

Part III

26 CFR § 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct tax liability.

(Also: Part 1, §§ 951, 951A, 952, 957, 964, 965, 6038, 6662, 6664)

Rev. Proc. 2019-40

SECTION 1. PURPOSE

This revenue procedure generally provides guidance related to the repeal of section 958(b)(4) of the Internal Revenue Code (“Code”) to certain United States persons within the meaning of section 7701(a)(30) (“U.S. persons”) that own stock in certain foreign corporations. Section 2 of this revenue procedure provides background on section 958. Section 3 of this revenue procedure provides definitions of terms used in this revenue procedure. Section 4 of this revenue procedure provides a safe harbor for determining whether a foreign corporation is a controlled foreign corporation within the meaning of section 957 (“CFC”). Section 5 of this revenue procedure provides a safe harbor for determining certain items, including taxable income and earnings and profits (“E&P”), of a CFC based on alternative information (as defined in section 3.01 of this revenue procedure). Section 6 of this revenue procedure provides a safe harbor for determining certain items of a specified foreign corporation within the meaning of section 965(e) and §1.965-1(f)(45) (“SFC”) based on alternative information. Section 7 of this revenue procedure addresses penalties under sections 6038 and 6662. Section 8 of this revenue procedure describes modifications to be made with respect to filing requirements for Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*. Section 9 of this revenue procedure provides examples illustrating rules described in this revenue procedure. Section 10 of this revenue procedure provides applicability dates. Section 11 of this revenue procedure provides drafting information. The Department of the Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) expect to issue other guidance related to certain other conse-

quences of the repeal of section 958(b)(4) separately.

SECTION 2. BACKGROUND

Section 958 provides rules for determining direct, indirect, and constructive stock ownership. Under section 958(a)(1), stock is considered owned by a person if it is owned directly or is owned indirectly through certain entities under section 958(a)(2). Under section 958(b), section 318 (relating to constructive ownership of stock) applies, with certain modifications, to the extent that the effect is to treat any U.S. person as a United States shareholder within the meaning of section 951(b) (“U.S. shareholder”) of a foreign corporation, to treat a person as a related person within the meaning of section 954(d)(3), to treat the stock of a domestic corporation as owned by a U.S. shareholder of a CFC for purposes of section 956(c)(2), or to treat a foreign corporation as a CFC.

As in effect before repeal, section 958(b)(4) provided that subparagraphs (A), (B), and (C) of section 318(a)(3) (providing for downward attribution) were not to be applied so as to consider a U.S. person as owning stock owned by a person who is not a U.S. person (“foreign person”). Effective for the last taxable year of foreign corporations beginning before January 1, 2018, and each subsequent year of the foreign corporations, and for the taxable years of U.S. shareholders in which or with which such taxable years of the foreign corporations end, section 958(b)(4) was repealed by section 14213 of the Tax Cuts and Jobs Act, Pub. L. 115-97 (2017). As a result of this repeal, stock of a foreign corporation owned by a foreign person can be attributed to a U.S. person under section 318(a)(3) for purposes of determining whether the U.S. person or another U.S. person is a U.S. shareholder of the foreign corporation and, therefore, whether the foreign corporation is a CFC. As a result, U.S. persons that were not previously treated as U.S. shareholders may be treated as U.S. shareholders, and foreign corporations that were not previously treated as CFCs may be treated as CFCs.

The Treasury Department and the IRS are aware that, in certain circumstanc-

es, taxpayers are required to include in gross income amounts under sections 951 (“subpart F inclusion amounts”) and 951A (“GILTI inclusion amounts”) attributable to, and report amounts with respect to, foreign corporations that are CFCs solely because of the repeal of section 958(b)(4), even though those taxpayers may have limited ability to determine whether such foreign corporations are CFCs and to obtain the information necessary to accurately determine these amounts.

SECTION 3. DEFINITIONS

For purposes of this revenue procedure, the following terms have the following meanings:

.01 Alternative information

(a) In general

The term “alternative information” means, with respect to a foreign corporation, information described in paragraph (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of this section 3.01(a), as applicable, subject to the adjustments described in section 3.01(b) of this revenue procedure. Information described in a paragraph qualifies as alternative information only if information described in any preceding paragraph is not readily available. For example, information described in paragraph (iii) of this section 3.01(a) qualifies as alternative information only if information described in paragraph (i) or (ii) of this section 3.01(a) is not readily available.

