FOREIGN CORPORATIONS

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[T.D. 8611, 60 FR 41005, Aug. 11, 1995]

§ 1.881–1 Manner of taxing foreign corporations.

(a) *Classes of foreign corporations.* For purposes of the income tax, foreign corporations are divided into two classes, namely, foreign corporations which at no time during the taxable year are engaged in trade or business in the United States and foreign corporations which, at any time during the taxable year, are engaged in trade or business in the United States.

(b) *Manner of taxing*—(1) *Foreign corporations not engaged in U.S. business.* A foreign corporation which at no time during the taxable year is engaged in trade or business in the United States is taxable, as provided in § 1.881–2, on all income received from sources within the United States which is fixed or determinable annual or periodical income and on other items of income enumerated under section 881(a). Such a foreign corporation is also taxable on certain income from sources within the United States which, pursuant to § 1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States.

(2) *Foreign corporations engaged in U.S. business.* A foreign corporation which at any time during the taxable year is engaged in trade or business in the United States is taxable, as provided in § 1.882–1, on all income from whatever source derived, whether or not fixed or determinable annual or periodical income, which is effectively connected for the taxable year with the conduct of a trade or business in the United States. Such a foreign corporation is also taxable, as provided in § 1.882–1, on income received from sources within the United States which is not effectively connected for the taxable year with the conduct of a trade or business in the United States and consists of (i) fixed or determinable annual or periodical income, or (ii) other items of income enumerated in section 881(a). A foreign corporation which at any time during the taxable year is engaged in trade or business in the United States is also taxable on certain income from sources within the United States which, pursuant to § 1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States.

(c) *Meaning of terms.* For the meaning of the term ''engaged in trade or business within the United States'', as used in section 881 and this section, see section 864(b) and the regulations thereunder. For determining when income, gain, or loss of a foreign corporation for a taxable year is effectively connected for that year with the conduct of a trade or business in the United States, see section 864(c), the regulations thereunder, and § 1.882–2. The term *foreign corporation* has the meaning assigned to it by section 7701(a)(3) and (5) and the regulations thereunder. However, for special rules relating to possessions of the United States, see § 1.881–5.

(d) *Rules applicable to foreign insurance companies*—(1) *Corporations qualifying under subchapter L.* A foreign corporation carrying on an insurance business in the United States at any time during the taxable year, which, without taking into account its income not effectively connected for the taxable year with the conduct of a trade or business in the United States, would qualify for the taxable year under part I, II, or III of subchapter L if it were a domestic corporation, shall be taxable for such year under that part on its entire taxable income (whether derived from sources within or without the United States) which is, or which pursuant to section 882 (d) or (e) and § 1.882–2 is treated as, effectively connected for the taxable year with the conduct of a trade or business (whether or not its insurance business) in the United States. Any income derived by that foreign corporation from sources within the United States which is not effectively connected for the taxable year with the conduct of a trade or business in the United States is taxable as provided in section 881(a) and § 1.882–1. See sections 842 and 861 through 864, and the regulations thereunder.

(2) *Corporations not qualifying under subchapter L.* A foreign corporation which carries on an insurance business

in the United States at any time during the taxable year, and which, without taking into account its income not effectively connected for the taxable year with the conduct of a trade or business in the United States, would not qualify for the taxable year under part I, II, or III of subchapter L if it were a domestic corporation, and a foreign insurance company which does not carry on an insurance business in the United States at any time during the taxable year, shall be taxable—

(i) Under section 881(a) and §1.881–2 or §1.882–1 on its income from sources within the United States which is not effectively connected for the taxable year with the conduct of a trade or business in the United States,

(ii) Under section 882(a)(1) and §1.882–1 on its income (whether derived from sources within or without the United States) which is effectively connected for the taxable year with the conduct of a trade or business in the United States, and

(iii) Under section 882(a)(1) and §1.882–1 on its income from sources within the United States which pursuant to section 882 (d) or (e) and §1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States.

(e) *Other provisions applicable to foreign corporations*—(1) *Accumulated earnings tax.* For the imposition of the accumulated earnings tax upon the accumulated taxable income of a foreign corporation formed or availed of for tax avoidance purposes, whether or not such corporation is engaged in trade or business in the United States, see section 532 and the regulations thereunder.

(2) *Personal holding company tax.* For the imposition of the personal holding company tax upon the undistributed personal holding company income of a foreign corporation which is a personal holding company, whether or not such corporation is engaged in trade or business in the United States, see sections 541 through 547, and the regulations thereunder. Except in the case of a foreign corporation having personal service contract income to which section 543(a)(7) applies, a foreign corporation is not a personal holding company if all of its stock outstanding during the last half of the taxable year is owned by nonresident alien individuals, whether directly or indirectly through foreign estates, foreign trusts, foreign partnerships, or other foreign corporations. See section 542(c)(7).

(3) *Foreign personal holding companies.* For the mandatory inclusion in the gross income of the United States shareholders of the undistributed foreign personal holding company income of a foreign personal holding company, see section 551 and the regulations thereunder.

(4) *Controlled foreign corporations*—(i) *Subpart F income and increase of earnings invested in U.S. Property.* For the mandatory inclusion in the gross income of the U.S. shareholders of the subpart F income, of the previously excluded subpart F income withdrawn from investment in less developed countries, of the previously excluded subpart F income withdrawn from investment in foreign base company shipping operations, and of the increase in earnings invested in U.S. property, of a controlled foreign corporation, see sections 951 through 964, and the regulations thereunder.

(ii) *Certain accumulations of earnings and profits.* For the inclusion in the gross income of U.S. persons as a dividend of the gain recognized on certain sales or exchanges of stock in a foreign corporation, to the extent of certain earnings and profits attributable to the stock which were accumulated while the corporation was a controlled foreign corporation, see section 1248 and the regulations thereunder.

(5) *Changes in tax rate.* For provisions respecting the effect of any change in rate of tax during the taxable year on the income of a foreign corporation, see section 21 and the regulations thereunder.

(6) *Consolidated returns.* Except in the case of certain corporations organized under the laws of Canada or Mexico and maintained solely for the purpose of complying with the laws of that country as to title and operation of property, a foreign corporation is not an includible corporation for purposes of the privilege of making a consolidated return by an affiliated group of

corporations. See section 1504 and the regulations thereunder.

(7) *Adjustment of tax of certain foreign corporations.* For the application of pre-1967 income tax provisions to corporations of a foreign country which imposes a more burdensome income tax than the United States, and for the adjustment of the income tax of a corporation of a foreign country which imposes a discriminatory income tax on the income of citizens of the United States or domestic corporations, see section 896.

(f) *Effective/applicability date.* This section applies for taxable years beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.881–1 (Revised as of January 1, 1971).

(Secs. 7805 (68A Stat. 917; 26 U.S.C. 7805) and 7654(e) (86 Stat. 1496; 26 U.S.C. 7654(e)) of the Internal Revenue Code of 1954)

[T.D. 7293, 38 FR 32795, Nov. 28, 1973, as amended by T.D. 7385, 40 FR 50260, Oct. 29, 1975; T.D. 7893, 48 FR 22507, May 19, 1983; T.D. 9194, 70 FR 18929, Apr. 11, 2005; T.D. 9391, 73 FR 19359, Apr. 9, 2008]

§ 1.881–2 Taxation of foreign corporations not engaged in U.S. business.

(a) *Imposition of tax.* (1) This section applies for purposes of determining the tax of a foreign corporation which at no time during the taxable year is engaged in trade or business in the United States. However, see also §1.882–2 where such corporation has an election in effect for the taxable year in respect to real property income or receives interest on obligations of the United States. Except as otherwise provided in §1.871–12, a foreign corporation to which this section applies is not subject to the tax imposed by section 11 or section 1201(a) but, pursuant to the provisions of section 881(a), is liable to a flat tax of 30 percent upon the aggregate of the amounts determined under paragraphs (b) and (c) of this section which are received during the taxable year from sources within the United States. Except as specifically provided in such paragraphs, such amounts do not include gains from the sale or exchange of property. To determine the source of such amounts, see sections 861 through 863, and the regulations thereunder.

(2) The tax of 30 percent is imposed by section 881(a) upon an amount only to the extent the amount constitutes gross income.

(3) Deductions shall not be allowed in determining the amount subject to tax under this section.

(4) Except as provided in §1.882–2, a foreign corporation which at no time during the taxable year is engaged in trade or business in the United States has no income, gain, or loss for the taxable year which is effectively connected for the taxable year with the conduct of a trade or business in the United States. See section 864(c)(1)(B) and §1.864–3.

(5) Gains and losses which, by reason of section 882(d) and §1.882–2, are treated as gains or losses which are effectively connected for the taxable year with the conduct of a trade or business in the United States by such a foreign corporation shall not be taken into account in determining the tax under this section. See, for example, paragraph (c)(2) of §1.871–10.

(6) Interest received by a foreign corporation pursuant to certain portfolio debt instruments is not subject to the flat tax of 30 percent described in paragraph (a)(1) of this section. For rules applicable to a foreign corporation's receipt of interest on certain portfolio debt instruments, see sections 871(h), 881(c), and §1.871–14.

(b) *Fixed or determinable annual or periodical income*—(1) General rule. The tax of 30 percent imposed by section 881(a) applies to the gross amount received from sources within the United States as fixed or determinable annual or periodical gains, profits, or income. Specific items of fixed or determinable annual or periodical income are enumerated in section 881(a)(1) as interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, and emoluments, but other items of fixed or determinable annual or periodical gains, profits, or income are also subject to the tax as, for instance, royalties, including royalties for the use of patents, copyrights, secret processes and formulas, and other like property. As to the determination of fixed or determinable annual or periodical income, see paragraph (a) of §1.1441–2. For special rules treating gain on the disposition of section 306 stock as fixed or determinable annual or periodical income for purposes of section 881(a), see section 306(f) and paragraph (h) of §1.306–3.

(2) *Substitute payments.* For purposes of this section, a substitute interest payment (as defined in §1.861–2(a)(7)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861–2(a)(7)) shall have the same character as interest income received pursuant to the terms of the transferred security. Similarly, for purposes of this section, a substitute dividend payment (as defined in §1.861–3(a)(6)) received by a foreign person pursuant to a securities lending transaction or a sale-repurchase transaction (as defined in §1.861–2(a)(7)) shall have the same character as a distribution received with respect to the transferred security. Where, pursuant to a securities lending transaction or a sale-repurchase transaction, a foreign person transfers to another person a security in the interest on which would qualify as portfolio interest under section 881(c) in the hands of the lender, substitute interest payments made with respect to the transferred security will be treated as portfolio interest, provided that in the case of interest on an obligation in registered form (as defined in §1.871–14(c)(1)(i)), the transferor complies with the documentation requirement described in §1.871–14(c)(1)(ii)(C) with respect to the payment of substitute interest and none of the exceptions to the portfolio interest exemption in sections 881(c) (3) and (4) apply. See also §§1.871–7(b)(2) and 1.894–1(c).

(3) *Dividend Equivalents.* For rules applicable to a foreign corporation's receipt of a dividend equivalent, see section 871(m) and the regulations thereunder.

(c) *Other income and gains*—(1) *Items subject to tax.* The tax of 30 percent imposed by section 881(a) also applies to the following gains received during the taxable year from sources within the United States:

(i) Gains described in section 631 (b) or (c), relating to the treatment of gain on the disposal of timber, coal, or iron ore with a retained economic interest;

(ii) [Reserved]

(iii) Gains from the sale or exchange after October 4, 1966, of patents, copyrights, secret processes and formulas, goodwill, trademarks, trade brands, franchises, or other like property, or of any interest in any such property, to the extent the gains are from payments (whether in a lump sum or in installments) which are contingent on the productivity, use, or disposition of the property or interest sold or exchanged, or from payments which are treated under section 871(e) and §1.871–11 as being so contingent.

(2) *Determination of amount of gain.* The tax of 30 percent imposed upon the gains described in subparagraph (1) of this paragraph applies to the full amount of the gains and is determined (i) without regard to the alternative tax imposed by section 1201(a) upon the excess of net long-term capital gain over the net short-term capital loss; (ii) without regard to section 1231, relating to property used in the trade or business and involuntary conversions; and (iii) except in the case of gains described in subparagraph (1)(ii) of this paragraph, whether or not the gains are considered to be gains from the sale or exchange of property which is a capital asset.

(d) *Credits against tax.* The credits allowed by section 32 (relating to tax withheld at source on foreign corporations), by section 39 (relating to certain uses of gasoline and lubricating oil), and by section 6402 (relating to overpayments of tax) shall be allowed against the tax of a foreign corporation determined in accordance with this section.

(e) *Effective/applicability date.* Except as otherwise provided in this paragraph, this section applies for taxable years beginning after December 31, 1966. Paragraph (b)(2) of this section is applicable to payments made after November 13, 1997. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.881–2 (Revised as of January 1, 1971). Paragraph (b)(3) of this section applies to payments made on or after January 23, 2012.

[T.D. 7293, 38 FR 32796, Nov. 28, 1973, as amended by T.D. 8735, 62 FR 53502, Oct. 14, 1997; T.D. 9323, 72 FR 18388, Apr. 12, 2007; T.D. 9572, 77 FR 3109, Jan. 23, 2012; T.D. 9648, 78 FR 73080, Dec. 5, 2013]

§ 1.881–3 Conduit financing arrangements.

