By **Carl A. Merino**

Controlled Foreign Corporations And the OBBBA

How changes to attribution and pro rata share rules will impact common ownership and succession planning structures

The One Big Beautiful Bill Act (OBBBA) made numerous changes to the controlled foreign corporation (CFC) regime. These changes included significant modifications to the global intangible low-taxed income (GILTI) regime (referred to as "net CFC tested income" (NCTI) for taxable years beginning after Dec. 31, 2025 and as "GILTI/NCTI" for the remainder of this article), such as the elimination of the 10% hurdle rate (net deemed tangible income return on qualified business asset investment) from the calculation of GILTI/NCTI; modifications to the Internal Revenue Code Section 250 deduction; and changes to the percentages of allowable tax credits in respect of both allocations of NCTI and distributions of previously taxed earnings and profits.[1] The OBBBA also made permanent the "look-through" rule in IRC Section 954(c)(6), excluding certain payments between related CFCs from subpart F income and GILTI/NCTI.[2] However, two changes will significantly impact multinational families with closely held businesses and inbound succession planning structures: (1) the restoration of the limitation on downward attribution in IRC Section 958(b)(4) (and implementation of new IRC Section 951B[3]), and (2) modifications to the mechanics of how a U.S. shareholder's pro rata portion of subpart F income and GILTI/NCTI is determined under Section 951(a)(2).[4] Most (but not all) of these changes go into effect for tax years of CFCs beginning after 2025.[5]

Much has been written about the pending curtailment of downward attribution, although some nuances are less understood. However, many practitioners have yet to grapple with how changes to the methodology for determining pro rata shares of subpart F income could upend planning for common asset holding structures for non-U.S. individuals with U.S. heirs and beneficiaries. The Internal Revenue Service has signaled that guidance on some of the above changes to the CFC rules could be issued before year-end, but clarity on many aspects of these rule changes will likely elude us for some time. Below I explore how some of these changes might play out.

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CFC Rules in General

A foreign corporation owned more than 50% by U.S. shareholders (by vote or value) is a CFC.[6] A U.S. person is a U.S. shareholder of a foreign corporation if such person owns at least 10% of the corporation's stock, also by vote or value.[7] U.S. shareholders of a CFC are taxed on their pro rata shares of the CFC's subpart F income and GILTI/NCTI.[8] Subpart F income includes most types of passive investment income, such as dividends, interest, rents, royalties and realized capital gains, as well as certain other limited categories of related party income.[9] The GILTI/NCTI regime picks up most types of active business income not otherwise included in subpart F income.[10]

Attribution Rules

U.S. shareholders of a CFC are subject to subpart F income or GILTI/NCTI inclusions only in proportion to direct interests or indirect interests (through a foreign entity or trust) in the CFC.[11] However, much broader constructive ownership rules apply in addition to indirect ownership for purposes of determining whether a U.S. person is a U.S. shareholder or a foreign corporation is a CFC in the first place. These include:

- Family attribution from spouses, parents, children or grandchildren (but not siblings).[12] Section 958(b)(1) blocks attribution from non-U.S. family members to U.S. family members but appears to allow attribution to other non-U.S. family members.
- Upward attribution from a corporation, partnership, trust or estate to a shareholder, partner or beneficiary, subject to a 10% direct or indirect ownership minimum (by value) for attribution up from a corporation.[13]
- Downward attribution from a shareholder, partner or beneficiary down to a corporation, partnership, trust or estate, subject to a 50% direct or indirect ownership minimum (by value) for attribution down to a corporation.[14] As explained below, downward attribution from non-U.S. owners to U.S. entities and trusts, which was introduced by the Tax Cuts and Jobs Act of 2017, will apply only on a limited basis for taxable years beginning on or after Jan. 1, 2026.