(i) Audited separate-entity financial statements of the foreign corporation that are prepared in accordance with U.S. generally accepted accounting principles (“U.S. GAAP”).

(ii) Audited separate-entity financial statements of the foreign corporation that are prepared on the basis of international financial reporting standards (“IFRS”).

(iii) Audited separate-entity financial statements of the foreign corporation that are prepared on the basis of the generally accepted accounting principles of the jurisdiction in which the foreign corporation is organized (“local-country GAAP”).

(iv) Unaudited separate-entity financial statements of the foreign corporation

that are prepared in accordance with U.S. GAAP.

(v) Unaudited separate-entity financial statements of the foreign corporation that are prepared on the basis of IFRS.

(vi) Unaudited separate-entity financial statements of the foreign corporation that are prepared on the basis of local-country GAAP.

(vii) Separate-entity records used by the foreign corporation for tax reporting.

(viii) Separate-entity records used by the foreign corporation for internal management controls or regulatory or other similar purposes.

(b) Adjustments when the basis of information changes from a prior taxable year

If an amount has been determined by a U.S. shareholder on the basis of information described in a paragraph in section 3.01(a) with respect to a foreign corporation for a taxable year of the foreign corporation, and another amount is subsequently determined by the U.S. shareholder on the basis of information described in a different paragraph in section 3.01(a) or on the basis of information satisfying the requirements of §1.952-2(a), (b), and (c)(2) and section 964 and the regulations thereunder with respect to a different taxable year of the foreign corporation, then as a condition of the IRS accepting the use of alternative information under this revenue procedure, the U.S. shareholder will use reasonable efforts to make any adjustments necessary in the subsequent taxable year to ensure that the change in type of information does not cause any material items to be duplicated or not included in any taxable year of the foreign corporation.

.02 Constructive U.S. shareholder

The term “constructive U.S. shareholder” means, with respect to a foreign corporation, a U.S. shareholder with respect to the foreign corporation that is not a section 958(a) U.S. shareholder with respect to the foreign corporation.

.03 Foreign-controlled CFC

The term “foreign-controlled CFC” means a foreign corporation that is a CFC but that would not be a CFC, if the de-

termination were made without applying subparagraphs (A), (B), and (C) of section 318(a)(3) so as to consider a U.S. person as owning stock which is owned by a foreign person.

.04 Readily available

The term “readily available” means, with respect to a person, information for a foreign corporation that, as of the due date (taking into account extensions, if any, or any additional time that would have been granted if the person had made an extension request) of the person’s return:

- (a) Is publicly available;
- (b) In the case of a direct or indirect investment in the foreign corporation that is completed on or before October 1, 2019, or subject to a binding contract as of October 1, 2019, or an acquisition of stock of the foreign corporation from a person that is not the foreign corporation or a related person with respect to the foreign corporation, the person has the legal or contractual right to obtain and is able to obtain using reasonable efforts; or
- (c) In the case of a direct or indirect investment in, or acquisition of stock of, the foreign corporation that is not described in paragraph (b) of this section 3.04, the foreign corporation is not prohibited from providing to the person under the laws of the jurisdiction(s) to which the foreign corporation is subject and the person is able to obtain using reasonable efforts. For purposes of this paragraph (c), reasonable efforts include a good faith attempt to obtain the right to receive relevant information as part of the acquisition or investment agreement(s).

.05 Related constructive U.S. shareholder

The term “related constructive U.S. shareholder” means, with respect to a foreign corporation, a constructive U.S. shareholder that is a related person with respect to the foreign corporation.

.06 Related person

The term “related person” means, with respect to a person, another person

described in section 954(d)(3), substituting the first-mentioned person for “controlled foreign corporation” each place it appears.

.07 Related section 958(a) U.S. shareholder

The term “related section 958(a) U.S. shareholder” means, with respect to a foreign corporation, a section 958(a) U.S. shareholder with respect to the foreign corporation, if such section 958(a) U.S. shareholder is a related person with respect to the foreign corporation.

.08 Section 957 ownership requirements

The term “section 957 ownership requirements” means, with respect to a foreign corporation and any given day of a taxable year of the foreign corporation, stock ownership described in section 957 that would cause the foreign corporation to be a CFC on such day.