(a) *General rules and definitions*—(1) *Purpose and scope.* Pursuant to the authority of section 7701(l), this section provides rules that permit the director of field operations to disregard, for purposes of section 881, the participation of one or more intermediate entities in a financing arrangement where such entities are acting as conduit entities. For purposes of this section, any reference to tax imposed under section 881 includes, except as otherwise provided and as the context may require, a reference to tax imposed under sections 871 or 884(f)(1)(A) or required to be withheld under section 1441 or 1442. See § 1.881–4 for recordkeeping requirements concerning financing arrangements. See §§ 1.1441–3(g) and 1.1441–7(f) for withholding rules applicable to conduit financing arrangements.

(2) *Definitions.* The following definitions apply for purposes of this section and §§ 1.881–4, 1.1441–3(g) and 1.1441–7(f).

(i) *Financing arrangement*—(A) *In general.* Financing arrangement means a series of transactions by which one person (the financing entity) advances money or other property, or grants rights to use property, and another person (the financed entity) receives money or other property, or rights to use property, if the advance and receipt are effected through one or more other persons (intermediate entities) and, except in cases to which paragraph (a)(2)(i)(B) of this section applies, there are financing transactions linking the financing entity, each of the intermediate entities, and the financed entity. A transfer of money or other property in satisfaction of a repayment obligation is not an advance of money or other property. A financing arrangement exists regardless of the order in which the transactions are entered into, but only for the period during which all of the financing transactions coexist. See *Examples 1, 2, 3* and *4* of paragraph (e) of this section for illustrations of the term financing arrangement.

(B) *Special rule for related parties.* If two (or more) financing transactions involving two (or more) related persons would form part of a financing arrangement but for the absence of a financing transaction between the related persons, the director of field operations may treat the related persons as a single intermediate entity if he determines that one of the principal purposes for the structure of the financing transactions is to prevent the characterization of such arrangement as a financing arrangement. This determination shall be based upon all of the facts and circumstances, including, without limitation, the factors set forth in paragraph (b)(2) of this section. See *Examples 5* and *6* of paragraph (e) of this section for illustrations of this paragraph (a)(2)(i)(B).

(C) *Treatment of disregarded entities.* For purposes of this section, the term person includes a business entity that is disregarded as an entity separate from its single member owner under § 301.7701–1 through § 301.7701–3.

(ii) *Financing transaction*—(A) *In general.* Financing transaction means—

(*1*) Debt;

(*2*) Stock in a corporation (or a similar interest in a partnership, trust, or other person) that meets the requirements of paragraph (a)(2)(ii)(B) of this section;

(*3*) Any lease or license; or

(*4*) Any other transaction (including an interest in a trust described in sections 671 through 679) pursuant to which a person makes an advance of money or other property or grants rights to use property to a transferee who is obligated to repay or return a substantial portion of the money or other property advanced, or the equivalent in value. This paragraph (a)(2)(ii)(A)(*4*) shall not apply to the posting of collateral unless the collateral consists of cash or the person holding the collateral is permitted to reduce the collateral to cash (through a transfer, grant of a security interest or similar transaction) prior to default on the financing transaction secured by the collateral.

(B) *Limitation on inclusion of stock or similar interests*—(*1*) *In general.* Stock in a corporation (or a similar interest in a partnership, trust, or other person) will constitute a financing transaction only if one of the following conditions is satisfied—

(*i*) The issuer is required to redeem the stock or similar interest at a specified time or the holder has the right to require the issuer to redeem the stock or similar interest or to make any other payment with respect to the stock or similar interest;

(*ii*) The issuer has the right to redeem the stock or similar interest, but only if, based on all of the facts and circumstances as of the issue date, redemption pursuant to that right is more likely than not to occur; or

(*iii*) The owner of the stock or similar interest has the right to require a person related to the issuer (or any other person who is acting pursuant to a plan or arrangement with the issuer) to acquire the stock or similar interest or make a payment with respect to the stock or similar interest.

(*2*) *Rules of special application*—(*i*) *Existence of a right.* For purposes of this paragraph (a)(2)(ii)(B), a person will be considered to have a right to cause a redemption or payment if the person has the right (other than rights arising, in the ordinary course, between the date that a payment is declared and the date that a payment is made) to enforce the payment through a legal proceeding or to cause the issuer to be liquidated if it fails to redeem the interest or to make a payment. A person will not be considered to have a right to force a redemption or a payment if the right is derived solely from ownership of a controlling interest in the issuer in cases where the control does not arise from a default or similar contingency under the instrument. The person is considered to have such a right if the person has the right as of the issue date or, as of the issue date, it is more likely than not that the person will receive such a right, whether through the occurrence of a contingency or otherwise.

(*ii*) *Restrictions on payment.* The fact that the issuer does not have the legally available funds to redeem the stock or similar interest, or that the payments are to be made in a blocked currency, will not affect the determinations made pursuant to this paragraph (a)(2)(ii)(B).

(*iii*) *Conduit entity* means an intermediate entity whose participation in the financing arrangement may be disregarded in whole or in part pursuant to this section, whether or not the director of field operations has made a determination that the intermediate entity should be disregarded under paragraph (a)(3)(i) of this section.

(*iv*) *Conduit financing arrangement* means a financing arrangement that is effected through one or more conduit entities.

(*v*) *Related* means related within the meaning of sections 267(b) or 707(b)(1), or controlled within the meaning of section 482, and the regulations under those sections. For purposes of determining whether a person is related to another person, the constructive ownership rules of section 318 shall apply, and the attribution rules of section 267(c) also shall apply to the extent they attribute ownership to persons to whom section 318 does not attribute ownership.

(3) *Disregard of participation of conduit entity*—(i) *Authority of director of field operations.* The director of field operations may determine that the participation of a conduit entity in a conduit financing arrangement should be disregarded for purposes of section 881. For this purpose, an intermediate entity will constitute a conduit entity if it meets the standards of paragraph (a)(4) of this section. The director of field operations has discretion to determine the manner in which the standards of paragraph (a)(4) of this section apply, including the financing transactions and parties composing the financing arrangement.

(ii) *Effect of disregarding conduit entity*—(A) *In general.* If the director of field operations determines that the participation of a conduit entity in a financing arrangement should be disregarded, the financing arrangement is recharacterized as a transaction directly between the remaining parties to the financing arrangement (in most cases, the financed entity and the financing entity) for purposes of section 881. To the extent that a disregarded conduit entity actually receives or makes payments pursuant to a conduit financing arrangement, it is treated as an agent of the financing entity. Except as otherwise provided, the recharacterization of the conduit financing arrangement also applies for purposes of sections 871, 884(f)(1)(A), 1441, and 1442 and other procedural provisions relating to those sections. This recharacterization will not otherwise affect a taxpayer's Federal income tax liability under any substantive provisions of the Internal Revenue Code. Thus, for example, the recharacterization generally applies for purposes of section 1461, in order to impose liability on a withholding agent who fails to withhold as required under §1.1441–3(g), but not for purposes of §1.882–5.

(B) *Character of payments made by the financed entity*. If the participation of a conduit financing arrangement is disregarded under this paragraph (a)(3), payments made by the financed entity generally shall be characterized by reference to the character (e.g., interest or rent) of the payments made to the financing entity. However, if the financing transaction to which the financing entity is a party is a transaction described in paragraph (a)(2)(ii)(A)(*2*) or (*4*) of this section that gives rise to payments that would not be deductible if paid by the financed entity, the character of the payments made by the financed entity will not be affected by the disregard of the participation of a conduit entity. The characterization provided by this paragraph (a)(3)(ii)(B) does not, however, extend to qualification of a payment for any exemption from withholding tax under the Internal Revenue Code or a provision of any applicable tax treaty if such qualification depends on the terms of, or other similar facts or circumstances relating to, the financing transaction to which the financing entity is a party that do not apply to the financing transaction to which the financed entity is a party. Thus, for example, payments made by a financed entity that is not a bank cannot qualify for the exemption provided by section 881(i) of the Code even if the loan between the financing entity and the conduit entity is a bank deposit.

(C) *Effect of income tax treaties*. Where the participation of a conduit entity in a conduit financing arrangement is disregarded pursuant to this section, it is disregarded for all purposes of section 881, including for purposes of applying any relevant income tax treaties. Accordingly, the conduit entity may not claim the benefits of a tax treaty between its country of residence and the United States to reduce the amount of tax due under section 881 with respect to payments made pursuant to the conduit financing arrangement. The financing entity may, however, claim the benefits of any income tax treaty under which it is entitled to benefits in order to reduce the rate of tax on payments made pursuant to the conduit financing arrangement that are recharacterized in accordance with paragraph (a)(3)(ii)(B) of this section.

(D) *Effect on withholding tax*. For the effect of recharacterization on withholding obligations, see §§1.1441–3(g) and 1.1441–7(f).

(E) *Special rule for a financing entity that is unrelated to both intermediate entity and financed entity—(1) Liability of financing entity*. Notwithstanding the fact that a financing arrangement is a conduit financing arrangement, a financing entity that is unrelated to the financed entity and the conduit entity (or entities) shall not itself be liable for tax under section 881 unless the financing entity knows or has reason to know that the financing arrangement is a conduit financing arrangement. But see §1.1441–3(g) for the withholding agent's withholding obligations.

(*2*) *Financing entity's knowledge*—(*i*) *In general*. A financing entity knows or has reason to know that the financing arrangement is a conduit financing arrangement only if the financing entity knows or has reason to know of facts sufficient to establish that the financing arrangement is a conduit financing arrangement, including facts sufficient to establish that the participation of the intermediate entity in the financing arrangement is pursuant to a tax avoidance plan. A person that knows only of the financing transactions that comprise the financing arrangement will not be considered to know or have reason to know of facts sufficient to establish that the financing arrangement is a conduit financing arrangement.

(*ii*) *Presumption regarding financing entity's knowledge.* It shall be presumed that the financing entity does not know or have reason to know that the financing arrangement is a conduit financing arrangement if the financing entity is unrelated to all other parties to the financing arrangement and the financing entity establishes that the intermediate entity who is a party to the financing transaction with the financing entity is actively engaged in a substantial trade or business. An intermediate entity will not be considered to be engaged in a trade or business if its business is making or managing investments, unless the intermediate entity is actively engaged in a banking, insurance, financing or similar trade or business and such business consists predominantly of transactions with customers who are not related persons. An intermediate entity's trade or business is substantial if it is reasonable for the financing entity to expect that the intermediate entity will be able to make payments under the financing transaction out of the cash flow of that trade or business. This presumption may be rebutted if the director of field operations establishes that the financing entity knew or had reason to know that the financing arrangement is a conduit financing arrangement. See *Example 7* of paragraph (e) of this section for an illustration of the rules of this paragraph (a)(3)(ii)(E).

(iii) *Limitation on taxpayer's use of this section.* A taxpayer may not apply this section to reduce the amount of its Federal income tax liability by disregarding the form of its financing transactions for Federal income tax purposes or by compelling the director of field operations to do so. See, however, paragraph (b)(2)(i) of this section for rules regarding the taxpayer's ability to show that the participation of one or more intermediate entities results in no significant reduction in tax.

(4) *Standard for treatment as a conduit entity*—(i) *In general.* An intermediate entity is a conduit entity with respect to a financing arrangement if—

(A) The participation of the intermediate entity (or entities) in the financing arrangement reduces the tax imposed by section 881 (determined by comparing the aggregate tax imposed under section 881 on payments made on financing transactions making up the financing arrangement with the tax that would have been imposed under paragraph (d) of this section);

(B) The participation of the intermediate entity in the financing arrangement is pursuant to a tax avoidance plan; and

(C) Either—

(*1*) The intermediate entity is related to the financing entity or the financed entity; or

(*2*) The intermediate entity would not have participated in the financing arrangement on substantially the same terms but for the fact that the financing entity engaged in the financing transaction with the intermediate entity.

(ii) *Multiple intermediate entities*—(A) *In general.* If a financing arrangement involves multiple intermediate entities, the director of field operations will determine whether each of the intermediate entities is a conduit entity. The director of field operations will make the determination by applying the special rules for multiple intermediate entities provided in this section or, if no special rules are provided, applying principles consistent with those of paragraph (a)(4)(i) of this section to each of the intermediate entities in the financing arrangement.

(B) *Special rule for related persons.* The director of field operations may treat related intermediate entities as a single intermediate entity if he determines that one of the principal purposes for the involvement of multiple intermediate entities in the financing arrangement is to prevent the characterization of an intermediate entity as a conduit entity, to reduce the portion of a payment that is subject to withholding tax or otherwise to circumvent the provisions of this section. This determination shall be based upon all of the facts and circumstances, including, but not limited to, the factors set forth in paragraph (b)(2) of this section. If a director of field operations determines that related persons are to be treated as a single intermediate entity, financing transactions between such related parties that are part of the conduit financing arrangement shall be disregarded for purposes of applying this section. *See Examples 8* and *9* of paragraph (e) of this section for illustrations of the rules of this paragraph (a)(4)(ii).

