), but have a lower limitation for U.S. tax purposes because of its allocable share of the limitation under Code Sec. 163(j).

## IV. The 2020 Regulations

"Listening looks easy, but it's not simple. Every head is a world."[22]

Treasury and the IRS received many comments on whether and how Code Sec. 163(j) should apply to CFCs, including comments on the design of the CFC election. Although they continue to believe Code Sec. 163(j) applies to CFCs, Treasury and the IRS listened to comments and made significant changes to the CFC group election, requiring new proposed regulations. This section contains a brief summary of the comments discussed in the preamble to the final and proposed regulations, a summary of the new group election, and a summary of the new annual safe harbor election. We also address the new anti-abuse rule that effectively forces every CFC into the group election.

### A. Code Sec. 163(j) Continues to Apply to CFCs and Implications for U.S. Shareholders

Commentators argued Code Sec. 163(j) should not apply to CFCs for two reasons. First, the statute and legislative history do not state Code Sec. 163(j) applies to foreign corporations. Second, the proposed regulations under prior Code Sec. 163(j) provided that Code Sec. 163(j) did not apply to foreign corporations, including CFCs, and there is no evidence that Congress preferred a different result. Treasury responded that the old Code Sec. 163(j) regulations are irrelevant because Congress repealed and replaced a narrow rule with a broader, different provision. Treasury and the IRS also flipped commentators' arguments on their head and noted the legislative history did not exclude foreign corporations from Code Sec. 163(j)'s scope. According to Treasury, if Congress wanted to exclude foreign corporations, it could have explicitly provided an exception for CFCs in the statute or legislative history, as it did for small businesses.

  

Additionally, Treasury and the IRS stated that they have the authority to apply Code Sec. 163(j) to CFCs:

> As a general matter, application of U.S. tax principles to a foreign corporation for purposes of determining its income for U.S. tax purposes is within the authority of the Treasury Department and the IRS. For example, a U.S. shareholder of an applicable CFC takes into account its pro rata share of the subpart F income and net tested income of an applicable CFC. Accordingly, in order to determine the U.S. shareholder's pro rata share, the income of the applicable CFC must be determined. Section 1.952–2(a)(1) provides that, "[e]xcept as provided in subparagraph (2) of this paragraph [relating to insurance gross income], the gross income of a foreign corporation for any taxable year shall, subject to the special rules of paragraph (c) of this section, be determined by treating such foreign corporation as a domestic corporation taxable under section 11 and by applying the principles of section 61 and the regulations thereunder." Neither §1.952–2(a)(2) nor (c) implicates section 163(j). Accordingly, pursuant to §1.952–2, a foreign corporation is treated as a domestic corporation for U.S. tax purposes when calculating its taxable income, including by application of section 163(j).[23]

Treasury and the IRS also expressed concern that taxpayers may use loans from the United States to increase leverage at the CFC level to increase tested losses for GILTI purposes. Commentators argued foreign limitations are sufficient to police CFCs and their levels of debt. Many countries adopted the minimum standard of BEPS Action Item 4. Without material analysis or specific examples, Treasury and the IRS noted that countries have not universally adopted the OECD BEPS standard. Some countries have loose interest limitation rules, and some countries do not have any limitations on interest expense deductions. Similarly, commentators argued transfer pricing adequately polices related party debt. Treasury and the IRS summarily concluded transfer pricing is an insufficient safeguard.[24]

Generally, the Code, in its entirety, applies to foreign corporations. That is why Congress enacted the loss importation rules in Code Sec. 362(e). Despite that, we have to look at things in the context, including their purpose. Code Sec. 163(j) is intended to prevent U.S. companies from eroding the U.S. tax base and the legislative history for the current and prior versions of 163(j) supports that conclusion. BEPS Action Item 4 also supports that conclusion. It makes no sense to apply 163(j) to CFCs. The idea that taxpayers would leverage CFCs to create tested losses sounds reasonable on its face, but it is not credible. If the loan is from a U.S. affiliate, the income is taxed at the normal rate, not the reduced GILTI rate. If the loan is from one CFC to another CFC and it qualifies for look through, it generally offsets. Conversely, if a loan from one CFC to another does not qualify for look through, then the income is taxed at the normal U.S. rate under subpart F unless an exception applies. If an exception applies to subpart F, Congress created the exception, so again there is no reason to be concerned. The only other source of leverage is outside borrowing from third parties. Taxpayers would not borrow, when they do not need the cash, just to create interest expense deductions. If they do need the cash, Congress does not want the expense in the United States. Bottom line, the government's justification for applying Code Sec. 163(j) to CFCs does not withstand scrutiny.