Downward Attribution

From 1962 to 2017, Section 958(b)(4) prevented downward attribution from non-U.S. owners to U.S. entities and trusts, but Congress repealed Section 958(b)(4) for taxable years beginning in 2017. This change targeted a certain type of de-control arrangement in which U.S. corporations that were part of multinational groups sought to dilute their ownership of foreign subsidiaries below the thresholds for CFC status, often via participation of a foreign parent or other affiliate. Attributing the foreign parent company's stock in the foreign subsidiary down to the U.S. corporation would make such planning more difficult. However, this change had such a broad impact that it opened the floodgates for attribution across a wide swath of closely held family businesses and succession structures, including companies overwhelmingly owned and controlled by non-U.S. people. For example, the foreign subsidiaries of a foreign parented multinational group that has at least one U.S. subsidiary are currently CFCs without regard to actual U.S. ownership of the parent company due to attribution of ownership of the foreign subsidiaries from the foreign parent company down to the U.S. subsidiary.

Example 1: Two parents and their two adult children, all nonresident aliens for U.S. federal income tax purposes, co-own a closely held corporate group in their country of residence. One of the children moves to the United States. Even though a supermajority of the owners is foreign, the foreign subsidiaries still become CFCs under the pre-OBBBA rules, exposing the U.S. child to subpart F income and GILTI inclusions from the foreign subsidiaries. See "Downward Attribution in Action—Before the OBBBA," p. 46.

The reach of downward attribution was amplified by reattribution.[15] For example, foreign stock owned by a non-U.S. individual could be attributed to another non-U.S. family member and then reattributed down to a U.S. partnership, corporation or trust owned by that other non-U.S. family member that's completely outside the structure.

The OBBBA restores the bar on downward attribution. Foreign to U.S. downward attribution is largely eliminated for purposes of determining CFC status starting in 2026. The OBBBA reinstated Section 958(b)(4), effective for CFC tax years beginning after 2025, and will generally block downward attribution from non-U.S. shareholders, partners and beneficiaries to U.S. corporations, partnerships, trusts and estates.

In place of the current rules, new Section 951B will apply a more limited downward attribution regime to "foreign-controlled United States shareholders" (foreign-controlled U.S. shareholders) of a "foreign-controlled foreign corporation" (FCFC). A foreign-controlled U.S. shareholder is a U.S. person who would be considered a U.S. shareholder with respect to a foreign corporation if, under the current constructive ownership rules allowing downward attribution from non-U.S. persons to U.S. entities and trusts, the U.S. person was considered to own more than 50% of the stock of the foreign corporation by vote or value. A foreign corporation other than a CFC is considered an FCFC if it's owned more than 50% by foreign-controlled U.S. shareholders. Thus, a greater than 50% U.S. owner (applying downward attribution) is required for both foreign-controlled U.S. shareholder and FCFC status. The new FCFC regime runs parallel to the existing CFC regime.

If a foreign corporation is an FCFC but not a

CFC under the general rules, then only the foreign-controlled U.S. shareholder is subject to subpart F income or GILTI/NCTI inclusions and, even then, presumably only to the extent such shareholder owns a direct or indirect interest in the FCFC within the meaning of Section 958(a). Returning to Example 1 above and applying it to tax years starting after 2025, the foreign subsidiaries would be FCFCs as to the U.S. subsidiary, which would be a foreign-controlled U.S. shareholder under the new rules. However, without a direct or indirect interest in the foreign subsidiaries (and subject to IRS guidance, which is pending), the U.S. subsidiary wouldn't appear to face any subpart F income or GILTI/NCTI exposure under Section 951B, which would make sense given that the provision is intended to target de-control arrangements in which the U.S. corporation retains an economic interest in the foreign subsidiary.