(b) *Determination of whether participation of intermediate entity is pursuant to a tax avoidance plan*—(1) *In general.* A tax avoidance plan is a plan one of the principal purposes of which is the avoidance of tax imposed by section 881. Avoidance of the tax imposed by section 881 may be one of the principal purposes for such a plan even though it is outweighed by other purposes (taken together or separately). In this regard, the only relevant purposes are those pertaining to the participation of the intermediate entity in the financing arrangement and not those pertaining to the existence of a financing arrangement as a whole. The plan may be formal or informal, written or oral, and may involve any one or more of the parties to the financing arrangement. The plan must be in existence no later than the last date that any of the financing transactions comprising the financing arrangement is entered into. The director of field operations may infer the existence of a tax avoidance plan from the facts and circumstances. In determining whether there is a tax avoidance plan, the director of field operations will weigh all relevant evidence regarding the purposes for the intermediate entity's participation in the financing arrangement. See *Examples 12* and *13* of paragraph (e) of this section for illustrations of the rule of this paragraph (b)(1).

(2) *Factors taken into account in determining the presence or absence of a tax avoidance purpose.* The factors described in paragraphs (b)(2)(i) through (iv) of this section are among the facts and circumstances taken into account in determining whether the participation of an intermediate entity in a financing arrangement has as one of its principal purposes the avoidance of tax imposed by section 881.

(i) *Significant reduction in tax.* The director of field operations will consider whether the participation of the intermediate entity (or entities) in the financing arrangement significantly reduces the tax that otherwise would have been imposed under section 881. The fact that an intermediate entity is a resident of a country that has an income tax treaty with the United States that significantly reduces the tax that otherwise would have been imposed under section 881 is not sufficient, by itself, to establish the existence of a tax avoidance plan. The determination of whether the participation of an intermediate entity significantly reduces the tax generally is made by comparing the aggregate tax imposed under section 881 on payments made on financing transactions making up the financing arrangement with the tax that would be imposed under paragraph (d) of this section. However, the taxpayer is not barred from presenting evidence that the financing entity, as determined by the director of field operations, was itself an intermediate entity and another entity should be treated as the financing entity for purposes of applying this test. A reduction in the absolute amount of tax may be significant even if the reduction in rate is not. A reduction in the amount of tax may be significant if the reduction is large in absolute terms or in relative terms. See *Examples 14*, *15* and *16* of paragraph (e) of this section for illustrations of this factor.

(ii) *Ability to make the advance.* The director of field operations will consider whether the intermediate entity had sufficient available money or other property of its own to have made the advance to the financed entity without the advance of money or other property to it by the financing entity (or in the case of multiple intermediate entities, whether each of the intermediate entities had sufficient available money or other property of its own to have made the advance to either the financed entity or another intermediate entity without the advance of money or other property to it by either the financing entity or another intermediate entity).

(iii) *Time period between financing transactions.* The director of field operations will consider the length of the period of time that separates the advances of money or other property, or the grants of rights to use property, by the financing entity to the intermediate entity (in the case of multiple intermediate entities, from one intermediate entity to another), and ultimately by the intermediate entity to the financed entity. A short period of time is evidence of the existence of a tax avoidance plan while a long period of time is evidence that there is not a tax avoidance plan. See *Example 17* of paragraph (e) of this section for an illustration of this factor.

(iv) *Financing transactions in the ordinary course of business.* If the parties to the financing transaction are related, the director of field operations will consider whether the financing transaction occurs in the ordinary course of the active conduct of complementary or integrated trades or businesses engaged in by these entities. The fact that a financing transaction is described in this paragraph (b)(2)(iv) is evidence that the participation of the parties to that transaction in the financing arrangement is not pursuant to a tax avoidance plan. A loan will not be considered to occur in the ordinary course of the active conduct of complementary or integrated trades or businesses unless the loan is a trade receivable or the parties to the transaction are actively engaged in a banking, insurance, financing or similar trade or business and such business consists predominantly of transactions with customers who are not related persons. See *Example 18* of paragraph (e) of this section for an illustration of this factor.

(3) *Presumption if significant financing activities performed by a related intermediate entity*—(i) *General rule.* It shall be presumed that the participation of an intermediate entity (or entities) in a financing arrangement is not pursuant to a tax avoidance plan if the intermediate entity is related to either or both the financing entity or the financed entity and the intermediate entity performs significant financing activities with respect to the financing transactions forming part of the financing arrangement to which it is a party. This presumption may be rebutted if the director of field operations establishes that the participation of the intermediate entity in the financing arrangement is pursuant to a tax avoidance plan. See *Examples 22*, *23* and *24* of paragraph (e) of this section for illustrations of this presumption.

(ii) *Significant financing activities.* For purposes of this paragraph (b)(3), an intermediate entity performs significant financing activities with respect to such financing transactions only if the financing transactions satisfy the requirements of either paragraph (b)(3)(ii)(A) or (B) of this section.

(A) *Active rents or royalties.* An intermediate entity performs significant financing activities with respect to leases or licenses if rents or royalties earned with respect to such leases or licenses are derived in the active conduct of a trade or business within the meaning of section 954(c)(2)(A), to be applied by substituting the term *intermediate* entity for the term *controlled foreign corporation.*

(B) *Active risk management*—(*1*) *In general.* An intermediate entity is considered to perform significant financing activities with respect to financing transactions only if officers and employees of the intermediate entity participate actively and materially in arranging the intermediate entity's participation in such financing transactions (other than financing transactions described in paragraph (b)(3)(ii)(*B*)(*3*) of this section) and perform the business activity and risk management activities described in paragraph (b)(3)(ii)(*B*)(*2*) of this section with respect to such financing transactions, and the participation of the intermediate entity in the financing transactions produces (or reasonably can be expected to produce) efficiency savings by reducing transaction costs and overhead and other fixed costs.

(*2*) *Business activity and risk management requirements.* An intermediate entity will be considered to perform significant financing activities only if, within the country in which the intermediate entity is organized (or, if different, within the country with respect to which the intermediate entity is claiming the benefits of a tax treaty), its officers and employees—

(*i*) Exercise management over, and actively conduct, the day-to-day operations of the intermediate entity. Such operations must consist of a substantial trade or business or the supervision, administration and financing for a substantial group of related persons; and

(*ii*) Actively manage, on an ongoing basis, material market risks arising from such financing transactions as an integral part of the management of the intermediate entity's financial and capital requirements (including management of risks of currency and interest rate fluctuations) and management of the intermediate entity's short-term investments of working capital by entering into transactions with unrelated persons.

(*3*) *Special rule for trade receivables and payables entered into in the ordinary course of business.* If the activities of the intermediate entity consist in whole or in part of cash management for a controlled group of which the intermediate entity is a member, then employees of the intermediate entity need not have participated in arranging any such financing transactions that arise in the ordinary course of a substantial trade or business of either the financed entity or the financing entity. Officers or employees of the financing entity or financed entity, however, must have participated actively and materially in arranging the transaction that gave rise to the trade receivable or trade payable. Cash management includes the operation of a sweep account whereby the intermediate entity nets intercompany trade payables and receivables arising from transactions among the other members of the controlled group and between members of the controlled group and unrelated persons.

(*4*) *Activities of officers and employees of related persons.* Except as provided in paragraph (b)(3)(ii)(B)(*3*) of this section, in applying this paragraph (b)(3)(ii)(B), the activities of an officer or employee of an intermediate entity will not constitute significant financing activities if any officer or employee of a related person participated materially in any of the activities described in this paragraph, other than to approve any guarantee of a financing transaction or to exercise general supervision and control over the policies of the intermediate entity.

(c) *Determination of whether an unrelated intermediate entity would not have participated in financing arrangement on substantially the same terms*—(1) *In general.* The determination of whether an intermediate entity would not have participated in a financing arrangement on substantially the same terms but for the financing transaction between the financing entity and the intermediate entity shall be based upon all of the facts and circumstances.

(2) *Effect of guarantee*—(i) *In general.* The director of field operations may presume that the intermediate entity would not have participated in the financing arrangement on substantially the same terms if there is a guarantee of the financed entity's liability to the intermediate entity (or in the case of multiple intermediate entities, a guarantee of the intermediate entity's liability to the intermediate entity that advanced money or property, or granted rights to use other property). However, a guarantee that was neither in existence nor contemplated on the last date that any of the financing transactions comprising the financing arrangement is entered into does not give rise to this presumption. A taxpayer may rebut this presumption by producing clear and convincing evidence that the intermediate entity would have participated in the financing transaction with the financed entity on substantially the same terms even if the financing entity had not entered into a financing transaction with the intermediate entity.

(ii) *Definition of guarantee.* For the purposes of this paragraph (c)(2), a guarantee is any arrangement under which a person, directly or indirectly, assures, on a conditional or unconditional basis, the payment of another person's obligation with respect to a financing transaction. The term shall be interpreted in accordance with the definition of the term in section 163(j)(6)(D)(iii).

(d) *Determination of amount of tax liability*—(1) *Amount of payment subject to recharacterization*—(i) *In general.* If a financing arrangement is a conduit financing arrangement, a portion of each payment made by the financed entity with respect to the financing transactions that comprise the conduit financing arrangement shall be recharacterized as a transaction directly between the financed entity and the financing entity. If the aggregate principal amount of the financing transaction(s) to which the financed entity is a party is less than or equal to the aggregate principal amount of the financing transaction(s) linking any of the parties to the financing arrangement, the entire amount of the payment shall be so recharacterized. If the aggregate principal amount of the financing transaction(s) to which the financed entity is a party is greater than the aggregate principal amount of the financing transaction(s) linking any of the parties to the financing arrangement, then the recharacterized portion shall be determined by multiplying the payment by a fraction the numerator of which is equal to the lowest aggregate principal amount of the financing transaction(s) linking any of the parties to the financing arrangement (other than financing transactions that are disregarded pursuant to paragraphs (a)(2)(i)(B) and (a)(4)(ii)(B) of this section) and the denominator of which is the aggregate principal amount of the financing transaction(s) to which the financed entity is a party. In the case of financing transactions the principal amount of which is subject to adjustment, the fraction shall be determined using the average outstanding principal amounts for the period to which the payment relates. The average principal amount may be computed using any method applied consistently that reflects with reasonable accuracy the amount outstanding for the period. See *Example 25* of paragraph (e) of this section for an illustration of the calculation of the amount of tax liability.

(ii) *Determination of principal amount*—(A) *In general.* Unless otherwise provided in this paragraph (d)(1)(ii), the principal amount equals the amount of money advanced, or the fair market value of other property advanced or subject to a lease or license, in the financing transaction. In general, fair market value is calculated in U.S. dollars as of the close of business on the day on which the financing transaction is entered into. However, if the property advanced, or the right to use property granted, by the financing entity is the same as the property or rights received by the financed entity, the fair market value of the property or right shall be determined as of the close of business on the last date that any of the financing transactions comprising the financing arrangement is entered into. In the case of fungible property, property of the same type shall be considered to be the same property. See *Example 26* of paragraph (e) for an illustration of the calculation of the principal amount in the case of financing transactions involving fungible property. The principal amount of a financing transaction shall be subject to adjustments, as set forth in this paragraph (d)(1)(ii).

(B) *Debt instruments and certain stock.* In the case of a debt instrument or of stock that is subject to the current inclusion rules of sections 305(c)(3) or (e), the principal amount generally will be equal to the issue price. However, if the fair market value on the issue date differs materially from the issue price, the fair market value of the debt instrument shall be used in lieu of the instrument's issue price. Appropriate adjustments will be made for accruals of original issue discount and repayments of principal (including accrued original issue discount).

(C) *Partnership and trust interests.* In the case of a partnership interest or an interest in a trust, the principal amount is equal to the fair market value of the money or property contributed to the partnership or trust in return for that partnership or trust interest.

(D) *Leases or licenses.* In the case of a lease or license, the principal amount is equal to the fair market value of the property subject to the lease or license on the date on which the lease or license is entered into. The principal amount shall be adjusted for depreciation or amortization, calculated on a basis that accurately reflects the anticipated decline in the value of the property over its life.

(2) *Rate of tax.* The rate at which tax is imposed under section 881 on the portion of the payment that is recharacterized pursuant to paragraph (d)(1) of this section is determined by

reference to the nature of the recharacterized transaction, as determined under paragraphs (a)(3)(ii)(B) and (C) of this section.

(e) *Examples.* The following examples illustrate this section. For purposes of these examples, unless otherwise indicated, it is assumed that FP, a corporation organized in country N, owns all of the stock of FS, a corporation organized in country T, and DS, a corporation organized in the United States. Country T, but not country N, has an income tax treaty with the United States. The treaty exempts interest, rents and royalties paid by a resident of one state (the source state) to a resident of the other state from tax in the source state.

Example 1. Financing arrangement. (i) On January 1, 1996, BK, a bank organized in country T, lends $1,000,000 to DS in exchange for a note issued by DS. FP guarantees to BK that DS will satisfy its repayment obligation on the loan. There are no other transactions between FP and BK.

(ii) BK's loan to DS is a financing transaction within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section. FP's guarantee of DS's repayment obligation is not a financing transaction as described in paragraphs (a)(2)(ii)(A)(*1*) through (*4*) of this section. Therefore, these transactions do not constitute a financing arrangement as defined in paragraph (a)(2)(i) of this section.

Example 2. Financing arrangement. (i) On January 1, 1996, FP lends $1,000,000 to DS in exchange for a note issued by DS. On January 1, 1997, FP assigns the DS note to FS in exchange for a note issued by FS. After receiving notice of the assignment, DS remits payments due under its note to FS.

(ii) The DS note held by FS and the FS note held by FP are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section, and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section.

Example 3.Participation of a disregarded intermediate entity. The facts are the same as in *Example 2*, except that FS is an entity that is disregarded as an entity separate from its owner, FP, under §301.7701–3. Under paragraph (a)(2)(i)(C) of this section, FS is a person and, therefore, may itself be an intermediate entity that is linked by financing transactions to other persons in a financing arrangement. The DS note held by FS and the FS note held by FP are financing transactions within the meaning of paragraph (a)(2)(ii) of this section, and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section.