.09 Section 958(a) U.S. shareholder

The term “section 958(a) U.S. shareholder” means, with respect to a foreign corporation, a U.S. shareholder with respect to the foreign corporation that owns (within the meaning of section 958(a)) stock of the foreign corporation.

.10 Separate-entity financial statement and separate-entity records

The terms “separate-entity financial statements” and “separate-entity records” mean, with respect to a foreign corporation, financial statements or records, as applicable, reflecting the balance sheet or operations solely of the foreign corporation. Notwithstanding the prior sentence, financial statements or records of a foreign corporation qualify as separate-entity financial statements or separate-entity records, as applicable, if:

(a) In cases in which a foreign corporation owns an equity interest in an entity that is a partnership or any other entity (whether domestic or foreign) other than a corporation to the extent that the income or deductions of the entity are included in the income of one or more direct or indirect owners or beneficiaries of the entity

(such an entity, a “pass-through entity”), including through other pass-through entities, the information from the foreign corporation’s financial statements or records is adjusted to take into account the foreign corporation’s proportionate share of the balance sheet and operations of the pass-through entity (based on the separate-entity financial statements or separate-entity records of the entity, determined as if such entity were a foreign corporation) to the extent these items are not already reflected in the foreign corporation’s financial statements or records, as applicable; and

(b) In cases in which a foreign corporation directly or indirectly owns an interest in an entity that is not a pass-through entity whose items are included in the information on the foreign corporation’s financial statements or records (such as an equity interest in a reverse hybrid entity (as defined in §1.909-2(b)(1)(iv))), the information from the foreign corporation’s financial statements or records is adjusted so that the information solely reflects the balance sheet and operations of the foreign corporation, subject to paragraph (a) of this section 3.10.

.11 Unrelated constructive U.S. shareholder

The term “unrelated constructive U.S. shareholder” means, with respect to a foreign corporation, a constructive U.S. shareholder with respect to the foreign corporation that is not a related constructive U.S. shareholder with respect to the foreign corporation.

.12 Unrelated section 958(a) U.S. shareholder

The term “unrelated section 958(a) U.S. shareholder” means, with respect to a foreign corporation, a section 958(a) U.S. shareholder with respect to the foreign corporation that is not a related section 958(a) U.S. shareholder with respect to the foreign corporation.

.13 U.S.-controlled CFC

The term “U.S.-controlled CFC” means a foreign corporation that is a CFC other than a foreign-controlled CFC.

SECTION 4. SAFE HARBOR FOR DETERMINING CFC STATUS

.01 Background

In certain circumstances, as a result of the repeal of section 958(b)(4), a U.S. shareholder with respect to a foreign corporation may not be able to determine that the foreign corporation is a CFC without knowledge regarding the investments of unrelated persons. In such a case, the Treasury Department and the IRS recognize that it may not be possible for the U.S. shareholder to obtain information necessary to determine whether the foreign corporation is a CFC.

.02 Safe harbor

(a) In general

For the reasons discussed in section 4.01 of this revenue procedure, the IRS will accept a U.S. person’s determination that a foreign corporation does not meet the section 957 ownership requirements and, therefore, that the foreign corporation is not a CFC with respect to the U.S. person if the conditions described in section 4.02(b) of this revenue procedure are satisfied. For the avoidance of doubt, if a U.S. person directly or indirectly owns (within the meaning of section 958(a)) stock in a foreign corporation, and a foreign person that is not a related person with respect to the U.S. person also directly or indirectly owns (within the meaning of section 958(a)) stock in the foreign corporation, the U.S. person’s failure to inquire of the foreign person whether the foreign person owns directly or indirectly (determined under the principles of section 958(a)(2)) or constructively owns (determined under the principles of section 958(b)) stock of, or an interest in, a domestic entity will not preclude reliance on the safe harbor described in this section 4.02. The safe harbor set forth in section 4.02 does not apply to a foreign corporation that is a U.S.-controlled CFC.

(b) Conditions

(i) The U.S. person does not have actual knowledge, statements received, and/or reliable publicly available information sufficient for the U.S. person to determine that the section 957 ownership requirements are met. For purposes of applying

this condition, actual knowledge, statements received, and/or reliable publicly available information as of a given date shall be treated as true for all subsequent dates, unless subsequent information rebuts the original information.