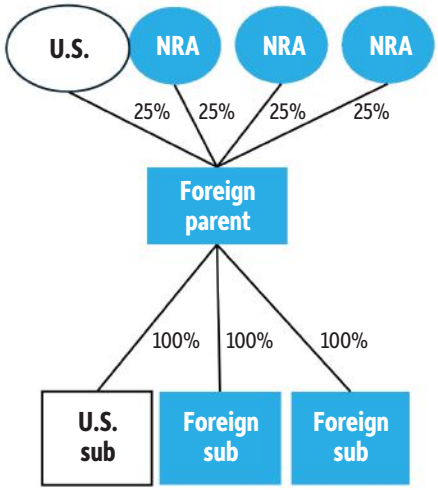
The U.S. child owns only 25% of the foreign parent company and foreign subsidiaries regardless of whether downward attribution applies and thus isn't a foreign-controlled U.S. shareholder. Because none of the foreign companies is an actual CFC under the new rules, and the U.S. child isn't a foreign-controlled U.S. shareholder as to the FCFC subsidiaries, the U.S. child has no phantom income inclusions under either the CFC or FCFC regimes. See "Limited Downward Attribution Regime," p. 47.

A few caveats:

- Even though the U.S. child is no longer a U.S. shareholder, they still must file IRS Form 5471 (Information Return of U.S. Persons With Respect to Certain Foreign Corporations). This form is known primarily as an information return required of U.S. shareholders of CFCs (Category 5 filers) but is also used to report interests in closely held foreign companies that may not be CFCs. For example, under IRC Section 6038, U.S. persons who "control" a foreign corporation (that is, own

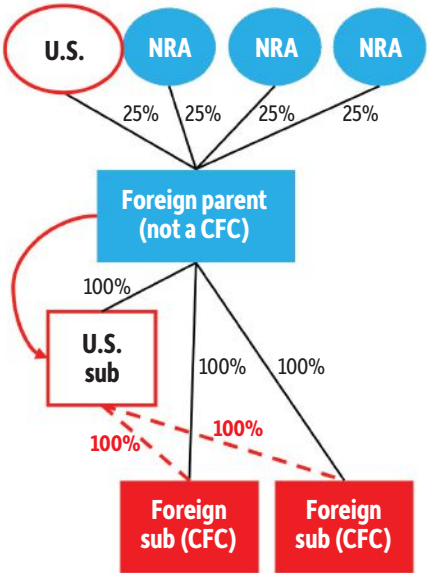
Downward Attribution in Action—Before the OBBBA

Foreign subsidiaries become controlled foreign corporations



(1) Foreign parent company's stock in foreign subs attributed down to U.S. sub, causing U.S. sub to be 100% constructive owner of foreign subs and foreign subs to be CFCs.

(2) U.S. child now a U.S. shareholder of foreign subs, exposing U.S. child to subpart F income and GILTI inclusions as to their 25% share of foreign subs' corporate earnings.



Key
U.S. sub—U.S. subsidiary
Foreign sub—Foreign subsidiary
CFC—Controlled foreign corporation
GILTI—Global intangible low-taxed income
NRA—Nonresident alien

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more than 50% of its stock by vote or value) must file Form 5471 as Category 4 filers. Unlike the case with Section 958(b)(1), Section 6038(e)(2) allows family attribution from non-U.S. family members to U.S. family members.[16] Thus, the U.S. child constructively owns the shares of the foreign parent company and the foreign subsidiaries directly and indirectly owned by their non-U.S. parents, making the child a 75% owner and, thus, a "control" person for Category 4 reporting purposes, despite not being a U.S. shareholder of any CFCs.[17]

- The U.S. subsidiary may still have reporting obligations as a foreign-controlled U.S. shareholder under the new rules, even if it doesn't face subpart F income or GILTI/NCTI exposure. IRS guidance on Section 951B reporting obligations and applicable filing exceptions is pending.
- In the case of many passive investment vehicles, CFC status may actually be the lesser of two evils because the alternative is the often more onerous passive foreign investment company (PFIC) rules, which can result in taxation at top marginal rates plus an interest charge on certain distributions and gains recognized in respect of a PFIC under Section 1291. In general, a foreign corporation is a PFIC if 75% or more of its gross income is passive income or 50% or more of its assets are held or deemed held for the production of passive income (such as stocks, bonds, cash and cash equivalents).[18] If a PFIC is also a CFC, then CFC status can supersede the application of the PFIC rules for eligible U.S. owners who qualify as U.S. shareholders under the CFC rules, allowing such U.S. shareholders to avoid the application of the PFIC rules.[19] However, this shield will fall away after this year.[20]

Last Day Requirement

The other major change affecting family succession structures was an overhaul of Section 951(a), which determines U.S. shareholders' pro rata shares of subpart F income.