Example 4. Financing arrangement. (i) On December 1, 1994 FP creates a special purposes subsidiary, FS. On that date FP capitalizes FS with $1,000,000 in cash and $10,000,000 in debt from BK, a Country N bank. On January 1, 1995, C, a U.S. person, purchases an automobile from DS in return for an installment note. On August 1, 1995, DS sells a number of installment notes, including C's, to FS in exchange for $10,000,000. DS continues to service the installment notes for FS.

(ii) The C installment note now held by FS (as well as all of the other installment notes now held by FS) and the FS note held by BK are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section, and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section.

Example 5. Related persons treated as a single intermediate entity. (i) On January 1, 1996, FP deposits $1,000,000 with BK, a bank that is organized in country N and is unrelated to FP and its subsidiaries. M, a corporation also organized in country N, is wholly-owned by the sole shareholder of BK but is not a bank within the meaning of section 881(c)(3)(A). On July 1, 1996, M lends $1,000,000 to DS in exchange for a note maturing on July 1, 2006. The note is in registered form within the meaning of section 881(c)(2)(B)(i) and DS has received from M the statement required by section 881(c)(2)(B)(ii). One of the principal purposes for the absence of a financing transaction between BK and M is the avoidance of the application of this section.

(ii) The transactions described above would form a financing arrangement but for the absence of a financing transaction between BK and M. However, because one of the principal purposes for the structuring of these financing transactions is to prevent characterization of such arrangement as a financing arrangement, the director of field operations may treat the financing transactions between FP and BK, and between M and DS as a financing arrangement under paragraphs (a)(2)(i)(B) of this section. In such a case, BK and M would be considered a single intermediate entity for purposes of this section. See also paragraph (a)(4)(ii)(B) of this section for the authority to treat BK and M as a single intermediate entity.

Example 6. Related persons treated as a single intermediate entity. (i) On January 1, 1995, FP lends $10,000,000 to FS in exchange for a 10-year note that pays interest annually at a rate of 8 percent per annum. On January 2, 1995, FS contributes $10,000,000 to FS2, a wholly-owned subsidiary of FS organized in country T, in exchange for common stock of FS2. On January 1, 1996, FS2 lends $10,000,000 to DS in exchange for an 8-year note that pays interest annually at a rate of 10 percent per annum. FS is a holding company whose most significant asset is the stock of FS2.

Throughout the period that the FP-FS loan is outstanding, FS causes FS2 to make distributions to FS, most of which are used to make interest and principal payments on the FP-FS loan. Without the distributions from FS2, FS would not have had the funds with which to make payments on the FP-FS loan. One of the principal purposes for the absence of a financing transaction between FS and FS2 is the avoidance of the application of this section.

(ii) The conditions of paragraph (a)(4)(i)(A) of this section would be satisfied with respect to the financing transactions between FP, FS, FS2 and DS but for the absence of a financing transaction between FS and FS2. However, because one of the principal purposes for the structuring of these financing transactions is to prevent characterization of an entity as a conduit, the director of field operations may treat the financing transactions between FP and FS, and between FS2 and DS as a financing arrangement. See paragraph (a)(4)(ii)(B) of this section. In such a case, FS and FS2 would be considered a single intermediate entity for purposes of this section. See also paragraph (a)(2)(i)(B) of this section for the authority to treat FS and FS2 as a single intermediate entity.

Example 7. Presumption with respect to unrelated financing entity. (i) FP is a corporation organized in country T that is actively engaged in a substantial manufacturing business. FP has a revolving credit facility with a syndicate of banks, none of which is related to FP and FP's subsidiaries, which provides that FP may borrow up to a maximum of $100,000,000 at a time. The revolving credit facility provides that DS and certain other subsidiaries of FP may borrow directly from the syndicate at the same interest rates as FP, but each subsidiary is required to indemnify the syndicate banks for any withholding taxes imposed on interest payments by the country in which the subsidiary is organized. BK, a bank that is organized in country N, is the agent for the syndicate. Some of the syndicate banks are organized in country N, but others are residents of country O, a country that has an income tax treaty with the United States which allows the United States to impose a tax on interest at a maximum rate of 10 percent. It is reasonable for BK and the syndicate banks to have determined that FP will be able to meet its payment obligations on a maximum principal amount of $100,000,000 out of the cash flow of its manufacturing business. At various times throughout 1995, FP borrows under the revolving credit facility until the outstanding principal amount reaches the maximum amount of $100,000,000. On December 31, 1995, FP receives $100,000,000 from a public offering of its equity. On January 1, 1996, FP pays BK $90,000,000 to reduce the outstanding principal amount under the revolving credit facility and lends $10,000,000 to DS. FP would have repaid the entire principal amount, and DS would have borrowed directly from the syndicate, but for the fact that DS did not want to incur the U.S. withholding tax that would have applied to payments made directly by DS to the syndicate banks.

(ii) Pursuant to paragraph (a)(3)(ii)(E)(*1*) of this section, even though the financing arrangement is a conduit financing arrangement (because the financing arrangement meets the standards for recharacterization in paragraph (a)(4)(i)), BK and the other syndicate banks have no section 881 liability unless they know or have reason to know that the financing arrangement is a conduit financing arrangement. Moreover, pursuant to paragraph (a)(3)(ii)(E)(*2*)(*ii*) of this section, BK and the syndicate banks are presumed not to know that the financing arrangement is a conduit financing arrangement. The syndicate banks are unrelated to both FP and DS, and FP is actively engaged in a substantial trade or business—that is, the cash flow from FP's manufacturing business is sufficient for the banks to expect that FP will be able to make the payments required under the financing transaction. See §1.1441–3(g) for the withholding obligations of the withholding agents.

Example 8. Multiple intermediate entities—special rule for related persons. (i) On January 1, 1995, FP lends $10,000,000 to FS in exchange for a 10-year note that pays interest annually at a rate of 8 percent per annum. On January 2, 1995, FS contributes $9,900,000 to FS2, a wholly-owned subsidiary of FS organized in country T, in exchange for common stock and lends $100,000 to FS2. On January 1, 1996, FS2 lends $10,000,000 to DS in exchange for an 8-year note that pays interest annually at a rate of 10 percent per annum. FS is a holding company that has no significant assets other than the stock of FS2. Throughout the period that the FP-FS loan is outstanding, FS causes FS2 to make distributions to FS, most of which are used to make interest and principal payments on the FP-FS loan. Without the distributions from FS2, FS would not have had the funds with which to make payments on the FP-FS loan. One of the principal purposes for structuring the transactions between FS and FS2 as primarily a contribution of capital is to reduce the amount of the payment that would be recharacterized under paragraph (d) of this section.

(ii) Pursuant to paragraph (a)(4)(ii)(B) of this section, the director of field operations may treat FS and FS2 as a single intermediate entity for purposes of this section since one of the principal purposes for the participation of multiple intermediate entities is to reduce the amount of the tax liability on any recharacterized payment by inserting a financing transaction with a low principal amount.

Example 9. Multiple intermediate entities. (i) On January 1, 1995, FP deposits $1,000,000 with BK, a bank that is organized in country T and is unrelated to FP and its subsidiaries, FS and DS. On January 1, 1996, at a time when the FP-BK deposit is still outstanding, BK lends $500,000 to BK2, a bank that is wholly-owned by BK and is organized in country T. On the same date, BK2 lends $500,000 to FS. On July 1, 1996, FS lends $500,000 to DS. FP pledges its deposit with BK to BK2 in support of FS' obligation to repay the BK2 loan. FS', BK's and BK2's participation in the financing arrangement is pursuant to a tax avoidance plan.

(ii) The conditions of paragraphs (a)(4)(i)(A) and (B) of this section are satisfied because the participation of BK, BK2 and FS in the financing arrangement reduces the tax imposed by section 881, and FS', BK's and BK2's participation in the financing arrangement is pursuant to a tax avoidance plan. However, since BK and BK2 are unrelated to FP and DS, under paragraph (a)(4)(i)(C)(*2*) of this section, BK and BK2 will be treated as conduit entities only if BK and BK2 would not have participated in the financing arrangement on substantially the same terms but for the financing transaction between FP and BK.

(iii) It is presumed that BK2 would not have participated in the financing arrangement on substantially the same terms but for the BK-BK2 financing transaction because FP's pledge of an asset in support of FS' obligation to repay the BK2 loan is a guarantee within the meaning of paragraph (c)(2)(ii) of this section. If the taxpayer does not rebut this presumption by clear and convincing evidence, then BK2 will be a conduit entity.

(iv) Because BK and BK2 are related intermediate entities, the director of field operations must determine whether one of the principal purposes for the involvement of multiple intermediate entities was to prevent characterization of an entity as a conduit entity. In making this determination, the director of field operations may consider the fact that the involvement of two related intermediate entities prevents the presumption regarding guarantees from applying to BK. In the absence of evidence showing a business purpose for the involvement of both BK and BK2, the director of field operations may treat BK and BK2 as a single intermediate entity for purposes of determining whether they would have participated in the financing arrangement on substantially the same terms but for the financing transaction between FP and BK. The presumption that applies to BK2 therefore will apply to BK. If the taxpayer does not rebut this presumption by clear and convincing evidence, then BK will be a conduit entity.

Example 10. Reduction of tax. (i) On February 1, 1995, FP issues debt to the public that would satisfy the requirements of section 871(h)(2)(A) (relating to obligations that are not in registered form) if issued by a U.S. person. FP lends the proceeds of the debt offering to DS in exchange for a note.

(ii) The debt issued by FP and the DS note are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. The holders of the FP debt are the financing entities, FP is the intermediate entity and DS is the financed entity. Because interest payments on the debt issued by FP would not have been subject to withholding tax if the debt had been issued by DS, there is no reduction in tax under paragraph (a)(4)(i)(A) of this section. Accordingly, FP is not a conduit entity.

Example 11. Reduction of tax. (i) On January 1, 1995, FP licenses to FS the rights to use a patent in the United States to manufacture product A. FS agrees to pay FP a fixed amount in royalties each year under the license. On January 1, 1996, FS sublicenses to DS the rights to use the patent in the United States. Under the sublicense, DS agrees to pay FS royalties based upon the units of product A manufactured by DS each year. Although the formula for computing the amount of royalties paid by DS to FS differs from the formula for computing the amount of royalties paid by FS to FP, each represents an arm's length rate.

(ii) Although the royalties paid by DS to FS are exempt from U.S. withholding tax, the royalty payments between FS and FP are income from U.S. sources under section 861(a)(4) subject to the 30 percent gross tax imposed by §1.881–2(b) and subject to withholding under §1.1441–2(a). Because the rate of tax imposed on royalties paid by FS to FP is the same as the rate that would have been imposed on royalties paid by DS to FP, the participation of FS in the FP-FS-DS financing arrangement does not reduce the tax imposed by section 881 within the meaning of paragraph (a)(4)(i)(A) of this section. Accordingly, FP is not a conduit entity.

Example 12. A principal purpose. (i) On January 1, 1995, FS lends $10,000,000 to DS in exchange for a 10-year note that pays interest annually at a rate of 8 percent per annum. As was intended at the time of the loan from FS to DS, on July 1, 1995, FP makes an interest-free demand loan of $10,000,000 to FS. A principal purpose for FS' participation in the FP-FS-DS financing arrangement is that FS generally coordinates the financing for all of FP's subsidiaries (although FS does not engage in significant financing activities with respect to such financing transactions). However, another principal purpose for FS' participation is to allow the parties to benefit from the lower withholding tax rate provided under the income tax treaty between country T and the United States.

(ii) The financing arrangement satisfies the tax avoidance purpose requirement of paragraph (a)(4)(i)(B) of this section because FS participated in the financing arrangement pursuant to a plan one of the principal purposes of which is to allow the parties to benefit from the country T-U.S. treaty.

Example 13. A principal purpose. (i) DX is a U.S. corporation that intends to purchase property to use in its manufacturing business. FX is a partnership organized in country N that is owned in equal parts by LC1 and LC2, leasing companies that are unrelated to DX. BK, a bank organized in country N and unrelated to DX, LC1 and LC2, lends $100,000,000 to FX to enable FX to purchase the property. On the same day, FX purchases the property and engages in a transaction with DX which is treated as a lease of the property for country N tax purposes but a loan for U.S. tax purposes. Accordingly, DX is treated as the owner of the property for U.S. tax purposes. The parties comply with the requirements of section 881(c) with respect to the debt obligation of DX to FX. FX and DX structured these transactions in this manner so that LC1 and LC2 would be entitled to accelerated depreciation deductions with respect to the property in country N and DX would be entitled to accelerated depreciation deductions in the United States. None of the parties would have participated in the transaction if the payments made by DX were subject to U.S. withholding tax.

(ii) The loan from BK to FX and from FX to DX are financing transactions and, together constitute a financing arrangement. The participation of FX in the financing arrangement reduces the tax imposed by section 881 because payments made to FX, but not BK, qualify for the portfolio interest exemption of section 881(c) because BK is a bank making an extension of credit in the ordinary course of its trade or business within the meaning of section 881(c)(3)(A). Moreover, because DX borrowed the money from FX instead of borrowing the money directly from BK to avoid the tax imposed by section 881, one of the principal purposes of the participation of FX was to avoid that tax (even though another principal purpose of the participation of FX was to allow LC1 and LC2 to take advantage of accelerated depreciation deductions in country N). Assuming that FX would not have participated in the financing arrangement on substantially the same terms but for the fact that BK loaned it $100,000,000, FX is a conduit entity and the financing arrangement is a conduit financing arrangement.