(ii) If the U.S. person directly owns stock of, or an interest in, a foreign entity (“top-tier entity”), the U.S. person inquires of the top-tier entity whether it meets the section 957 ownership requirements, whether, how, and to what extent such top-tier entity directly or indirectly owns (within the meaning of section 958(a)) stock of one or more foreign corporations, and whether, how, and to what extent such top-tier entity owns directly or indirectly (determined under the principles of section 958(a)(2)) stock of, or an interest in, one or more domestic entities.

SECTION 5. GENERAL SAFE HARBOR FOR USING ALTERNATIVE INFORMATION

.01 Background

In order to determine a subpart F inclusion amount or GILTI inclusion amount of a U.S. shareholder with respect to a CFC, the U.S. shareholder needs to determine the gross and taxable income, as well as the qualified business asset investment (within the meaning of section 951A(d)) and specified interest expense (as defined in §1.951A-1(c)(3)(iii)), of the CFC. In addition, in order to determine whether the E&P limitation in section 952(c)(1)(A) on subpart F income applies, the U.S. shareholder needs to determine the E&P of the CFC. Under §1.952-2(a) and (b), the gross and taxable income of a foreign corporation are generally determined by treating the foreign corporation as a domestic corporation and by applying the principles of sections 61 and 63 and the regulations thereunder. Under section 964 and the regulations thereunder, the E&P of a foreign corporation are determined according to rules substantially similar to those applicable to domestic corporations. Under §§1.952-2(c)(2) and 1.964-1(a)(1), the determinations of income and E&P of a foreign corporation are made by first making adjustments to the foreign corporation’s books of account to conform with U.S. GAAP, and then making further ad-

justments to conform such statements to U.S. tax accounting standards.

However, the Treasury Department and the IRS recognize that certain U.S. shareholders may be unable to obtain information necessary for the U.S. shareholder to calculate a subpart F inclusion amount or GILTI inclusion amount in the case of a foreign corporation that is a foreign-controlled CFC or report amounts on Form 5471 consistent with the requirements in §1.952-2 and section 964 and the regulations thereunder. Accordingly, the Treasury Department and the IRS believe that it is reasonable for taxpayers to choose to use alternative information for determining a subpart F inclusion amount and GILTI inclusion amount or related recordkeeping or reporting on a Form 5471 with respect to a foreign-controlled CFC in the circumstances described in this section 5. The IRS will accept the use of alternative information by a taxpayer in the circumstances described in section 5.02 of this revenue procedure. However, nothing in this revenue procedure affects the application of the requirements for determining the foreign income taxes paid or accrued by a foreign-controlled CFC for purposes of applying section 960 (relating to deemed paid foreign income taxes). Accordingly, a taxpayer that uses alternative information must determine if amounts paid or accrued are “foreign income taxes,” as defined under §1.960-1(b) (5) and satisfy the evidentiary and other requirements of §1.905-2.

.02 Safe harbor

In the case of a foreign-controlled CFC with respect to which there is no related section 958(a) U.S. shareholder, if information satisfying the requirements of §1.952-2(a), (b), and (c)(2) and section 964 and the regulations thereunder is not readily available to an unrelated section 958(a) U.S. shareholder with respect to the foreign-controlled CFC, a subpart F inclusion amount or a GILTI inclusion amount or an amount in a record required to be maintained under section 964(c), §1.964-3, or §1.964-4 may be determined by the unrelated section 958(a) U.S. shareholder on the basis of alternative information (without adjustments other than those described in sections 3.01(b) and 3.10 of this revenue procedure) with respect to

the foreign-controlled CFC. However, the preceding sentence does not apply for purposes of determining section 965 amounts (as defined in section 6.01 of this revenue procedure). See section 6 of this revenue procedure for a safe harbor for determining section 965 amounts.

In the case of a foreign-controlled CFC with respect to which there is no related section 958(a) U.S. shareholder, the Treasury Department and the IRS intend to revise the instructions for Form 5471 to provide that if information satisfying the requirements of §1.952-2(a), (b), and (c) (2) and section 964 and the regulations thereunder is not readily available to an unrelated section 958(a) U.S. shareholder or an unrelated constructive U.S. shareholder with respect to the foreign-controlled CFC, an amount reported on a Form 5471 may be determined by the unrelated section 958(a) U.S. shareholder or the unrelated constructive U.S. shareholder, as applicable, on the basis of alternative information (without adjustments other than those described in sections 3.01(b) and 3.10 of this revenue procedure) with respect to the foreign-controlled CFC.