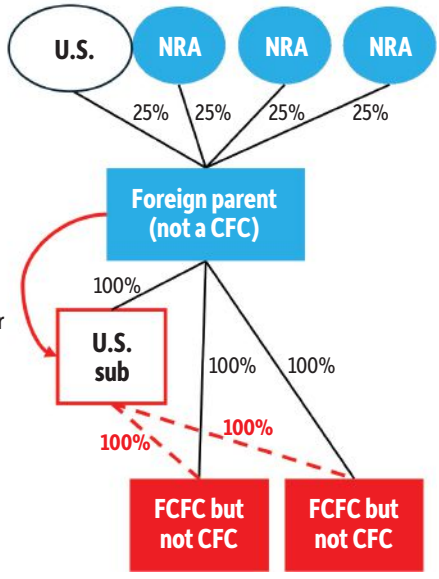
Current rules (pre-OBBBA). For taxable years of CFCs beginning before Jan. 1, 2026, if a foreign corporation is a CFC at any time during a taxable year, only those persons who are U.S. shareholders and directly or indirectly (via a foreign entity or trust) own stock in the corporation on the last day in such taxable year that the corporation is a CFC are required to include their pro rata share of the corporation's subpart F income in their gross income.[21] A U.S. shareholder's pro rata share of subpart F income is the amount they would receive in a hypothetical distribution by the corporation on the last day of the taxable year on which it's a CFC

Limited Downward Attribution Regime

No income inclusion

U.S. child is neither a U.S. shareholder subject to subpart F income or GILTI/NCTI inclusions, nor a foreign-controlled U.S. shareholder under Internal Revenue Code Section 951B.

U.S. sub is a foreign-controlled U.S. shareholder of foreign subs under IRC Section 951B (reporting obligations to be determined) but has no apparent subpart F income or GILTI/NCTI exposure without direct or indirect interest in foreign subs.



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if it had distributed pro rata to its shareholders a fraction of its total subpart F income for the tax year determined by dividing the number of days of CFC status by the total number of days in its tax year.[22]

The last day rule noted above, coupled with a fractional inclusion of subpart F income without any closing of the books, can have arbitrary results, particularly in cases involving a mid-year sale or other transfer by a U.S. shareholder. For example, if a U.S. shareholder sells their stock in a CFC mid-year, but U.S. ownership is sufficient for the corporation to remain a CFC after the sale, then the seller isn't a U.S. shareholder on the last day of the taxable year that the corporation is a CFC and, thus, may escape subpart F income inclusions entirely in the year of sale. By the same token, if the buyer is a U.S. shareholder on the last day of the CFC's tax year, then the buyer is on the hook for a fractional inclusion of subpart F income attributable to the seller's period of ownership. On the other hand, if the sale terminates CFC status, then the seller is considered a U.S. shareholder as of the last day of CFC status. Without a closing of the book on transfer, the seller is exposed to at least a fraction of subpart F income generated post-sale after the seller has ceased to be a U.S. shareholder.

Note: Because the GILTI/NCTI regime incorporates the pro rata rule from Section 951(a)(2), this same fractional inclusion rule applies before the rule change for purposes of determining a U.S. shareholder's pro rata share of GILTI/NCTI.[23]

Elimination of the last day and fractional inclusion rules by OBBBA. For taxable years beginning on or after Jan. 1, 2026, if a foreign corporation is a CFC at any time during its taxable year (such portion of the year referred to as the "CFC year"), then any U.S. shareholder who owns stock during the CFC year is required to include their pro rata share of the CFC's subpart F income or GILTI/NCTI for the CFC year.[24] A U.S. shareholder's pro rata share of a CFC's subpart F income (and thus, NCTI per amended Section 951A(c)(1)) is the portion of such income that's attributable to: (1) the stock of such corporation directly or indirectly owned by such shareholder; and (2) any period of the CFC year during which: (i) the shareholder directly or indirectly owned such stock; (ii) the shareholder was a U.S. shareholder; and (iii) the corporation was a CFC.[25] Only subpart F income or GILTI/NCTI generated by a foreign corporation while it's a CFC and the taxpayer is a U.S. shareholder with a direct or indirect interest in such CFC would appear to be allocable to such taxpayer.