Many commentators argued a U.S. shareholder[25] should include in ATI its inclusions with respect to CFCs, including subpart F income, GILTI and the Code Sec. 78 gross-up. The government responded that because Code Sec. 163(j) applies to CFCs, including CFC income inclusions at the U.S. shareholder level would create "an inappropriate double-counting of income."[26] Even if Code Sec. 163(j) did not apply to CFCs, Treasury notes CFCs are entities that could be leveraged, and "permitting the income of the CFC that gives rise to CFC income inclusions attributable to non-excepted trade or business of CFCs to be included in the ATI of U.S. shareholders would be inconsistent with the principles of section 163(j)."[27] Treasury provided an example that demonstrates how a U.S. shareholder could deduct additional interest expense in the United States if it includes its CFC income inclusions in ATI. The example and explanation are not compelling, as the U.S. shareholder is taxed in the United States on the CFC income inclusions. The fact that a U.S. shareholder may have a higher Code Sec. 163(j) limitation due to these items of income is a consequence of our hybrid system. Treasury and the IRS have created a more complex "heads I win, tails you lose" system.

### B. The CFC Group Election—From the Top Down

"Everything should be built top-down, except the first time."[28]

Treasury and the IRS received multiple comments regarding the structure of the group election, such as: (1) the group's Code Sec. 163(j) limitation should take a top-down approach by determining the group's limitation and then allocating it to CFC group members; (2) the rules should permit taxpayers to revoke the group election on an annual or at least periodic basis; (3) relatedness should be reduced to 50%; (4) a CFC with ECI should be permitted to remain in the CFC group; and (5) due to the complexity of applying Code Sec. 163(j) to CFCs, taxpayers should have the ability to elect into a safe harbor on a periodic basis.

Treasury recognized a bottom-up approach is complicated and significantly increases the compliance burden. Although Treasury did not eliminate CFCs from the scope of Code Sec. 163(j), it accepted many of the commentators' points in the re-proposed portion of the 2020 Regulations to create a more administrable group election:

> The Treasury Department and the IRS acknowledge that the application of section 163(j) to applicable CFCs and other relevant foreign corporations, like many other tax provisions, will increase the complexity of determining the taxable income of a relevant foreign corporation. Similarly, section 163(j) may have a significant effect on the amount of taxable income of some relevant foreign corporations and have limited or no effect on the amount of taxable income of others. The Treasury Department and the IRS do not view the complexity of a provision of the Code or its net effect on tax revenue as determinative as to whether the provision applies to CFCs. Nonetheless, the Treasury Department and the IRS have determined that it is appropriate to reduce the compliance and administrative burdens of applying section 163(j) to certain applicable CFCs.
>
> Accordingly, the Treasury Department and the IRS have developed new rules, taking into account comments received, that substantially modify the rules contained in proposed §1.163(j)–7. The Treasury Department and the IRS anticipate that, in many cases, these modifications will significantly reduce the compliance and administrative burdens of applying section 163(j) to applicable CFCs.[29]

This top-down approach comes at a cost—the anti-abuse rule, discussed below, effectively forces every specified CFC group to make the election.

The 2020 proposed regulations incorporate consolidated return concepts to the CFC group election. The new CFC group election is available to highly related CFCs, directly or indirectly related with 80% or greater ownership by value.[30] Treasury rejected comments supporting a reduction of ownership to more than 50% by a U.S. shareholder, which would align more closely with the requirement for a foreign corporation to be treated as a CFC. Unlike the election in the 2018 proposed regulations, the new election requires a CFC group "parent," as that term applies in the context of a common parent in a U.S. consolidated group, which is either a U.S. person or a CFC. A U.S. person for purposes of the election is a domestic corporation (including an S corporation) or an individual citizen or U.S. resident.[31]

A specified group is a CFC group if the group files an election to apply the Code Sec. 163(j) limitation at the group level.[32] A CFC that is a standalone entity (*i.e.*, the CFC does not have a single 80% or greater shareholder) or is not part of a specified group is required to compute its own Code Sec. 163(j) limitation.[33] Like a consolidated group, the election is in effect for 60 months.[34] If a CFC leaves the group, the election terminates for that CFC, but not for the specified group. The principles under Reg. §1.1502-75 apply for purposes of determining when a specified group ceases to exist.[35]