SECTION 6. SAFE HARBOR FOR USING ALTERNATIVE INFORMATION FOR DETERMINING SECTION 965 AMOUNTS

.01 Background

The Treasury Department and the IRS recognize that certain U.S. shareholders may have been unable to obtain information necessary for the U.S. shareholder to calculate an amount included under section 951 by reason of section 965 or a deduction under section 965(c) (each a “section 965 amount”) in the case of certain SFCs consistent with the requirements of section 964 and the regulations thereunder and thus may have used alternative information. Accordingly, the Treasury Department and the IRS believe that it is reasonable in such circumstances for such taxpayers to use an approach consistent with the approach outlined in section 5 of this revenue procedure for purposes of the determination of section 965 amounts. Thus, the IRS will accept the use of alternative information by a taxpayer in the circumstances described in section 6.02 of

this revenue procedure. However, nothing in this revenue procedure affects the application of the requirements for determining the foreign income taxes paid or accrued by an SFC for purposes of applying sections 902 and 960 (as in effect on December 21, 2017) for taxable years of SFCs that begin before January 1, 2019. Accordingly, a taxpayer that uses alternative information must determine if amounts paid or accrued are “foreign income taxes,” as provided under sections 902 and 960 (as in effect on December 21, 2017) and applicable regulations, and satisfy the evidentiary and other requirements of §1.905-2, and the extent to which a credit is disallowed for such amounts (see, for example, section 901(k)(1), (l), and (m)).

.02 Safe harbor

In the case of an SFC, other than either a foreign-controlled CFC with respect to which there is a related section 958(a) U.S. shareholder or a U.S.-controlled CFC, if information satisfying the requirements of §1.952-2(a), (b), and (c)(2) and section 964 and the regulations thereunder is not readily available to an unrelated section 958(a) U.S. shareholder with respect to the SFC, a section 965 amount may be determined by the section 958(a) U.S. shareholder on the basis of alternative information (without adjustments other than those described in sections 3.01(b) and 3.10 of this revenue procedure) with respect to the SFC, provided the section 958(a) U.S. shareholder reports such amount on a return both due and filed before October 1, 2019, or a return both due and filed after October 1, 2019.

In the case of an SFC, other than either a foreign-controlled CFC with respect to which there is a related section 958(a) U.S. shareholder or a U.S.-controlled CFC, the Treasury Department and the IRS intend to revise the instructions for Form 5471 to provide that if information satisfying the requirements of section 964 and the regulations thereunder is not readily available to an unrelated section 958(a) U.S. shareholder or an unrelated constructive U.S. shareholder with respect to the SFC, an amount reported on a Form 5471 may be determined by the unrelated section 958(a) U.S. shareholder or the unrelated constructive U.S. shareholder,

as applicable, on the basis of alternative information (without adjustments other than those described in sections 3.01(b) and 3.10 of this revenue procedure) with respect to the SFC.

SECTION 7. INAPPLICABILITY OF PENALTIES UNDER SECTIONS 6038 AND 6662

.01 Background

Under section 6038(b) and (c), penalties can be imposed if any person fails to timely furnish information required under section 6038(a)(1), which information is required to be reported on Form 5471. Under section 6038(c)(4)(B), for purposes of determining such penalties, the time for furnishing such information is treated as not earlier than the last day on which reasonable cause existed for failure to furnish such information. Under section 6662, penalties can be imposed on any portion of an underpayment (as defined in section 6664(a)) of tax required to be shown on a return that is attributable to one of the items listed in section 6662(b), which include negligence or disregard of rules or regulations and a substantial understatement of income tax. Under section 6664(c)(1), penalties will generally not be imposed under section 6662 with respect to any portion of an underpayment if it is shown that there was reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

.02 Inapplicability

Taking into account that the IRS will accept taxpayers' positions based on sections 4.02, 5.02, and 6.02 of this revenue procedure and the availability of reasonable cause relief, penalties under sections 6038 and 6662 will not be applied to the extent such penalties would be attributable to:

- (a) A U.S. person determining that a foreign corporation does not meet the section 957 ownership requirements consistent with section 4.02 of this revenue procedure,
- (b) A U.S. person determining a subpart F inclusion amount or GILTI inclusion amount, an amount in a record required to be maintained under sec-

tion 964(c), §1.964-3, or §1.964-4, or an amount reported on a Form 5471 on the basis of alternative information consistent with section 5.02 of this revenue procedure, or

- (c) A U.S. person determining a section 965 amount on the basis of alternative information consistent with section 6.02 of this revenue procedure.

