FACTCOALITION
Financial Accountability & Corporate Transparency

November 26, 2018

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224

Re: Proposed Regulations Under Section 951A (REG-104390-18)

Dear Commissioner Rettig,

We are writing on behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition to share our views on the Internal Revenue Service's proposed guidance regarding the tax on Global Intangible Low-Taxed Income (GILTI) under Section 951A and related provisions (REG-104390-18).

The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.[1]

While the Coalition has concerns about the legislative structure of the GILTI, the IRS's overview of the proposed regulation correctly notes that this provision was enacted with the goal of protecting the base of the new tax code given the movement to a participation exemption under the Tax Cuts and Jobs Act (TCJA). We believe that implementation of the GILTI tax provisions should, whenever possible, prioritize this base protection role over competitiveness concerns.

Taking a step back, it is important to note that, based on data from the Organization for Economic Cooperation and Development (OECD), the United States corporate tax level as a percentage of gross domestic product was below average compared to other developed countries even before the passage of the TCJA. Starting in 2018, the United States is slated to have the lowest corporate tax level as a percentage of GDP in the developed world.[2] In addition, by applying a maximum effective rate of 10.5 percent on offshore earnings, the U.S. is setting a corporate income tax rate lower than the vast majority of foreign countries and only really taxing income that is artificially shifted into tax haven jurisdictions. The implication is that any concerns about the GILTI tax should recognize that U.S. corporations are starting with much lower tax rates than their competitors and the rate being applied is much lower than the one imposed anywhere except in recognized tax haven jurisdictions.

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[1] For a full list of FACT Coalition members, visit https://thefactcoalition.org/about/coalition-members-and supporters/

[2] Institute on Taxation and Economic Policy, "Trump Tax Cuts Likely Make U.S. Corporate Tax Level Lowest Among Developed Countries," April 11, 2018. https://itep.org/trump-tax-cuts-likely-make-u-s-corporate-tax-level-lowest-among-developed-countries/

The TCJA already includes an overly generous tax break with GILTI which essentially gives companies a zero percent tax rate on foreign profits equal to an amount that is up to 10 percent of the value of their offshore tangible assets. Provisions in the law then allow for essentially a 50 percent reduction in the tax rate owed on any remaining foreign profits. In other words, the maximum tax rate on offshore income will be 10.5 percent, half the domestic rate, with many companies paying substantially less depending on the value of their offshore assets. This lower rate applied to offshore income compared to domestic income will itself give companies an incentive to shift income outside of the United States.[3]

Ideally, to prevent base erosion, Congress should have applied an equal rate to offshore and domestic income. Instead, it already anticipated competitiveness concerns (however unfounded) by choosing to provide a significant additional tax break. Given the already generous tax break on GILTI written into the statute, there is no reason to exacerbate the base erosion issues this lower rate causes by cutting the rate further.

While tighter rules would help prevent gaming of the GILTI regulations and provide better protection against base erosion, the approach in the proposed rule is a minimally acceptable way to implement the provision. We do, however, oppose any additional effort to carve out or weaken anti-abuse rules proposed by Treasury in this regulation. As noted above, the goal of the tax on GILTI is to prevent base erosion. Regulators should not allow these provisions themselves to become a source of gaming and base erosion moving forward.

Thank you for taking into consideration our concerns. Should you have any questions, please feel free to contact Clark Gascoigne at +1 (202) 810-1334 or cgascoigne@thefactcoalition.org.

Sincerely,

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The FACT Coalition

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Richard Phillips
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[3] Institute on Taxation and Economic Policy, "Understanding and Fixing the New International Corporate Tax System," July 17, 2018. https://itep.org/understanding-and-fixing-the-new-international-corporate-tax-system/