While the mechanics of how subpart F income (and GILTI/NCTI) will be attributed to U.S. shareholders (including under what circumstances the CFC's tax year would close) have been left to the IRS to sort out,[26] this opens the door to what could be a more balanced result in a sale or other transfer scenario, for example, with the transferor and transferee U.S. shareholders each bearing responsibility only for subpart F income and GILTI/NCTI generated during their own respective holding periods as U.S. shareholders of a CFC. However, this change also could have a dramatic impact on post-mortem elections with respect to common inbound succession planning structures.

Impact of loss of the fractional inclusion rule on post-mortem planning. Nonresident alien individuals[27] are subject to U.S. federal estate tax only with respect to assets situated in the United States (U.S. situs assets).[28] However, their lifetime exemption is only $60,000, as compared with the $15 million exemption available to U.S. citizens and residents starting in 2026.[29] Nonresident aliens often hold U.S. stocks and other U.S. situs assets subject to estate tax in wholly owned foreign corporations because stock in a foreign corporation is considered a non-U.S. situs asset and, thus, generally wouldn't be subject to estate tax in the hands of a non-U.S. decedent.

If the nonresident has U.S. heirs and local law permits, both U.S. and non-U.S. financial assets will often be held in a foreign grantor trust drafted with reserved powers to allow for a basis step-up at death with respect to assets held at trust level under IRC Sections 1014(b)(2) or (3). However, a trust with a nonresident alien grantor generally will qualify as a grantor trust only if the trust is either: (1) revocable solely by the grantor (or with the consent of a related or subordinate party subservient to the grantor); or (2) irrevocable and the trust instrument allows distributions only to the grantor and/or the grantor's spouse during the grantor's lifetime. Because these retained powers or interests cause inclusion under IRC Section 2038 (revocable transfers) or IRC

Section 2036 (retained life interest or control over beneficial enjoyment), respectively, the trust assets will generally be includible in the grantor's U.S. gross estate to the extent they have a U.S. situs, necessitating the use of foreign holding companies for any U.S. situs assets.[30] As a practical matter, both U.S. and non-U.S. financial assets are typically held in foreign holding companies for ease of administration by the trustees and investment managers.

These foreign holding companies, which protect the non-U.S. owners/grantors from estate tax, create income tax complications post-mortem. First, while shares of stock in the foreign holding company itself are stepped up to fair market value at death (assuming the grantor reserved the necessary powers), this has no bearing on the company's inside basis with respect to its underlying assets. Second, the foreign holding company generally will become a CFC after the grantor/owner dies if most of the beneficial interest is vested in U.S. citizens or residents or a PFIC if U.S. beneficiaries are in the minority and the company holds primarily portfolio investments. Thus, it will often be imperative to file entity classification elections after the grantor's death to convert the foreign holding companies into disregarded entities (or partnerships if held directly by multiple heirs).[31]

If the foreign holding company owns only non-U.S. situs assets, an election can be filed, effective on or prior to the date of death,[32] so that the grantor/owner will be deemed to have died holding the assets through a disregarded entity. This presumably allows for an inside basis step-up under Section 1014. Because the trust remains a grantor trust and the non-U.S. grantor continues to be the tax owner when the company becomes a disregarded entity, no income or gain is recognized under the CFC or PFIC rules.

On the other hand, if the holding company owns U.S. situs assets, then the election must be made effective after the date of death because converting the holding company into a disregarded entity while the grantor is still alive could eliminate the estate tax protection afforded by the foreign holding company. When the grantor dies, the trust automatically becomes a foreign non-grantor trust. At this point, shares of the foreign holding company can be attributed to the U.S. beneficiaries for purposes of the CFC and PFIC rules.[33] In that case, there could be a brief period of CFC or PFIC status before the foreign holding company is deemed liquidated, depending on the mix of U.S. and non-U.S. beneficiaries, resulting in some tax leakage. As illustrated in the following example, this is where loss of the fractional inclusion rule has the biggest impact.