SECTION 8. FORM 5471 FILING REQUIREMENTS

.01 Background

Pursuant to section 6038(a)(4), the IRS may require any U.S. person treated as a U.S. shareholder of a CFC to file an information return on Form 5471 with respect to its ownership in such CFC. In section 5.02 of Notice 2018-13, 2018-6 I.R.B. 341, the Treasury Department and the IRS announced that the IRS intended to amend the instructions for Form 5471 to provide an exception from Category 5 filing for a U.S. person that is a U.S. shareholder with respect to a CFC if no U.S. shareholder (including such U.S. person) owns, within the meaning of section 958(a), stock in such CFC, and the foreign corporation is a CFC solely because such U.S. person is considered to own the stock of the CFC owned by a foreign person under section 318(a)(3). Section 6 of Notice 2018-13 and section 7 of Notice 2018-26, 2018-16 I.R.B. 480, provided that taxpayers may rely on this exception with respect to the last taxable year of a foreign corporation beginning before January 1, 2018, and each subsequent year of the foreign corporation, and for the taxable years of a U.S. shareholder in which or with which these taxable years of the foreign corporation end. Accordingly, the instructions for Form 5471 (rev. December 2018) provide that a Category 1 or 5 filer does not have to file a Form 5471 if no U.S. shareholder (including the filer) owns, within the meaning of section 958(a), stock in the foreign corporation, and the foreign corporation is a specified foreign corporation or CFC solely because one or more U.S. persons is considered to own the stock of the foreign corporation owned by a foreign person under section 318(a)(3).

However, the Treasury Department and the IRS understand that, even as modified,

the Form 5471 filing requirements may result in a significant undertaking for certain U.S. shareholders with limited access to information with respect to a foreign-controlled CFC. Accordingly, the Treasury Department and the IRS intend to further limit the Form 5471 filing requirements, as described in sections 8.02, 8.03, and 8.04 of this revenue procedure.

.02 Unrelated section 958(a) U.S. shareholders

The IRS intends to revise the instructions for Form 5471 to provide that a Category 5 filer is generally only required to file the identifying information on page 1 of Form 5471 above Schedule A, as well as Schedule I, Schedule I-1, and Schedule P, with respect to a foreign-controlled CFC if the Category 5 filer is an unrelated section 958(a) U.S. shareholder with respect to the foreign-controlled CFC. If, however, the Category 5 filer claims under section 960 to be deemed to have paid foreign income taxes of the foreign-controlled CFC for the Category 5 filer's taxable year, Schedule E and Schedule E-1 are also required to be filed. Therefore, a Category 5 filer that is an unrelated section 958(a) U.S. shareholder with respect to a foreign-controlled CFC will no longer have to file Part II of Schedule B, Schedule G, Schedule H, or Schedule J with respect to the foreign-controlled CFC.

.03 Related constructive U.S. shareholders

The IRS intends to revise the instructions for Form 5471 to provide that a Category 5 filer is generally only required to file the identifying information on page 1 of Form 5471 above Schedule A, as well as Part II of Schedule B, Schedule E, Schedule G, and Schedule I-1, with respect to a foreign-controlled CFC if the Category 5 filer is a related constructive U.S. shareholder with respect to the foreign-controlled CFC. Therefore, a Category 5 filer that is a related constructive U.S. shareholder with respect to a foreign-controlled CFC will no longer have to file Schedule E-1, Schedule H, Schedule I, Schedule J, or Schedule P with respect to the foreign-controlled CFC.

.04 Unrelated constructive U.S. shareholders

The IRS intends to revise the instructions for Form 5471 to provide that a Category 5 filer is not required to file a Form 5471 with respect to a foreign-controlled CFC if it is an unrelated constructive U.S. shareholder with respect to the foreign-controlled CFC.