Once the specified group and specified group parent are identified,[36] the group calculates its CFC group Code Sec. 163(j) limitation.[37] The limitation for the group is based on the sum of each CFC group member's business interest expense (BIE), disallowed BIE carryforward, business interest income, floor plan financing interest expense, and tentative taxable income. Unlike with a consolidated group, loans between CFCs are generally respected for purposes of computing the group limitation, primarily because a U.S. shareholder will take those items into income for subpart F and GILTI purposes.[38]

An anti-abuse rule can apply to disregard intercompany transactions with a principal purpose of affecting the CFC group limitation. Specifically, the anti-abuse rule disregards transactions between CFC group members entered into with a principal purpose of affecting a CFC group or group member's limitation by increasing or decreasing a group or group member's ATI for a specified taxable year.[39]

The Code Sec. 163(j) limitation is computed for the CFC group's specified period and each CFC group member's taxable year ending with or within such year (the member's specified taxable year). If the CFC group parent is a U.S. person, the specified period ends on the last day of the U.S. person's taxable year and begins on the first day of the specified group's immediately preceding specified period. If the specified group parent is an applicable CFC, the specified period ends on the last day of the specified group parent's required year without regard to a one-month deferral.[40]

Unlike the 2018 proposed regulations, a CFC with ECI can participate in the CFC group. It must compute two limitations by hiving off its ECI and effectively treating the ECI portion as a separate CFC that cannot join the CFC group election.[41]

*Treasury and the IRS received many comments on whether, and if so, how Code Sec. 163(j) should apply to CFCs, including comments on the design of the CFC election.*

If the group limitation is greater than or equal to the sum of the members' BIE plus disallowed BIE carryforwards, then none of the members' BIE and BIE carryforwards are disallowed. Also, current BIE is used first before using BIE carryforwards, effectively applying a first-in-first-out approach for BIE. Carryforwards of excess BIE from a pre-CFC group period are limited under separate-return-limitation-year (SRLY) rules.[42] If the sum of the CFC group members' BIE and disallowed BIE carryforwards exceeds the group limitation, then each member with BIE and BII deducts a portion of its BIE expense equal to its BII. To the extent there is additional remaining limitation, each member with remaining BIE deducts a portion of its BIE equal to its allocable share of the group limitation. A CFC group member's allocable share is the product of the group's remaining Code Sec. 163(j) limitation and the CFC's remaining current-year interest ratio.

The consequences or benefits of the CFC group election for a U.S. shareholder in the 2020 Regulations have also changed. As discussed above, the 2020 Regulations continue to exclude from a U.S. corporation's ATI its allocable share of subpart F income, GILTI inclusion (reduced by the amount of the Code Sec. 250 deduction allowed with respect to the GILTI inclusion, computed without regard to the Code Sec. 250(a)(2) limitation), and the Code Sec. 78 gross up. However, if the CFC group has excess taxable income (ETI) after taking into account all of its BIE and BIE carry forwards, then the U.S. shareholder can include in its ATI a portion of the specified deemed inclusions (subpart F and GILTI inclusions) with respect to a CFC that is equal to the ratio of the CFC's ETI over its ATI. The ETI of a CFC is defined as its allocable share of the ETI of the CFC group that is allocated to the CFC *pro rata* according to its relative amount of ATI. This benefit does not apply where a specified group has not made the group election, but it does apply to a stand-alone CFC. It also does not apply where the CFC group has made the annual safe harbor election.[43]

## C. The Safe Harbor Election: Because the Group Election Is Really Hard to Apply to Large Groups

The 2020 Regulations recognize the challenges of computing the CFC group limitation and applying it to potentially hundreds of CFCs. The 2020 Regulations contain a safe harbor election that a designated U.S. person (generally, the U.S. shareholder) can make on an annual basis on an original return by the due date, including extensions.[44] The U.S. shareholder can make the safe harbor election if the CFC group's interest expense does not exceed 30% of the lesser of the (1) sum of the eligible amounts of each CFC group member, or (2) the sum of the qualified tentative taxable income of each CFC group member. The eligible amount is the sum of the CFC's subpart F income and the approximate GILTI inclusion amount the CFC could include as if the CFC were wholly owned by domestic corporations and without any tested losses. The eligible amount is computed without regard to Code Sec. 163(j).