Example 2. Lisa, a nonresident alien settles a foreign grantor trust for the benefit of two of her children and their children, all of whom are U.S. citizens. The trust owns a portfolio of publicly traded U.S. and foreign stocks through a foreign company (FCo). FCo is eligible to elect its classification for U.S. federal tax purposes.[34] The trust is drafted with reserved powers that allow for a step-up in basis as to the shares of FCo (and any other assets held at trust level) when the grantor dies. Lisa dies on April 9 of a non-leap year.

> The fractional inclusion rule makes the biggest difference under current law (until the OBBBA changes go into effect) because the fractional inclusion can be reduced by minimizing the number of days of CFC status.

Because FCo holds U.S. situs assets, the election must be made effective after the date of death to avoid estate tax exposure for the grantor. However, because the conversion of a corporation into a disregarded entity pursuant to an entity classification election is treated as a liquidation,[35] the trust will be deemed to sell its shares of FCo in a taxable sale under IRC Section 331, and FCo will be deemed to sell its underlying assets under IRC Section 336. Because of the basis step-up at death, very little outside gain is recognized by the trust, and so very little distributable net income (which could be taxable when distributed

to the U.S. beneficiaries) is generated as a result of the election. However, because FCo still would have a cost basis in its underlying assets, all of its inside gain will be recognized as subpart F income. This is where the fractional inclusion rule makes the biggest difference under current law (until the OBBBA changes go into effect) because the fractional inclusion can be reduced by minimizing the number of days of CFC status.

Guidance on the new pro rata rules is scarce; however, practitioners relying on the fractional inclusion rule to minimize tax leakage from post-mortem elections will need to consider the possibility of 100% inclusion and plan accordingly.

Pro rata share of subpart F income under current rules (fractional inclusion). The holding period for the U.S. beneficiaries excludes the acquisition date (that is, the date of death when the trust becomes a foreign non-grantor trust and the U.S. beneficiaries become indirect U.S. shareholders) and includes the disposition date (that is, the day after when the foreign holding company is deemed to be liquidated pursuant to the entity classification election).[36] Thus, if the election is filed effective April 11 (two days after the date of death), FCo will be deemed to have been liquidated on April 10, resulting in only one day of CFC status in the numerator. However, the denominator will include 100 days running from Jan. 1 to April 10, resulting in a fractional inclusion of only 1%. That's how much of the inside gain could be taxable to the U.S. beneficiaries as subpart F income under the current rules. If their combined indirect ownership is less than 100%, then their pro rata share of subpart F income will be correspondingly reduced. Even if the grantor died earlier in the year, resulting in a smaller denominator and a higher fractional inclusion, the tax leakage from the fractional inclusion generally would be a small fraction of the estate tax avoided by holding U.S. situs assets in FCo.

Pro rata share of Subpart F income under new rules (starting in 2026). As discussed above, Section 951(a)(2), as revised by the OBBBA, includes in a U.S. shareholder's pro rata share of subpart F income the portion of such income attributable to the period during which: (1) the shareholder directly or indirectly (via a foreign trust or entity) owned such stock; (2) the shareholder was a U.S. shareholder; and (3) the corporation was a CFC. The statutory language is quite skeletal and leaves much to IRS interpretation. However, all of the inside gains recognized by the foreign company on account of the deemed liquidation would be recognized during the 1-day period of CFC status for FCo and U.S. shareholder status for the beneficiaries. Thus, arguably 100% of the inside gain could be included in the U.S. beneficiaries' pro rata share of subpart F income under the new rules. It's unclear whether this is where the IRS guidance will land, but it would seem to be the most direct reading of the statutory language.