SECTION 9. EXAMPLES

Example 1: Definition of unrelated section 958(a) U.S. shareholder and related constructive U.S. shareholder—(i) Facts. USI, a citizen of the United States, owns 10% of the single class of stock of FP, a foreign corporation. The remaining 90% of the stock of FP is owned by a foreign individual that is unrelated to USI. FP owns 100% of the single class of stock of FS1, a foreign corporation. FS1 owns 100% of the single class of stock of USS, a domestic corporation, and 100% of the single class of stock of FS2, a foreign corporation

(ii) *Analysis—(a) USS as related constructive U.S. shareholder.* Because FS1 owns 50% or more in value of the stock in USS, USS is considered to own, pursuant to section 958(b) and section 318(a)(3)(C), the 100% of the single class of stock of FS2 owned by FS1. Accordingly, USS is a U.S. shareholder with respect to FS2. Because USS does not own (within the meaning of section 958(a)) any stock of FS2, USS is not a section 958(a) U.S. shareholder with respect to FS2 within the meaning of section 3.09 of this revenue procedure. Accordingly, USS is a constructive U.S. shareholder with respect to FS2 within the meaning of section 3.02 of this revenue procedure. Because USS is a related person with respect to FS2 within the meaning of section 3.06 of this revenue procedure, USS is a related constructive U.S. shareholder with respect to FS2 within the meaning of section 3.05 of this revenue procedure.

(b) *FS2 as a foreign-controlled CFC.* Because more than 50% of the single class of stock of FS2 is considered owned under section 958(b) by USS, a U.S. shareholder with respect to FS2, FS2 is a CFC. If, however, section 318(a)(3)(C) did not apply to treat USS as owning the FS2 stock owned by FS1, FS2 would not be a CFC, because the only stock of FS2 owned (within the meaning of section 958(a)) or considered owned under section 958(b) by U.S. shareholders would be the 10% of the FS2 stock owned (within the meaning of section 958(a)) by USI. Accordingly, FS2 is a foreign-controlled CFC within the meaning of section 3.03 of this revenue procedure.

(c) *USI as an unrelated section 958(a) U.S. shareholder.* Because USI owns (within the meaning of section 958(a)) 10% of the stock of FS2, USI is a section 958(a) U.S. shareholder with respect to FS2 within the meaning of section 3.09 of this revenue procedure. Because USI is not a related person with respect to FS2 within the meaning of section 3.06 of this revenue procedure, USI is an unrelated section 958(a) U.S. shareholder with respect to FS2 within

the meaning of section 3.12 of this revenue procedure.

Example 2: Definition of related section 958(a) U.S. shareholder—(i) Facts. The facts are the same as in *Example 1* of this section 9, except that USS owns 1% of the single class of stock of FS2 and FS1 owns 99%.

(ii) *Analysis.* The analysis is the same as in *Example 1* of this section 9, except that because USS owns (within the meaning of section 958(a)) 1% of the single class of stock of FS2, it is a section 958(a) U.S. shareholder with respect to FS2 within the meaning of section 3.09 of this revenue procedure and not a constructive U.S. shareholder within the meaning of section 3.02 of this revenue procedure. Because USS is a related person with respect to FS2 within the meaning of section 3.06 of this revenue procedure, USS is a related section 958(a) U.S. shareholder with respect to FS2 within the meaning of section 3.07 of this revenue procedure.

Example 3: Definition of unrelated constructive U.S. shareholder—(i) Facts. In 2020, USP, a domestic corporation, and FP, a foreign corporation, invest in FJV, a newly formed foreign corporation. USP receives 10% of the single class of stock of FJV, and FP receives the remaining 90% of the stock of FJV. FP is not a related person with respect to USP. FP has no U.S. shareholders. FP owns 5% of the interests in a domestic partnership, DPS, the remainder of the interests in which are held by persons unrelated to USP and FP.