Example 14. Significant reduction of tax. (i) FS owns all of the stock of FS1, which also is a resident of country T. FS1 owns all of the stock of DS. On January 1, 1995, FP contributes $10,000,000 to the capital of FS in return for perpetual preferred stock. On July 1, 1995, FS lends $10,000,000 to FS1. On January 1, 1996, FS1 lends $10,000,000 to DS. Under the terms of the country T-U.S. income tax treaty, a country T resident is not entitled to the reduced withholding rate on interest income provided by the treaty if the resident is entitled to specified tax benefits under country T law. Although FS1 may deduct interest paid on the loan from FS, these deductions are not pursuant to any special tax benefits provided by country T law. However, FS qualifies for one of the enumerated tax benefits pursuant to which it may deduct dividends paid with respect to the stock held by FP. Therefore, if FS had made a loan directly to DS, FS would not have been entitled to the benefits of the country T-U.S. tax treaty with respect to payments it received from DS, and such payments would have been subject to tax under section 881 at a 30 percent rate.

(ii) The FS-FS1 loan and the FS1–DS loan are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. Pursuant to paragraph (b)(2)(i) of this section, the significant reduction in tax resulting from the participation of FS1 in the financing arrangement is evidence that the participation of FS1 in the financing arrangement is pursuant to a tax avoidance plan. However, other facts relevant to the presence of such a plan must also be taken into account.

Example 15. Significant reduction of tax. (i) FP owns 90 percent of the voting stock of FX, an unlimited liability company organized in country T. The other 10 percent of the common stock of FX is owned by FP1, a subsidiary of FP that is organized in country N. Although FX is a partnership for U.S. tax purposes, FX is entitled to the benefits of the U.S.-country T income tax treaty because FX is subject to tax in country T as a resident corporation. On January 1, 1996, FP contributes $10,000,000 to FX in exchange for an instrument denominated as preferred stock that pays a dividend of 7 percent and that must be redeemed by FX in seven years. For U.S. tax purposes, the preferred stock is a partnership interest. On July 1, 1996, FX makes a loan of $10,000,000 to DS in exchange for a 7-year note paying interest at 6 percent.

(ii) Because FX is required to redeem the partnership interest at a specified time, the partnership interest constitutes a financing transaction within the meaning of paragraph (a)(2)(ii)(A)(*2*) of this section. Moreover, because the FX-DS note is a financing transaction within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section, together the transactions constitute a financing arrangement within the meaning of (a)(2)(i) of this section. Payments of interest made directly by DS to FP and FP1 would not be eligible for the portfolio interest exemption and would not be entitled to a reduction in withholding tax pursuant to a tax treaty. Therefore, there is a significant reduction in tax resulting from the participation of FX in the financing arrangement, which is evidence that the participation of FX in the financing arrangement is pursuant to a tax avoidance plan. However, other facts relevant to the existence of such a plan must also be taken into account.

Example 16. Significant reduction of tax. (i) FP owns a 10 percent interest in the profits and capital of FX, a partnership organized in country N. The other 90 percent interest in FX is owned by G, an unrelated corporation that is organized in country T. FX is not engaged in business in the United States. On January 1, 1996, FP contributes $10,000,000 to FX in exchange for an instrument documented as perpetual subordinated debt that provides for quarterly interest payments at 9 percent per annum. Under the terms of the instrument, payments on the perpetual subordinated debt do not otherwise affect the allocation of income between the partners. FP has the right to require the liquidation of FX if FX fails to make an interest payment. For U.S. tax purposes, the perpetual subordinated debt is treated as a partnership interest in FX and the payments on the perpetual subordinated debt constitute guaranteed payments within the meaning of section 707(c). On July 1, 1996, FX makes a loan of $10,000,000 to DS in exchange for a 7-year note paying interest at 8 percent per annum.

(ii) Because FP has the effective right to force payment of the ''interest'' on the perpetual subordinated debt, the instrument constitutes a financing transaction within the meaning of paragraph (a)(2)(ii)(A)(*2*) of this section. Moreover, because the note between FX and DS is a financing transaction within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section, together the transactions are a financing arrangement within the meaning of (a)(2)(i) of this section. Without regard to this section, 90 percent of each interest payment received by FX would be treated as exempt from U.S. withholding tax because it is beneficially owned by G, while 10 percent would be subject to a 30 percent withholding tax because beneficially owned by FP. If FP held directly the note issued by DS, 100 percent of the interest payments on the note would have been subject to the 30 percent withholding tax. The significant reduction in the tax imposed by section 881 resulting from the participation of FX in the financing arrangement is evidence that the participation of FX in the financing arrangement is pursuant to a tax avoidance plan. However, other facts relevant to the presence of such a plan must also be taken into account.

Example 17. Time period between transactions. (i) On January 1, 1995, FP lends $10,000,000 to FS in exchange for a 10-year note that pays no interest annually. When the note matures, FS is obligated to pay $24,000,000 to FP. On January 1, 1996, FS lends $10,000,000 to DS in exchange for a 10-year note that pays interest annually at a rate of 10 percent per annum.

(ii) The FS note held by FP and the DS note held by FS are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of (a)(2)(i) of this section. Pursuant to paragraph (b)(2)(iii) of this section, the short period of time (twelve months) between the loan by FP to FS and the loan by FS to DS is evidence that the participation of FS in the financing arrangement is pursuant to a tax avoidance plan. However, other facts relevant to the presence of such a plan must also be taken into account.

Example 18. Financing transactions in the ordinary course of business. (i) FP is a holding company. FS is actively engaged in country T in the business of manufacturing and selling product A. DS manufactures product B, a principal component in which is product A. FS' business activity is substantial. On January 1, 1995, FP lends $100,000,000 to FS to finance FS' business operations. On January 1, 1996, FS ships $30,000,000 of product A to DS. In return, FS creates an interest-bearing account receivable on its books. FS' shipment is in the ordinary course of the active conduct of its trade or business (which is complementary to DS' trade or business.)

(ii) The loan from FP to FS and the accounts receivable opened by FS for a payment owed by DS are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. Pursuant to paragraph (b)(2)(iv) of this section, the fact that DS' liability to FS is created in the ordinary course of the active conduct of DS' trade or business that is complementary to a business actively engaged in by DS is evidence that the participation of FS in the financing arrangement is not pursuant to a tax avoidance plan. However, other facts relevant to the presence of such a plan must also be taken into account.

Example 19. Tax avoidance plan—other factors. (i) On February 1, 1995, FP issues debt in Country N that is in registered form within the meaning of section 881(c)(3)(A). The FP debt would satisfy the requirements of section 881(c) if the debt were issued by a U.S. person and the withholding agent received the certification required by section 871(h)(2)(B)(ii). The purchasers of the debt are financial institutions and there is no reason to believe that they would not furnish Forms W–8. On March 1, 1995, FP lends a portion of the proceeds of the offering to DS.

(ii) The FP debt and the loan to DS are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. The owners of the FP debt are the financing entities, FP is the intermediate entity and DS is the financed entity. Interest payments on the debt issued by FP would be subject to withholding tax if the debt were issued by DS, unless DS received all necessary Forms W–8. Therefore, the participation of FP in the financing arrangement potentially reduces the tax imposed by section 881(a). However, because it is reasonable to assume that the purchasers of the FP debt would have provided certifications in order to avoid the withholding tax imposed by section 881, there is not a tax avoidance plan. Accordingly, FP is not a conduit entity.

Example 20. Tax avoidance plan—other factors. (i) Over a period of years, FP has maintained a deposit with BK, a bank organized in the United States, that is unrelated to FP and its subsidiaries. FP often sells goods and purchases raw materials in the United States. FP opened the bank account with BK in order to facilitate this business and the amounts it maintains in the account are reasonably related to its dollar-denominated working capital needs. On January 1, 1995, BK lends $5,000,000 to DS. After the loan is made, the balance in FP's bank account remains within a range appropriate to meet FP's working capital needs.

(ii) FP's deposit with BK and BK's loan to DS are financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section and together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. Pursuant to section 881(i), interest paid by BK to FP with respect to the bank deposit is exempt from withholding tax. Interest paid directly by DS to FP would not be exempt from withholding tax under section 881(i) and therefore would be subject to a 30% withholding tax. Accordingly, there is a significant reduction in the tax imposed by section 881, which is evidence of the existence of a tax avoidance plan. See paragraph (b)(2)(i) of this section. However, the director of field operations also will consider the fact that FP historically has maintained an account with BK to meet its working capital needs and that, prior to and after BK's loan to DS, the balance within the account remains within a range appropriate to meet those business needs as evidence that the participation of BK in the FP-BK-DS financing arrangement is not pursuant to a tax avoidance plan. In determining the presence or absence of a tax avoidance plan, all relevant facts will be taken into account.

Example 21. Tax avoidance plan—other factors. (i) Assume the same facts as in *Example 20,* except that on January 1, 2000, FP's deposit with BK substantially exceeds FP's expected working capital needs and on January 2, 2000, BK lends additional funds to DS. Assume also that BK's loan to DS provides BK with a right of offset against FP's deposit. Finally, assume that FP would have lent the funds to DS directly but for the imposition of the withholding tax on payments made directly to FP by DS.

(ii) As in *Example 19,* the transactions in paragraph (i) of this *Example 21* are a financing arrangement within the meaning of paragraph (a)(2)(i) and the participation of the BK reduces the section 881 tax. In this case, the presence of funds substantially in excess of FP's working capital needs and the fact that FP would have been willing to lend funds directly to DS if not for the withholding tax are evidence that the participation of BK in the FP-BK-FS financing arrangement is pursuant to a tax avoidance plan. However, other facts relevant to the presence of such a plan must also be taken into account. Even if the director of field operations determines that the participation of BK in the financing arrangement is pursuant to a tax avoidance plan, BK may not be treated as a conduit entity unless BK would not have participated in the financing arrangement on substantially the same terms in the absence of FP's deposit with BK. BK's right of offset against FP's deposit (a form of guarantee of BK's loan to DS) creates a presumption that BK would not have made the loan to DS on substantially the same terms in the absence of FP's deposit with BK. If the taxpayer overcomes the presumption by clear and convincing evidence, BK will not be a conduit entity.

Example 22. Significant financing activities. (i) FS is responsible for coordinating the financing of all of the subsidiaries of FP, which are engaged in substantial trades or businesses and are located in country T, country N, and the United States. FS maintains a centralized cash management accounting system for FP and its subsidiaries in which it records all intercompany payables and receivables; these payables and receivables ultimately are reduced to a single balance either due from or owing to FS and each of FP's subsidiaries. FS is responsible for disbursing or receiving any cash payments required by transactions between its affiliates and unrelated parties. FS must borrow any cash necessary to meet those external obligations and invests any excess cash for the benefit of the FP group. FS enters into interest rate and foreign exchange contracts as necessary to manage the risks arising from mismatches in incoming and outgoing cash flows. The activities of FS are intended (and reasonably can be expected) to reduce transaction costs and overhead and other fixed costs. FS has 50 employees, including clerical and other back office personnel, located in country T. At the request of DS, on January 1, 1995, FS pays a supplier $1,000,000 for materials delivered to DS and charges DS an open account receivable for this amount. On February 3, 1995, FS reverses the account receivable from DS to FS when DS delivers to FP goods with a value of $1,000,000.

(ii) The accounts payable from DS to FS and from FS to other subsidiaries of FP constitute financing transactions within the meaning of paragraph (a)(2)(ii)(A)(*1*) of this section, and the transactions together constitute a financing arrangement within the meaning of paragraph (a)(2)(i) of this section. FS's activities constitute significant financing activities with respect to the financing transactions even though FS did not actively and materially participate in arranging the financing transactions because the financing transactions consisted of trade receivables and trade payables that were ordinary and necessary to carry on the trades or businesses of DS and the other subsidiaries of FP. Accordingly, pursuant to paragraph (b)(3)(i) of this section, FS' participation in the financing arrangement is presumed not to be pursuant to a tax avoidance plan.

Example 23. Significant financing activities—active risk management. (i) The facts are the same as in Example 22, except that, in addition to its short-term funding needs, DS needs long-term financing to fund an acquisition of another U.S. company; the acquisition is scheduled to close on January 15, 1995. FS has a revolving credit agreement with a syndicate of banks located in Country N. On January 14, 1995, FS borrows ¥10 billion for 10 years under the revolving credit agreement, paying yen LIBOR plus 50 basis points on a quarterly basis. FS enters into a currency swap with BK, an unrelated bank that is not a member of the syndicate, under which FS will pay BK ¥10 billion and will receive $100 million on January 15, 1995; these payments will be reversed on January 15, 2004. FS will pay BK U.S. dollar LIBOR plus 50 basis points on a notional principal amount of $100 million semi-annually and will receive yen LIBOR plus 50 basis points on a notional principal amount of ¥10 billion quarterly. Upon the closing of the acquisition on January 15, 1995, DS borrows $100 million from FS for 10 years, paying U.S. dollar LIBOR plus 50 basis points semiannually.