- There are ways to mitigate some of these potential consequences, and some of these measures are already advisable under the current rules. For example, if there are significant non-U.S. situs assets in the overall portfolio, they should be held in a separate foreign holding company, which could elect to be disregarded for federal tax purposes effective on or before the grantor's death, taking CFC and PFIC status off the table and positioning the underlying assets for an automatic basis step-up at death without risking estate tax exposure.
- If the U.S. asset holding company holds primarily marketable securities, then periodic rotation of stocks in the portfolio (that is, harvesting gains along the way) could prevent an excessive buildup of inside basis, thereby reducing the amount of subpart F income that could be taxable on account of the post-mortem elections.[37]

- Certain tiered holding company structures, such as the "trio" and "diamond" structures used by some practitioners to deal with illiquid assets, potentially could be used to prevent the inside gain from being included in subpart F income under the new rules. If the lower tier subsidiary holding the portfolio elects to be disregarded effective prior to the grantor's death so that the deemed asset sale is made by a company that never becomes a CFC or PFIC in the first place and the deemed sale of subsidiary stock by the upper tier companies that co-own it occurs before they become CFCs or have U.S. shareholders, then there's potentially a mechanism to cut off subpart F income exposure. However, this depends on whether the new rules, as implemented by the IRS, will indeed allow for a closing of the books on the pre-CFC period and only take into account subpart F income generated when the holding company is a CFC and the U.S. beneficiaries are U.S. shareholders. The use of tiered holding companies remains untested and raises potential business purpose issues even under the current rules. It remains to be seen how the IRS would treat these structures under the modified rules. Further, adding more entities to the structure is quite expensive when one considers the annual carrying and compliance costs of these additional companies over what could be many decades.
- Finally, one might hold assets in an irrevocable trust that benefits only the grantor's spouse during the grantor's lifetime. This trust could qualify as a grantor trust while still offering the grantor estate tax protection. The grantor would have to forgo the usual reservation of Section 1014(b)(3) powers that would otherwise allow for an automatic basis step-up at death. However, because the trust itself is designed to provide estate tax protection, U.S. and non-U.S. assets alike could be held in a foreign company that elects to be disregarded effective on or prior to the grantor's death, triggering a deemed liquidation that potentially steps up the basis of the underlying assets. However, to provide more robust estate tax protection, it's generally recommended that the grantor not be a beneficiary, which can limit this option's utility.[38]

Guidance is Scarce

As of the date of this writing, guidance on the new pro rata rules is scarce; however, practitioners relying on the fractional inclusion rule to minimize tax leakage from post-mortem elections will need to consider the possibility of 100% inclusion and plan accordingly. Some of the options above, which already are in use, may take on added importance in the years to come.

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Endnotes

1. Pub. L. 119-21, Sections 70311, 70312, 70321, 70322, 70323.
2. Pub. L. 119-21, Section 70351.
3. Pub. L. 119-21, Section 70353.
4. Pub. L. 119-21, Section 70354.
5. A one-time transition rule could affect how certain distributions made in 2025 could affect allocations of subpart F income, and changes to the percentage of allowable foreign tax credits associated with respect to distributions of previously taxed earnings and profits are effective for global intangible low-taxed income (GILTI)/net controlled foreign corporation (CFC) tested income (NCTI) inclusions after June 28, 2025. *See* Pub. L. 119-21, Sections 70354(c)(2), 70312(c)(2).
6. Internal Revenue Code Section 957(a).
7. IRC Section 951(b).
8. Sections 951(a), 951A(a).
9. IRC Sections 952(a), 953 and 954.
10. There are significant differences in the mechanics of how subpart F income and GILTI/NCTI are calculated. A discussion of these differences is beyond the scope of this article.
11. Sections 951(a), 958(a).
12. Section 958(b); Treasury Regulations Section 1.958-2(b).
13. Section 958(b); Treas. Regs. Section 1.958-2(c).
14. Section 958(b); Treas. Regs. Section 1.958-2(d)(1).
15. IRC Section 318(a)(5)(A); Treas. Regs. Section 1.958-2(f)(1)(i).
16. Treas. Regs. Section 1.6038-2(c) makes no distinction between U.S. and non-U.S. family members.
17. Treas. Regs. Section 1.6038-2(l) provides a limited exception to family attribution from non-U.S. family members for a U.S. person whose interest is purely constructive. However, the U.S. child owns a direct interest in the foreign parent company and indirect interests in its foreign subsidiaries and thus doesn't qualify for this exception.
18. IRC Section 1297(a); Notice 88-22, 1988-1 C.B. 489. If a foreign corporation owns 25% or more of the stock of a subsidiary, one would