The safe harbor election is not available if the CFC group has not made a CFC group election or if the CFC group has SRLY disallowed BIE carry forwards. If a U.S. person makes the safe harbor election, then all of the BIE of each CFC group member is allowed. But as described above, a U.S. shareholder cannot receive a portion of ETI. The safe harbor is a matter of administrative convenience and eliminates the complexities of computing the group election and applying it on a CFC-by-CFC basis.[45] If a U.S. person makes the safe harbor election, the CFC group loses the ability to tier up ETI to a U.S. shareholder, which could outweigh the benefit of the simple safe harbor approach.

## D. The Anti-Abuse Rule

Treasury and the IRS are concerned that U.S. shareholders may inappropriately play with the composition of the CFC group and loan amounts between CFCs to achieve an inappropriate result. In the preamble, Treasury and the IRS describe their concerns and the anti-abuse rule:

> The Treasury Department and the IRS are concerned that, in certain situations, U.S. shareholders may inappropriately affirmatively plan to limit BIE deductions as part of a tax-planning transaction, including by not making a CFC group election for purposes of increasing the disallowed BIE of a specified group member or of a partnership substantially owned by specified group members of the same specified group. For example, in a taxable year in which a U.S. shareholder would otherwise have foreign tax credits in the section 951A category in excess of the section 904 limitation, a U.S. shareholder might inappropriately cause one specified group member to pay interest to another specified group member in an amount in excess of the borrowing specified group member's section 163(j) limitation. As a result, the U.S. shareholder's pro rata share of tested income of the borrowing specified group member for the taxable year would be increased without increasing the U.S. shareholder's Federal income tax because excess foreign tax credits in the section 951A category in the taxable year that cannot be carried forward to a future taxable year would offset the Federal income tax on the incremental increase in the U.S. shareholder's pro rata share of tested income, while also enabling the borrowing specified group member to generate a disallowed BIE carryforward that may be used in a subsequent taxable year.
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> Accordingly, under proposed §1.163(j)–7(g)(4), if certain conditions are met, when one specified group member or applicable partnership (specified borrower) pays interest to another specified group member or applicable partnership (specified lender), and the payment is BIE to the specified borrower and income to the specified lender, then the ATI of the specified borrower is increased by the amount necessary such that the BIE of the specified borrower is not limited under section 163(j). This amount is determined by multiplying the lesser of the payment amount or the disallowed BIE (computed without regard to this ATI adjustment) by 3⅓ (or by 2, in the case of taxable years or specified taxable years with respect to a specified period for which the section 163(j) limitation is determined by reference to 50 percent of ATI). A partnership is an applicable partnership if at least 80 percent of the capital or profits interests is owned, in aggregate, by direct or direct partners that are specified group members of the same specified group. The conditions for this rule to apply are as follows: (i) The BIE is incurred with a principal purpose of reducing the Federal income tax liability of a U.S. shareholder (including over multiple taxable years); (ii) the effect of the specified borrower treating the payment amount as disallowed BIE would be to reduce the Federal income tax of a U.S. shareholder; and (iii) either no CFC group election is in effect or the specified borrower is an applicable partnership.[46]

*The fact that a U.S. shareholder may have a higher Code Sec. 163(j) limitation due to these items of income is a consequence of our hybrid system. Treasury and the IRS have created a more complex heads I win, tails you lose system.*

This anti-abuse rule applies where no CFC group election is in effect.[47] The way to avoid the application of the anti-abuse rule is for all specified CFCs to participate in the CFC group election. Perhaps Treasury and the IRS did not believe they had the authority to mandate the application of consolidated return concepts to CFCs. The anti-abuse rule is a strong nudge to encourage highly related CFCs to participate in the CFC group election.

  

## E. Effective Dates

A taxpayer can apply the 2020 proposed regulations for years beginning after December 31, 2017, so long as the taxpayer also applies the final regulations to those years and the 2020 proposed regulations regarding effectively connected income. Also, a taxpayer and its related parties must consistently apply the regulations. Theoretically, a taxpayer can elect to apply the new CFC group election and safe harbor to years beginning after December 31, 2017. The final regulations apply to tax years beginning 60 days after date of official publication (September 14, 2020).[48] Considering the final regulations apply to CFCs, it is likely taxpayers will elect to apply the 2020 proposed regulations before they are finalized.