(ii) Although FS performs significant financing activities with respect to certain financing transactions to which it is a party, FS does not perform significant financing activities with respect to the financing transactions between FS and the syndicate of banks and between FS and DS because FS has eliminated all material market risks arising from those financing transactions through its currency swap with BK. Accordingly, the financing arrangement does not benefit from the presumption of paragraph (b)(3)(i) of this section and the director of field operations must determine whether the participation of FS in the financing arrangement is pursuant to a tax avoidance plan on the basis of all the facts and circumstances. However, if additional facts indicated that FS reviews its currency swaps daily to determine whether they are the most cost efficient way of managing their currency risk and, as a result, frequently terminates swaps in favor of entering into more cost efficient hedging arrangements with unrelated parties, FS would be considered to perform significant financing activities and FS' participation in the financing arrangements would not be pursuant to a tax avoidance plan.

Example 24. Significant financing activities—presumption rebutted. (i) The facts are the same as in *Example 22*, except that, on January 1, 1995, FP lends to FS DM 15,000,000 (worth $10,000,000) in exchange for a 10 year note that pays interest annually at a rate of 5 percent per annum. Also, on March 15, 1995, FS lends $10,000,000 to DS in exchange for a 10-year note that pays interest annually at a rate of 8 percent per annum. FS would not have had sufficient funds to make the loan to DS without the loan from FP. FS does not enter into any long-term hedging transaction with respect to these financing transactions, but manages the interest rate and currency risk arising from the transactions on a daily, weekly or quarterly basis by entering into forward currency contracts.

(ii) Because FS performs significant financing activities with respect to the financing transactions between FS, DS and FP, the participation of FS in the financing arrangement is presumed not to be pursuant to a tax avoidance plan. The director of field operations may rebut this presumption by establishing that the participation of FS is pursuant to a tax avoidance plan, based on all the facts and circumstances. The mere fact that FS is a resident of country T is not sufficient to establish the existence of a tax avoidance plan. However, the existence of a plan can be inferred from other factors in addition to the fact that FS is a resident of country T. For example, the loans are made within a short time period and FS would not have been able to make the loan to DS without the loan from FP.

Example 25. Determination of amount of tax liability. (i) On January 1, 1996, FP makes two three-year installment loans of $250,000 each to FS that pay interest at a rate of 9 percent per annum. The loans are self-amortizing with payments on each loan of $7,950 per month. On the same date, FS lends $1,000,000 to DS in exchange for a two-year note that pays interest semi-annually at a rate of 10 percent per annum, beginning on June 30, 1996. The FS-DS loan is not self-amortizing. Assume that for the period of January 1, 1996 through June 30, 1996, the average principal amount of the financing transactions between FP and FS that comprise the financing arrangement is $469,319. Further, assume that for the period of July 1, 1996 through

December 31, 1996, the average principal amount of the financing transactions between FP and FS is $393,632. The average principal amount of the financing transaction between FS and DS for the same periods is $1,000,000. The director of field operations determines that the financing transactions between FP and FS, and FS and DS, are a conduit financing arrangement.

(ii) Pursuant to paragraph (d)(1)(i) of this section, the portion of the $50,000 interest payment made by DS to FS on June 30, 1996, that is recharacterized as a payment to FP is $23,450 computed as follows: ($50,000 × $469,319/$1,000,000) = $23,450. The portion of the interest payment made on December 31, 1996 that is recharacterized as a payment to FP is $19,650, computed as follows: ($50,000 × $393,632/$1,000,000) = $19,650. Furthermore, under §1.1441–3(g), DS is liable for withholding tax at a 30 percent rate on the portion of the $50,000 payment to FS that is recharacterized as a payment to FP, i.e., $7,035 with respect to the June 30, 1996 payment and $5,895 with respect to the December 31, 1996 payment.

Example 26. Determination of principal amount. (i) FP lends DM 5,000,000 to FS in exchange for a ten year note that pays interest semi-annually at a rate of 8 percent per annum. Six months later, pursuant to a tax avoidance plan, FS lends DM 10,000,000 to DS in exchange for a 10 year note that pays interest semi-annually at a rate of 10 percent per annum. At the time FP make its loan to FS, the exchange rate is DM 1.5/$1. At the time FS makes its loan to DS the exchange rate is DM 1.4/$1.

(ii) FP's loan to FS and FS' loan to DS are financing transactions and together constitute a financing arrangement. Furthermore, because the participation of FS reduces the tax imposed under section 881 and FS' participation is pursuant to a tax avoidance plan, the financing arrangement is a conduit financing arrangement.

(iii) Pursuant to paragraph (d)(1)(i) of this section, the amount subject to recharacterization is a fraction the numerator of which is the lowest aggregate principal amount advanced and the denominator of which is the principal amount advanced from FS to DS. Because the property advanced in these financing transactions is the same type of fungible property, under paragraph (d)(1)(ii)(A) of this section, both are valued on the date of the last financing transaction. Accordingly, the portion of the payments of interest that is recharacterized is ((DM 5,000,000 × DM 1.4/$1)/(DM 10,000,000 × DM 1.4/$1) or 0.5.

(f) *Effective/applicability date.* This section is effective for payments made by financed entities on or after September 11, 1995. This section shall not apply to interest payments covered by section 127(g)(3) of the Tax Reform Act of 1984, and to interest payments with respect to other debt obligations issued prior to October 15, 1984 (whether or not such debt was issued by a Netherlands Antilles corporation). Paragraph (a)(2)(i)(C) and *Example 3* of paragraph (e) of this section apply to payments made on or after December 9, 2011.

[T.D. 8611, 60 FR 41005, Aug. 11, 1995; 60 FR 55312, Oct. 31, 1995; 63 FR 67578, Dec. 8, 1998; T.D. 9562, 76 FR 76896, Dec. 9, 2011; 77 FR 22480, Apr. 16, 2012]

§ 1.881–4 Recordkeeping requirements concerning conduit financing arrangements.

(a) *Scope.* This section provides rules for the maintenance of records concerning certain financing arrangements to which the provisions of §1.881–3 apply.

(b) *Recordkeeping requirements*—(1) *In general.* Any person subject to the general recordkeeping requirements of section 6001 must keep the permanent books of account or records, as required by section 6001, that may be relevant to determining whether that person is a party to a financing arrangement and whether that financing arrangement is a conduit financing arrangement.

(2) *Application of Sections 6038 and 6038A.* A financed entity that is a reporting corporation within the meaning of section 6038A(a) and the regulations under that section, and any other person that is subject to the recordkeeping requirements of §1.6038A–3, must comply with those recordkeeping requirements with respect to records that may be relevant to determining whether the financed entity is a party to a financing arrangement and whether that financing arrangement is a conduit financing arrangement. Such records, including records that a person is required to maintain pursuant to paragraph (c) of this section, shall be considered records that are required to be maintained pursuant to section 6038 or 6038A. Accordingly, the provisions of sections 6038 and 6038A (including, without limitation, the penalty provisions thereof), and the regulations under those sections, shall apply to any records required to be maintained pursuant to this section.

(c) *Records to be maintained*—(1) *In general.* An entity described in paragraph (b) of this section shall be required to retain any records containing the following information concerning each financing transaction that the entity knows or has reason to know comprises the financing arrangement—

(i) The nature (e.g., loan, stock, lease, license) of each financing transaction;

(ii) The name, address, taxpayer identification number (if any) and country of residence of—

(A) Each person that advanced money or other property, or granted rights to use property;

(B) Each person that was the recipient of the advance or rights; and

(C) Each person to whom a payment was made pursuant to the financing transaction (to the extent that person is a different person than the person who made the advance or granted the rights);

(iii) The date and amount of—

(A) Each advance of money or other property or grant of rights; and

(B) Each payment made in return for the advance or grant of rights;

(iv) The terms of any guarantee provided in conjunction with a financing transaction, including the name of the guarantor; and

(v) In cases where one or both of the parties to a financing transaction are related to each other or another entity in the financing arrangement, the manner in which these persons are related.

(2) *Additional documents.* An entity described in paragraph (b) of this section must also retain all records relating to the circumstances surrounding its participation in the financing transactions and financing arrangements. Such documents may include, but are not limited to—

(i) Minutes of board of directors meetings;

(ii) Board resolutions or other authorizations for the financing transactions;

(iii) Private letter rulings;

(iv) Financial reports (audited or unaudited);

(v) Notes to financial statements;

(vi) Bank statements;

(vii) Copies of wire transfers;

(viii) Offering documents;

(ix) Materials from investment advisors, bankers and tax advisors; and

(x) Evidences of indebtedness.

(3) *Effect of record maintenance requirement.* Record maintenance in accordance with paragraph (b) of this section generally does not require the original creation of records that are ordinarily not created by affected entities. If, however, a document that is actually created is described in this paragraph (c), it is to be retained even if the document is not of a type ordinarily created by the affected entity.

(d) *Effective date.* This section is effective September 11, 1995. This section shall not apply to interest payments covered by section 127(g)(3) of the Tax Reform Act of 1984, and to interest payments with respect to other debt obligations issued prior to October 15, 1984 (whether or not such debt was issued by a Netherlands Antilles corporation).

[T.D. 8611, 60 FR 41014, Aug. 11, 1995]

§ 1.881–5 Exception for certain possessions corporations.

(a) *Scope.* Section 881(b) and this section provide special rules for the application of sections 881 and 884 to certain corporations created or organized in possessions of the United States. Paragraph (g) of this section provides special rules for the application of sections 881 and 884 to corporations created or organized in the United States for purposes of determining tax liability incurred to certain possessions that administer income tax laws that are identical (except for the substitution of the name of the possession for the term "United States" where appropriate) to those in force in the United States. See § 1.884–0(b) for special rules relating to the application of section 884 with respect to possessions of the United States.

(b) *Operative rules.* (1) Corporations described in paragraphs (c) and (d) of this section are not treated as foreign corporations for purposes of section 881. Accordingly, they are exempt from the tax imposed by section 881(a).

(2) For corporations described in paragraph (e) of this section, the rate of tax imposed by section 881(a) on U.S. source dividends received is 10 percent (rather than the generally applicable 30 percent).

(c) *U.S. Virgin Islands and section 931 possessions.* A corporation created or organized in, or under the law of, the U.S. Virgin Islands or a section 931 possession is described in this paragraph (c) for a taxable year when the following conditions are satisfied—

(1) At all times during such taxable year, less than 25 percent in value of the stock of such corporation is beneficially owned (directly or indirectly) by foreign persons;

(2) At least 65 percent of the gross income of such corporation is shown to the satisfaction of the Commissioner upon examination to be effectively connected with the conduct of a trade or business in such a possession or the United States for the 3-year period ending with the close of the taxable year of such corporation (or for such part of such period as the corporation or any predecessor has been in existence); and

(3) No substantial part of the income of such corporation for the taxable year is used (directly or indirectly) to satisfy obligations to persons who are not bona fide residents of such a possession or the United States.

(d) *Section 935 possessions.* A corporation created or organized in, or under the law of, a section 935 possession is described in this paragraph (d) for a taxable year when the following conditions are satisfied—

(1) At all times during such taxable year, less than 25 percent in value of the stock of such corporation is owned (directly or indirectly) by foreign persons; and

(2) At least 20 percent of the gross income of such corporation is shown to the satisfaction of the Commissioner upon examination to have been derived from sources within such possession for the 3-year period ending with the close of the preceding taxable year of such corporation (or for such part of such period as the corporation has been in existence).

(e) *Puerto Rico.* A corporation created or organized in, or under the law of, Puerto Rico is described in this paragraph (e) for a taxable year when the conditions of paragraphs (c)(1) through (c)(3) of this section are satisfied (using the language ''Puerto Rico'' instead of ''such a possession'').

(f) *Definitions and other rules.* For purposes of this section—

(1) ''Section 931 possession'' is defined in §1.931–1(c)(1);and

(2) ''Section 935 possession'' is defined in §1.935–1(a)(3)(i).

(3) *Foreign person* means any person other than—

(i) A United States person (as defined in section 7701(a)(30) and the regulations under that section); or

(ii) A person who would be a United States person if references to the United States in section 7701 included references to a possession of the United States.

(4) *Bona fide resident*—

(i) With respect to a particular possession, means—

(A) An individual who is a bona fide resident of the possession as defined in §1.937–1; or

(B) A business entity organized under the laws of the possession and taxable as a corporation in the possession; and

(ii) With respect to the United States, means—

(A) An individual who is a citizen or resident of the United States (as defined under section 7701(b)(1)(A)); or

(B) A business entity organized under the laws of the United States or any State that is classified as a corporation for Federal tax purposes under §301.7701–2(b) of this chapter.

(5) *Source.* The rules of §1.937–2 will apply for determining whether income is from sources within a possession.

(6) *Effectively connected income.* The rules of §1.937–3 (other than paragraph (c) of that section) will apply for determining whether income is effectively connected with the conduct of a trade or business in a possession.

(7) *Indirect ownership.* The rules of section 318(a)(2) will apply except that the language ''5 percent'' will be used instead of ''50 percent'' in section 318(a)(2)(C).

(g) *Mirror code jurisdictions.* For purposes of applying mirrored section 881 to determine tax liability incurred to a section 935 possession or the U.S. Virgin Islands—

(1) The rules of paragraphs (b) through (d) of this section will not apply; and

(2) A corporation created or organized in, or under the law of, such possession or the United States will not be considered a foreign corporation.