look through the subsidiary to the subsidiary's underlying income and assets in proportion to the parent company's ownership for purposes of testing whether the foreign parent company is a passive foreign investment company (PFIC). IRC Section 1297(c). This look-through rule prevents a holding company with operating subsidiaries from automatically being treated as a PFIC on account of owning primarily stock of other corporations.

19. IRC Section 1297(d). Note that for the CFC rules to supersede application of the PFIC rules as to a given U.S. owner, the U.S. owner must have been a U.S. shareholder, and the PFIC must have been a CFC for the entirety of such owner's holding period.
20. Note that the U.S. child already would have had to consider whether the foreign parent company was a PFIC because downward attribution would have triggered CFC status only in respect of the foreign subsidiaries.
21. Section 951(a)(1) (for tax years of foreign corporations beginning before Jan. 1, 2026).
22. Adjustments are made for certain distributions to other shareholders.
23. Section 951A(c)(1).
24. Note that the last day rule still applies for purposes of income inclusions triggered by certain CFC investments in U.S. property under IRC Section 956.
25. Section 951(a)(2) (for tax years of foreign corporations beginning on or after Jan. 1, 2026).
26. Section 951(a)(4) directs the Internal Revenue Service to issue regulations or other guidance as necessary to carry out the purposes of this subsection, including guidance either allowing or requiring taxpayers to close the taxable year of a CFC on the direct or indirect disposition of its stock.
27. Unlike the case with residence for federal income tax purposes, which is based on either green card status or day count, residence for estate and gift tax purposes is based on domicile. However, for purposes of this article, the term "nonresident alien" refers to a noncitizen who's a nonresident for both income and transfer tax purposes.
28. IRC Sections 2104, 2105. U.S. situs assets include U.S. stocks and certain other types of intangible property issued by U.S. persons, as well as real and tangible personal property situated in the United States.
29. IRC Section 2106(b). In some cases, an estate tax treaty may allow for a larger exemption amount or assign primary taxing jurisdiction over certain assets to another country.
30. It's possible for a foreign grantor trust to serve as an estate tax blocker if only the grantor's spouse is eligible for distributions during the grantor's lifetime.
31. It's assumed for purposes of this article that in the case of direct ownership by heirs, non-U.S. owners would use non-U.S. holding companies to hold their interests in the now fiscally transparent entity.
32. Elections generally may be filed with retroactive effect up to 75 days after the effective date. Treas. Regs. Section 301.7701-3(c)(1)(iii).
33. If the trust was drafted to automatically become a U.S. trust at death, then the trust itself would be the U.S. shareholder.
34. Treas. Regs. Sections 301.7701-2(b)(8), -3(a), -3(b)(2).
35. Treas. Regs. Section 301.7701-3(g)(1)(iii).
36. Treas. Regs. Section 1.951-1(f).
37. Although "wash sale" rules prevent the recognition of losses for affected taxpayers who repurchase the same stock within certain time windows, there's no equivalent wash sale rule for the recognition of gains.
38. It's possible for the grantor to be a discretionary beneficiary of a self-settled trust in certain asset protection jurisdictions, but even in such cases, the grantor could undermine the estate tax protection offered by the trust by looking to the trust for distributions.

SPOTLIGHT

Lady in the Hat
Easter, The Saturday Evening Post cover by Joseph Christian Leyendecker sold for $150,000 at Heritage Auctions American Art Signature Auction on May 16, 2025 in Dallas. Leyendecker was known for his illustrations of idealized figures, including men, women and children, presented with an unmistakable blend of glamour and modern sophistication.