(ii) *Analysis—(a) DPS as an unrelated constructive U.S. shareholder.* Because FP is a partner in DPS, DPS is considered to own, pursuant to section 958(b) and section 318(a)(3)(A), the 90% of the single class of stock of FJV owned by FP. Accordingly, DPS is a U.S. shareholder with respect to FJV. Because DPS does not own (within the meaning of section 958(a)) any stock of FJV, DPS is not a section 958(a) U.S. shareholder with respect to FJV within the meaning of section 3.09 of this revenue procedure. Accordingly, DPS is a constructive U.S. shareholder with respect to FJV within the meaning of section 3.02 of this revenue procedure. Because DPS is not a related person with respect to FJV within the meaning of section 3.06 of this revenue procedure, relying on §1.954-1(f)(2)(iv), as proposed to be revised at 84 FR 22751, DPS is an unrelated constructive U.S. shareholder with respect to FJV within the meaning of section 3.11 of this revenue procedure.

(b) *FJV as a foreign-controlled CFC.* Because more than 50% of the single class of stock of FJV is considered owned under section 958(b) by DPS, a U.S. shareholder with respect to FJV, FJV is a CFC. If, however, section 318(a)(3)(A) did not apply to treat DPS as owning the FJV stock owned by FP, FJV would not be a CFC, because the only stock of FJV owned (within the meaning of section 958(a)) or considered owned under section 958(b) by U.S. shareholders would be the 10% of the FJV stock owned by USP. Accordingly, FJV is a foreign-controlled CFC within the meaning of section 3.03 of this revenue procedure.

(c) *USP as an unrelated section 958(a) U.S. shareholder.* Because USP owns (within the meaning of section 958(a)) 10% of the stock of FJV, USP is a section 958(a) U.S. shareholder with respect to FJV within the meaning of section 3.09 of this revenue

procedure. Because USP is not a related person with respect to FJV within the meaning of section 3.06 of this revenue procedure, USP is an unrelated section 958(a) U.S. shareholder with respect to FJV within the meaning of section 3.12 of this revenue procedure.

Example 4: U.S. shareholder relies on section 4.02 to determine whether foreign corporation meets the section 957 ownership requirements—(i) Facts. The facts are the same as in *Example 3* of this section 9. USP inquired of FJV whether FJV met the section 957 ownership requirements, and FJV did not report that it met the section 957 ownership requirements. There is no reliable publicly available information that would indicate that FJV is a CFC. USP has not received a statement indicating that FJV is a CFC. Furthermore, after making the inquiry of FJV, USP does not know that FJV is a CFC.

(ii) *Analysis.* Pursuant to section 4.02 of this revenue procedure, because FJV is not a U.S.-controlled CFC and FP is not a related person with respect to USP within the meaning of section 3.06 of this revenue procedure, for purposes of determining if FJV meets the section 957 ownership requirements, USP may rely on the safe harbor described in section 4.02 of this revenue procedure without inquiring of FP whether FP owns directly or indirectly (determined under the principles of section 958(a)(2)) or constructively owns (determined under the principles of section 958(b)) stock of, or an interest in, a domestic entity. Because there is no reliable publicly available information that would indicate that FJV is a CFC, USP has not received a statement indicating that FJV is a CFC, and, after making an inquiry of FJV, USP does not know that FJV is a CFC, USP may treat FJV as not meeting the section 957 ownership requirements.

SECTION 10. APPLICABILITY DATES

Unless otherwise provided in future guidance, taxpayers may apply sections 4, 5, 6, and 7 of this revenue procedure with respect to the last taxable year of a foreign corporation beginning before January 1, 2018, and each subsequent taxable year of such foreign corporation, and with respect to the taxable years of United States shareholders in which or with which such taxable years of such foreign corporation end.

Taxpayers may apply the rules described in sections 5, 6, and 8 of this revenue procedure, before the instructions to the Form 5471 are modified, for the last taxable year of a foreign corporation beginning before January 1, 2018, and each subsequent taxable year of the foreign corporation, and with respect to the taxable years of U.S. shareholders in which or with which such taxable years of the foreign corporation end.

The Treasury Department and the IRS may update the safe harbor for alternative information or the definition of “readily available” in future guidance as needed to ensure adequate tax compliance. Any such updates would be prospective.

SECTION 11. DRAFTING INFORMATION

The principal author of this revenue procedure is Christina G. Daniels of the Office of Associate Chief Counsel (International). For further information regard-

ing this revenue procedure, contact Ms. Daniels at (202) 317-6934 (not a toll free number).