(h) *Example*. The principles of this section are illustrated by the following example:

Example. X is a corporation organized under the law of the U.S. Virgin Islands with a branch located in State F. At least 65 percent of the gross income of X is effectively connected with the conduct of a trade or business in the U.S. Virgin Islands and no substantial part of the income of X for the taxable year is used to satisfy obligations to persons who are not bona fide residents of the United States or the U.S. Virgin Islands. Seventy-four percent of the stock of X is owned by unrelated individuals who are residents of the United States or the U.S. Virgin Islands. Y, a corporation organized under the law of State D, and Z, a partnership organized under the law of State F, each own 13 percent of the stock of X. A, an unrelated foreign individual, owns 100 percent of the stock of corporation Y. B and C, unrelated foreign individuals, each own a 50 percent interest in partnership Z. Thus, the condition of paragraph (c)(1) of this section is not satisfied, because 26 percent of X is owned indirectly by foreign persons (A, B, and C). Accordingly, X is treated as a foreign corporation for purposes of section 881.

(i) *Effective/applicability dates*. Except as otherwise provided in this paragraph (i), this section applies to payments made in taxable years ending after April 9, 2008. If, on or after April 9, 2008, there takes effect an increase in the Commonwealth of Puerto Rico's withholding tax generally applicable to dividends paid to United States corporations not engaged in a trade or business in the Commonwealth to a rate greater than 10 percent, the rules of paragraphs (b)(2) and (e) of this section will not apply to dividends received on or after the effective date of the increase. Paragraph (f)(4) of this section applies to payments made after January 31, 2006. Taxpayers may choose to apply paragraph (f)(4) of this section to payments made after October 22, 2004.

[T.D. 9248, 71 FR 5001, Jan. 31, 2006, as amended by T.D. 9391, 73 FR 19359, Apr. 9, 2008; 73 FR 27728, May 14, 2008]

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This section lists captions contained in §§ 1.882–1, 1.882–2, 1.882–3, 1.882–4 and 1.882–5.

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(iv) Interbranch transactions.
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(A) In general.
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(A) In general.
(B) Example.
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(e) Separate currency pools method.
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(i) Determine the value of U.S. assets in each currency pool.
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(5) Examples.
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(1) General rule.
(2) Special rules for financial products.

[T.D. 8658, 61 FR 9329, Mar. 8, 1996; 61 FR 15891, Apr. 10, 1996, as amended by T.D. 9281, 71 FR 47448, Aug. 17, 2006; T.D. 9465, 74 FR 49317, Sept. 28, 2009]

§ 1.882–1 Taxation of foreign corporations engaged in U.S. business or of foreign corporations treated as having effectively connected income.

(a) *Segregation of income.* This section applies for purposes of determining the tax of a foreign corporation which at any time during the taxable year is engaged in trade or business in the United States. It also applies for purposes of determining the tax of a foreign corporation which at no time during the taxable year is engaged in trade or business in the United States but has for the taxable year real property income or interest on obligations of the United States which, by reason of section 882 (d) or (e) and §1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. A foreign corporation to which this section applies must segregate its gross income for the taxable year into two categories, namely, the income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation and the income which is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. A separate tax shall then be determined upon each such category of income, as provided in paragraph (b) of this section. The determination of whether income or gain is or is not effectively connected for the taxable year with the conduct of a trade or business in the United States by the foreign corporation shall be made in accordance with section 864(c) and §§1.864–3 through 1.864–7. For purposes of this section income which is effectively connected for the taxable year with the conduct of a trade or business in the United States includes all income which is treated under section 882 (d) or (e) and §1.882–2 as income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by the foreign corporation.

(b) *Imposition of tax*—(1) *Income not effectively connected with the conduct of a trade or business in the United States.* If a foreign corporation to which this section applies derives during the taxable year from sources within the United States income or gains described in section 881(a) and paragraph (b) or (c) of §1.881–2 which are not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation, such income or gains shall be subject to a flat tax of 30 percent of the aggregate amount of such items. This tax shall be determined in the manner, and subject to the same conditions, set forth in §1.881–2 as though the income or gains were derived by a foreign corporation not engaged in trade or business in the United States during the taxable year, except that in applying paragraph (c) of such section there shall not be taken into account any gains which are taken into account in determining the tax under section 882(a)(1) and subparagraph (2) of this paragraph.

(2) *Income effectively connected with the conduct of a trade or business in the United States*—(i) *In general.* If a foreign corporation to which this section applies derives income or gains which are effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation, the taxable income or gains shall, except as provided in §1.871–12, be taxed in accordance with section 11 or, in the alternative, section 1201(a). See sections 11(f) and 882(a)(1). Any income of the foreign corporation which is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation shall not be taken into account in determining either the rate or amount of such tax.

(ii) *Determination of taxable income.* The taxable income for any taxable year for purposes of this subparagraph consists only of the foreign corporation's taxable income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation; and, for this purpose, it is immaterial that the trade or business with which that income is effectively connected is not the same as the trade or business carried on in the United States by that corporation during the taxable year. See example 2 in §1.864–4(b). In determining such taxable income all amounts constituting, or considered to be, gains or losses for the taxable year from the sale or exchange of capital assets shall be taken into account if such gains or losses are effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation.

(iii) *Cross references.* For rules for determining the gross income and deductions for the taxable year, see section

882 (b) and (c)(1) and the regulations thereunder.

(c) *Change in trade or business status.* The principles of paragraph (c) of §1.871–8 shall apply to cases where there has been a change in the trade or business status of a foreign corporation.

(d) *Credits against tax.* The credits allowed by section 32 (relating to tax withheld at source on foreign corporations), section 33 (relating to the foreign tax credit), section 38 (relating to investment in certain depreciable property), section 39 (relating to certain uses of gasoline and lubricating oil), section 40 (relating to expenses of work incentive programs), and section 6042 (relating to overpayments of a tax) shall be allowed against the tax determined in accordance with this section. However, the credits allowed by sections 33, 38, and 40 shall not be allowed against the flat tax of 30 percent imposed by section 881(a) and paragraph (b)(1) of this section. For special rules applicable in determining the foreign tax credit, see section 906(b) and the regulations thereunder. For the disallowance of certain credits where a return is not filed for the taxable year see section 882(c)(2) and the regulations thereunder.

(e) *Payment of estimated tax.* Every foreign corporation which for the taxable year is subject to tax under section 11 or 1201(a) and this section must make payment of its estimated tax in accordance with section 6154 and the regulations thereunder. In determining the amount of the estimated tax the foreign corporation must treat the tax imposed by section 881(a) and paragraph (b)(1) of this section as though it were a tax imposed by section 11.

(f) *Effective date.* This section applies for taxable years beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.882–1 (Revised as of January 1, 1971).

[T.D. 7293, 38 FR 32797, Nov. 28, 1973]

§1.882–2 Income of foreign corporations treated as effectively connected with U.S. business.

(a) *Election as to real property income.* A foreign corporation which during the taxable year derives any income from real property which is located in the United States, or derives income from any interest in any such real property, may elect, pursuant to section 882(d) and §1.871–10, to treat all such income as income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. The election may be made whether or not the foreign corporation is engaged in trade or business in the United States during the taxable year for which the election is made or whether or not the corporation has income from real property which for the taxable year is effectively connected with the conduct of a trade or business in the United States, but it may be made only with respect to income from sources within the United States which, without regard to section 882(d) and §1.871–10, is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. The income to which the election applies shall be determined as provided in paragraph (b) of §1.871–10 and shall be subject to tax in the manner, and subject to the same conditions, provided by section 882(a)(1) and paragraph (b)(2) of §1.882–1. Section 871(d) (2) and (3) and the provisions of §1.871–10 thereunder shall apply in respect of an election under section 882(d) in the same manner and to the same extent as they apply in respect of elections under section 871(d).

(b) *Interest on U.S. obligations received by banks organized in possessions.* Interest received from sources within the United States during the taxable year on obligations of the United States by a foreign corporation created or organized in, or under the law of, a possession of the United States and carrying on the banking business in a possession of the United States during the taxable year shall be treated, pursuant to section 882(e) and this paragraph, as income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. This paragraph applies whether or not the foreign corporation is engaged in trade or business in the United States at any time during the taxable year but only with respect to income which, without regard to this paragraph, is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. Any interest to which this paragraph applies shall be subject to tax in the manner, and subject to the same conditions, provided by section 882(a)(1) and paragraph (b)(2) of §1.882–1. To the extent that deductions are connected with interest to which this paragraph applies, they shall be treated for purposes of section 882(c)(1) and the regulations thereunder as connected with income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by the foreign corporation. An election by the taxpayer is not required in respect of the income to which this paragraph applies. For purposes of this paragraph the term ''possession of the United States'' includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island.

(c) *Treatment of income.* Any income in respect of which an election described in paragraph (a) of this section is in effect, and any interest to which paragraph (b) of this section applies, shall be treated, for purposes of paragraph (b)(2) of §1.882–1 and paragraph (a) of §1.1441–4, as income which is effectively connected for the taxable year with the conduct of a trade or business in the United States by the foreign corporation. A foreign corporation shall not be treated as being engaged in trade or business in the United States merely by reason of having such income for the taxable year.

(d) *Effective date.* This section applies for taxable years beginning after December 31, 1966. There are no corresponding rules in this part for taxable years beginning before January 1, 1967.

[T.D. 7293, 38 FR 32798, Nov. 28, 1973]

§1.882–3 Gross income of a foreign corporation.

(a) *In general*—(1) *Inclusions.* The gross income of a foreign corporation for any taxable year includes only (i) the gross income which is derived from sources within the United States and which is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation and (ii) the gross income, irrespective of whether such income is derived from sources within or without the United States, which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation. For the determination of the sources of income, see sections 861 through 863, and the regulations thereunder. For the determination of whether income from sources within or without the United States is effectively connected for the taxable year with the conduct of a trade or business in the United States, see sections 864(c) and 882 (d) and (e), §§1.864–3 through 1.864–7, and §1.882–2.

(2) *Exchange transactions.* Even though a foreign corporation which effects certain transactions in the United States in stocks, securities, or commodities during the taxable year may not, by reason of section 864(b)(2) and paragraph (c) or (d) of §1.864–2, be engaged in trade or business in the United States during the taxable year through the effecting of such transactions, nevertheless it shall be required to include in gross income for the taxable year the gains and profits from those transactions to the extent required by paragraph (c) of §1.881–2 or by paragraph (a) of §1.882–1.

(3) *Exclusions.* For exclusions from gross income of a foreign corporation, see §1.883–1.

(b) *Foreign corporations not engaged in U.S. business.* In the case of a foreign corporation which at no time during the taxable year is engaged in trade or business in the United States the gross income shall include only (1) the gross income from sources within the United States which is described in section 881(a) and paragraphs (b) and (c) of §1.881–2, and (2) the gross income from sources within the United States which, by reason of section 882 (d) or (e) and §1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation.

(c) *Foreign corporations engaged in U.S. business.* In the case of a foreign corporation which is engaged in trade or business in the United States at any time during the taxable year, the gross income shall include (1) the gross income from sources within and without the United States which is effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation, (2) the gross income from sources within the United States which, by reason of section 882 (d) or (e) and § 1.882–2, is treated as effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation, and (3) the gross income from sources within the United States which is described in section 881(a) and paragraphs (b) and (c) of § 1.881–2 and is not effectively connected for the taxable year with the conduct of a trade or business in the United States by that corporation.

(d) *Effective date.* This section applies for taxable years beginning after December 31, 1966. For corresponding rules applicable to taxable years beginning before January 1, 1967, see 26 CFR 1.882–2 (Revised as of January 1, 1971).

[T.D. 7293, 38 FR 32799, Nov. 28, 1973]

§ 1.882–4 Allowance of deductions and credits to foreign corporations.

(a) *Foreign corporations*—(1) *In general.* A foreign corporation that is engaged in, or receives income treated as effectively connected with, a trade or business within the United States is allowed the deductions which are properly allocated and apportioned to the foreign corporation's gross income which is effectively connected, or treated as effectively connected, with its conduct of a trade or business within the United States. The foreign corporation is entitled to credits which are attributable to that effectively connected income. No provision of this section (other than paragraph (b)(2)) shall be construed to deny the credits provided by sections 33, 34 and 852(b)(3)(D)(ii) or the deduction allowed by section 170.

(2) *Return necessary.* A foreign corporation shall receive the benefit of the deductions and credits otherwise allowed to it with respect to the income tax, only if it timely files or causes to be filed with the Philadelphia Service Center, in the manner prescribed in subtitle F, a true and accurate return of its taxable income which is effectively connected, or treated as effectively connected, for the taxable year with the conduct of a trade or business in the United States by that corporation. The deductions and credits allowed such a corporation electing under a tax convention to be subject to tax on a net basis may be obtained by filing a return of income in the manner prescribed in the regulations (if any) under the tax convention or under any other guidance issued by the Commissioner.