# V. The Future

Stakeholders can comment on the proposed regulations by November 2, 2020. The 2020 proposed regulations reflect significant stakeholder input. It is highly unlikely Treasury and the IRS can finalize the 2020 proposed regulations before January 20, 2021. If there is a change in administration, will Treasury and the IRS modify the CFC election and its mechanics? We hope taxpayers will be able to rely on the 2020 proposed regulations until Treasury finalizes the CFC group election.

### ENDNOTES

* All the authors can be found working from home and enjoying existence on virtual platforms.
1 Charles Dickens, LITTLE DORRIT.
2 An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.
3 P.G. Wodehouse, LOVE AMONG THE CHICKENS.
4 Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239).
5 Similar to earnings before interest, tax, depreciation and amortization. ATI required adding back net interest expense, net operating losses, the deduction under Code Sec. 199, depreciation, amortization and depletion.
6 Proposed Reg. §§1.163(j)-0 through -10, 56 FR 27907 (June 18, 1991).
7 Report to the Congress on Earnings Stripping, Transfer Pricing and U.S. Income Tax Treaties (November 2007).
8 *Id.* at 6.
9 *Id.*
10 *Id.* at 30.
11 Apologies to Chairman Mao.
12 The BEPS Action Item 4 final report recommended a limitation between 10% to 30% of EBITDA. If a country used EBIT as a limitation, then it should increase the limitation.
13 *See www.oecd.org/tax/limiting-base-erosion-involving-interest-deductions-and-other-financial-payments-action-4-2015-final-report-9789264241176-en.htm.*
14 The limitation is increased to 50% of ATI for taxable years beginning in 2019 or 2020, pursuant to the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136) (the CARES Act).
15 Code Sec. 163(j)(2).
16 The legislative history does not refer to the OECD Action Item 4 report, even though the design of revised Code Sec. 163(j) is very similar to the recommended standard.
17 Section 4302 of H.R. 1.
18 Tax Cuts and Jobs Act Conference Report (Report 115-466) at 389.
19 Marcus Aurelius, MEDITATIONS.
20 Treasury and the IRS published Notice 2018-28 on April 2, 2018, providing interim guidance regarding Code Sec. 163(j). The notice was silent regarding the application of Code Sec. 163(j) to CFCs.
21 "I don't think top-down works in America." Donald J. Trump, from *www.Time.com*.
22 Cuban proverb.
23 85 FR at 56725 (Sept. 14, 2020).
24 The silence in the legislative history is deafening and demonstrates why following regular order with sufficient time to receive comments from stakeholders could have eliminated this issue. If Congress amends Code Sec. 163(j), perhaps Congress can clarify whether it intends Code Sec. 163(j) to apply to CFCs.
25 As defined in Code Sec. 951(b), a U.S. shareholder is a 10% or greater shareholder of a CFC.
26 85 FR at 56695 (Sept. 14, 2020).
27 *Id.*
28 Yogi Berra.
29 85 FR at 56725–56726 (Sept. 14, 2020).
30 Proposed Reg. §1.163(j)-7(d)(2)(i).
31 Proposed Reg. §1.163(j)-7(d)(2)(iii), (iv).
32 Proposed Reg. §1.163(j)-7(e).
33 Proposed Reg. §1.163(j)-7(d) and -7(k)(31).
34 Proposed Reg. §1.163(j)-7(e)(5).
35 Proposed Reg. §1.163(j)-7(d)(2)(vii).
36 Proposed Reg. §1.163(j)-7(d)(2).
37 Proposed Reg. §1.163(j)-7(c)(2)(i).
38 Thankfully, Treasury did not apply Reg. §1.1502-13 concepts.
39 Proposed Reg. §1.163(j)-7(c)(2)(ii).
40 Proposed Reg. §1.163(j)-7(k)(29).
41 Proposed Reg. §1.163(j)-7(f).
42 Proposed Reg. §1.163(j)-7(c)(3)(iv).
43 Proposed Reg. §1.163(j)-7(j).
44 Proposed Reg. §1.163(j)-7(h).
45 *Id.*
46 85 FR at 56869 (Sept. 14, 2020).
47 Proposed Reg. §1.163(j)-7(g)(4).
48 Proposed Reg. §1.163(j)-7(m).