



FACTCOALITION

Financial Accountability & Corporate Transparency

December 21, 2018

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

**Re: Proposed Removal of Section 385 Documentation Regulations (REG-130244-17)**

Dear Commissioner Rettig,

We are writing on behalf of the Financial Accountability and Corporate Transparency (FACT) Coalition to register and detail our opposition to the Internal Revenue Service's proposed removal of Section 385 documentation regulations (REG-130244-17).

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.<sup>1</sup>

As the Coalition noted in its comment letter to Notice 2017-38, the Treasury Department's 385 regulations "appropriately proposed to restore some honesty to cross-border transactions by curbing the incentive for companies to use intercompany debt to artificially shift their income."<sup>2</sup> As the Treasury Department itself noted in its summary of the original 385 rule, the rule could raise as much as \$7.4 billion.<sup>3</sup> The previous FACT Coalition letter went on to note that while this amount was considerable, the rule did not fully recapture the cost of earnings stripping and thus "385 regulations should be strengthened, rather than weakened or repealed."<sup>4</sup>

The proposed regulation would undermine the progress made by the 385 regulations by making tracking and countering earnings stripping more difficult. In the proposed regulations, the Treasury Department itself notes that the change in documentation requirements will result in a loss of \$407 million in revenue over the next 10 years. This is likely to be a significant underestimate given companies' well-documented history of exploiting and expanding loopholes left open in the requirements. The Treasury Department is also right to note the numerous problems the new rules will create, including the fact that they will "reduce the overall perceived legitimacy of the U.S. tax system and hence reduce

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

<sup>2</sup> FACT Coalition, "Letter to the IRS Supporting Treasury's Corporate Inversion Regulations," August 7, 2017. <https://thefactcoalition.org/letter-to-the-irs-supporting-treasurys-corporate-inversion-regulations>

<sup>3</sup> Internal Revenue Service, "Internal Revenue Bulletin: 2016-45, November 7, 2016, T.D. 9790: Treatment of Certain Interests in Corporations as Stock or Indebtedness." November 7, 2016, accessible at [https://www.irs.gov/irb/2016-45\\_IRB/ar09.html](https://www.irs.gov/irb/2016-45_IRB/ar09.html).

<sup>4</sup> FACT Coalition, "Letter to the IRS Supporting Treasury's Corporate Inversion Regulations," August 7, 2017. <https://thefactcoalition.org/letter-to-the-irs-supporting-treasurys-corporate-inversion-regulations>

voluntary compliance”, “increase the tax advantage foreign owners have over domestic owners of U.S. assets”, and “reduce the ability of the IRS to more effectively administer the tax laws.” With the tax code already facing legitimacy issues, including bias against domestic owners and limits on IRS enforcement tools, there is no justification for rolling back these critical regulations.

The Treasury Department claims that the cost of compliance with the current documentation requirement is substantial. Its estimates, however, reflect a material overstatement of the compliance costs. Much of the required documentation is already compiled as part of the normal cost of doing business. In addition, the small cost of the documentation requirements are born solely by the largest companies, representing just 0.4 percent of C corporation taxpayers. These companies are both sophisticated enough to already be tracking these sorts of transactions and profitable enough to bear any marginal additional costs.

It is also worth noting that in issuing its final rule on 10/21/2016, the Treasury Department already modified the documentation rules substantially to accommodate numerous commenters and reduce the overall cost of compliance. There is no need to go beyond the changes already included in the final rule.

To the extent that the documentation requirements did create initial compliance issues for corporations, these issues were addressed by the Treasury Department’s generous decision to allow a one-year delay in implementation such that the regulations apply starting January 1, 2019. There is no legitimate reason why, given the already lengthy amount of time given to adapt to the new rules under the 385 regulations, it is necessary to remove the documentation or any other requirements of the previously proposed regulation.

Timely and effective tax audits and enforcement actions rely on adequate, readily available documentation. Identifying and curbing abusive earnings stripping practices will become more difficult if Section 385 documentation requirements are reduced or eliminated. Less corporate documentation will necessitate greater investigative efforts by federal tax authorities, with all the costs and time involved, if the same level of earnings stripping oversight is to occur. The end result is that the proposed documentation changes will impose unreasonable costs on honest taxpayers and make it easier for dishonest taxpayers to engage in earnings stripping. The proposal should be rejected.

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](mailto:cgascoigne@thefactcoalition.org).

Sincerely,

**Gary Kalman**  
Executive Director  
The FACT Coalition

**Clark Gascoigne**  
Deputy Director  
The FACT Coalition

**Richard Phillips**  
Tax Policy Co-Chair  
The FACT Coalition

**FACTCOALITION**

1225 Eye St. NW, Suite 600 | Washington, DC | 20005 | USA  
+1 (202) 827-6401 | @FACTCoalition | [www.thefactcoalition.org](http://www.thefactcoalition.org)