(3) *Filing deadline for return.* (i) As provided in paragraph (a)(2) of this section, for purposes of computing the foreign corporation's taxable income for any taxable year, otherwise allowable deductions (other than that allowed by section 170) and credits (other than those allowed by sections 33, 34 and 852(b)(3)(D)(ii)) will be allowed only if a return for that taxable year is filed by the foreign corporation on a timely basis. For taxable years of a foreign corporation ending after July 31, 1990, whether a return for the current taxable year has been filed on a timely basis is dependent upon whether the foreign corporation filed a return for the taxable year immediately preceding the current taxable year. If a return was filed for that immediately preceding taxable year, or if the current taxable year is the first taxable year of the foreign corporation for which a return is required to be filed, the required return for the current taxable year must be filed within 18 months of the due date as set forth in section 6072 and the regulations under that section, for filing the return for the current taxable year. If no return for the taxable year immediately preceding the current taxable year has been filed, the required return for the current taxable year (other than the first taxable year of the foreign corporation for which a return is required to be filed) must have been filed no later than the earlier of the date which is 18 months after the due date, as set forth in section 6072, for filing the return for the current taxable year or the date the Internal Revenue Service mails a notice to the foreign corporation advising the corporation that the

current year tax return has not been filed and that no deductions (other than that allowed under section 170) or credits (other than those allowed under sections 33, 34 and 852(b)(3)(D)(ii)) may be claimed by the taxpayer.

(ii) The filing deadlines set forth in paragraph (a)(3)(i) of this section may be waived if the foreign corporation establishes to the satisfaction of the Commissioner or his or her delegate that the corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return (including a protective return (as described in paragraph (a)(3)(vi) of this section)). For this purpose, a foreign corporation shall not be considered to have acted reasonably and in good faith if it knew that it was required to file the return and chose not to do so. In addition, a foreign corporation shall not be granted a waiver unless it cooperates in the process of determining its income tax liability for the taxable year for which the return was not filed. The Commissioner or his or her delegate shall consider the following factors in determining whether the foreign corporation, based on the facts and circumstances, acted reasonably and in good faith in failing to file a U.S. income tax return—

(A) Whether the corporation voluntarily identifies itself to the Internal Revenue Service as having failed to file a U.S. income tax return before the Internal Revenue Service discovers the failure to file;

(B) Whether the corporation did not become aware of its ability to file a protective return (as described in paragraph (a)(3)(vi) of this section) by the deadline for filing a protective return;

(C) Whether the corporation had not previously filed a U.S. income tax return;

(D) Whether the corporation failed to file a U.S. income tax return because, after exercising reasonable diligence (taking into account its relevant experience and level of sophistication), the corporation was unaware of the necessity for filing the return;

(E) Whether the corporation failed to file a U.S. income tax return because of intervening events beyond its control; and

(F) Whether other mitigating or exacerbating factors existed.

(iii) The following examples illustrate the provisions of this section. In all examples, FC is a foreign corporation and uses the calendar year as its taxable year. The examples are as follows:

Example 1. Foreign corporation discloses own failure to file. In Year 1, FC became a limited partner with a passive investment in a U.S. limited partnership that was engaged in a U.S. trade or business. During Year 1 through Year 4, FC incurred losses with respect to its U.S. partnership interest. FC's foreign tax director incorrectly concluded that because it was a limited partner and had only losses from its partnership interest, FC was not required to file a U.S. income tax return. FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. In Year 5, FC began realizing a profit rather than a loss with respect to its partnership interest and, for this reason, engaged a U.S. tax advisor to handle its responsibility to file U.S. income tax returns. In preparing FC's income tax return for Year 5, FC's U.S. tax advisor discovered that returns were not filed for Year 1 through Year 4. Therefore, with respect to those years for which applicable filing deadlines in paragraph (a)(3)(i) of this section were not met, FC would be barred by paragraph (a)(2) of this section from claiming any deductions that otherwise would have given rise to net operating losses on returns for those years, and that would have been available as loss carryforwards in subsequent years. At FC's direction, its U.S. tax advisor promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 through Year 4 and by making FC's books and records available to an Internal Revenue Service examiner. FC has met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 2. Foreign corporation refuses to cooperate. Same facts as in *Example 1*, except that while FC's U.S. tax advisor contacted the appropriate examining personnel and filed the appropriate income tax returns for Year 1 through Year 4, FC refused all requests by the Internal Revenue Service to provide supporting information (for example, books and records) with respect to those returns. Because FC did not cooperate in determining its U.S. tax liability for the taxable years for which an income tax return was not timely filed, FC is not granted a waiver as described in paragraph (a)(3)(ii) of this section of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 3. Foreign corporation fails to file a protective return. Same facts as in *Example 1*, except that in Year 1 through Year 4, FC's tax director also consulted a U.S. tax advisor, who advised FC's tax director that it was uncertain whether U.S. income tax returns were necessary for those years and that FC could protect its right subsequently to claim the loss carryforwards by filing protective returns under paragraph (a)(3)(vi) of this section. FC did not file U.S. income tax returns or protective returns for those years. FC did not present evidence that intervening events beyond FC's control prevented it from filing an income tax return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 4. Foreign corporation with effectively connected income. In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. FC had minimal business or tax experience internationally, and no such experience in the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC, however, did not file U.S. income tax returns for Year 1 or Year 2. FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. In January of Year 4, FC engaged U.S. counsel in connection with licensing software to an unrelated U.S. company. U.S. counsel reviewed FC's U.S. activities and advised FC that it should have filed U.S. income tax returns for Year 1 and Year 2. FC immediately engaged a U.S. tax advisor who, at FC's direction, promptly contacted the appropriate examining personnel and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making FC's books and records available to an Internal Revenue Service examiner. FC has met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 5. IRS discovers foreign corporation's failure to file. In Year 1, FC, a technology company, opened an office in the United States to market and sell a software program that FC had developed outside the United States. Through FC's direct efforts, U.S. sales of the software produced income effectively connected with a U.S. trade or business. FC had extensive experience conducting similar business activities in other countries, including making the appropriate tax filings. However, FC's management was aware neither of FC's obligation to file a U.S. income tax return for those years, nor of its ability to file a protective return for those years. FC had never filed a U.S. income tax return before. Despite FC's extensive experience conducting similar business activities in other countries, it made no effort to seek advice in connection with its U.S. tax obligations. FC failed to file either U.S. income tax returns or protective returns for Year 1 and Year 2. In January of Year 4, an Internal Revenue Service examiner asked FC for an explanation of FC's failure to file U.S. income tax returns. FC immediately engaged a U.S. tax advisor, and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 1 and Year 2 and by making FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing a return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

Example 6. Foreign corporation with prior filing history. FC began a U.S. trade or business in Year 1. FC's tax advisor filed the appropriate U.S. income tax returns for Year 1 through Year 6, reporting income effectively connected with FC's U.S. trade or business. In Year 7, FC replaced its tax advisor with a tax advisor unfamiliar with U.S. tax law. FC did not file a U.S. income tax return for any year from Year 7 through Year 10, although it had effectively connected income for those years. FC's management was aware of FC's ability to file a protective return for those years. In Year 11, an Internal Revenue Service examiner contacted FC and asked its chief financial officer for an explanation of FC's failure to file U.S. income tax returns after Year 6. FC immediately engaged a U.S. tax advisor and cooperated with the Internal Revenue Service in determining FC's income tax liability, for example, by preparing and filing the appropriate income tax returns for Year 7 through Year 10 and by making FC's books and records available to the examiner. FC did not present evidence that intervening events beyond its control prevented it from filing a return, and there were no other mitigating factors. FC has not met the standard described in paragraph (a)(3)(ii) of this section for waiver of any applicable filing deadlines in paragraph (a)(3)(i) of this section.

(iv) Paragraphs (a)(3)(ii) and (iii) of this section are applicable to open years for which a request for a waiver is filed on or after January 29, 2002.

(v) A foreign corporation which has a permanent establishment, as defined in an income tax treaty between the United States and the foreign corporation's country of residence, in the United States is subject to the filing deadlines set forth in paragraph (a)(3)(i) of this section.

(vi) If a foreign corporation conducts limited activities in the United States in a taxable year which the foreign corporation determines does not give rise to gross income which is effectively connected with the conduct of a trade or business within the United States as defined in sections 882(b) and 864 (b) and (c) and the regulations under those sections, the foreign corporation may nonetheless file a return for that taxable year on a timely basis under paragraph (a)(3)(i) of this section and thereby protect the right to receive the benefit of the deductions and credits attributable to that gross income if it is later determined, after the return was filed, that the original determination was incorrect. On that timely filed return, the foreign corporation is not required to report any gross income as effectively connected with a United States trade or business or any deductions or credits but should attach a statement indicating that the return is being filed for the reason set forth in this paragraph (a)(3). If the foreign corporation determines that part of the activities which it conducts in the United States in a taxable year gives rise to gross income which is effectively connected with the conduct of a trade or business and part does not, the foreign corporation must timely file a return for that taxable year to report the gross income determined to be effectively connected, or treated as effectively connected, with the conduct of the trade or business within the United States and the deductions and credits attributable to the gross income. In addition, the foreign corporation should attach to that return the statement described in this paragraph (b)(3) with regard to the other activities. The foreign corporation may follow the same procedure if it determines initially that it has no United States tax liability under the provisions of an applicable income tax treaty. In the event the foreign corporation relies on the provisions of an income tax treaty to reduce or eliminate the income subject to taxation, or to reduce the rate of tax, disclosure may be required pursuant to section 6114.

(vii) In order to be eligible for any deductions and credits for purposes of computing the accumulated earnings tax of section 531, a foreign corporation must file a true and accurate return; on a timely basis, in the manner as set forth in paragraph (a) (2) and (3) of this section.

(4) *Return by Internal Revenue Service.* If a foreign corporation has various sources of income within the United States and a return of income has not been filed, in the manner prescribed by subtitle F, including the filing deadlines set forth in paragraph (a)(3) of this section, the Internal Revenue Service shall:

(i) Cause a return of income to be made,

(ii) Include on the return the income described in §1.882–1 of that corporation from all sources concerning which it has information, and

(iii) Assess the tax and collect it from one or more of those sources of income within the United States, without allowance for any deductions (other than that allowed by section 170) or credits (other than those allowed by sections 33, 34 and 852(b)(3)(D)(ii)).

If the income of the corporation is not effectively connected with, or if the corporation did not receive income that is treated as being effectively connected with, the conduct of a United States trade or business, the tax will be assessed under §1.882–1(b)(1) on a gross basis, without allowance for any deduction (other than that allowed by section 170) or credit (other than the credits allowed by sections 33, 34 and 852(b)(3)(D)(ii)). If the income is effectively connected, or treated as effectively connected, with the conduct of a United States trade on business, tax will be assessed in accordance with either section 11, 55 or 1201(a) without allowance for any deduction (other than that allowed by section 170) or credit (other than the credits allowed by sections 33, 34 and 852(b)(3)(D)(ii)).

(b) *Allowed deductions and credits*—(1) *In general.* Except for the deduction allowed under section 170 for charitable contributions and gifts (see section 882(c)(1)(B)), deductions are allowed to a foreign corporation only to the extent they are connected with gross income which is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States. Deductible expenses (other than interest expense) are properly allocated and apportioned to effectively connected gross income in accordance with the rules of §1.861–8. For the method of determining the interest deduction allowed to a foreign corporation, see §1.882–5. Other than the credits allowed by sections 33, 34 and 852(b)(3)(D)(ii), the foreign corporation is entitled to credits only if they are attributable to effectively connected income. See paragraph (a)(2) of this section for the requirement that a return be filed. Except as provided by section 906, a foreign corporation shall not be allowed the credit against the tax for taxes of foreign countries and possessions of the United States allowed by section 901.

(2) *Verification.* At the request of the Internal Revenue Service, a foreign corporation claiming deductions from gross income which is effectively connected, or treated as effectively connected, with the conduct of a trade or business in the United States or credits which are attributable to that income must furnish at the place designated pursuant to §301.7605–1(a) information sufficient to establish that the corporation is entitled to the deductions and credits in the amounts claimed. All information must be furnished in a form suitable to permit verification of claimed deductions and credits. The Internal Revenue Service may require, as appropriate, that an English translation be provided with any information in a foreign language. If a foreign corporation fails to furnish sufficient information, the Internal Revenue Service may in its discretion disallow any claimed deductions and credits in full or in part. For additional filing requirements and for penalties for failure to provide information, see also section 6038A.

[T.D. 8322, 55 FR 50830, Dec. 11, 1990, as amended by T.D. 8981, 67 FR 4175, Jan. 29, 2002; T.D. 9043, 68 FR 11314, Mar. 10, 2003]

§1.882–5 Determination of interest deduction.

(a)(1) *Overview*—(i) *In general.* The amount of interest expense of a foreign corporation that is allocable under section 882(c) to income which is (or is treated as) effectively connected with the conduct of a trade or business within the United States (ECI) is the sum of the interest allocable by the foreign corporation under the three-step process set forth in paragraphs (b), (c), and (d) of this section and the specially allocated interest expense determined under paragraph (a)(1)(ii) of this section. The provisions of this section provide the exclusive rules for allocating interest expense to the ECI of a foreign corporation under section 882(c). Under the three-step process, the total value of the U.S. assets of a foreign corporation is first determined under paragraph (b) of this section (Step 1). Next, the amount of U.S.-connected liabilities is determined under paragraph (c) of this section (Step 2). Finally, the amount of interest paid or accrued on U.S.-booked liabilities, as determined under paragraph (d)(2) of this section, is adjusted for interest expense attributable to the difference between U.S.-connected liabilities and U.S.-booked liabilities (Step 3). Alternatively, a foreign corporation may elect to determine its interest rate on U.S.-connected liabilities by reference to its U.S. assets, using the separate currency pools method described in paragraph (e) of this section.

(ii) *Direct allocations*—(A) *In general.* A foreign corporation that has a U.S. asset and indebtedness that meet the requirements of §1.861–10T (b) or (c), as limited by §1.861–10T(d)(1), shall directly allocate interest expense from such indebtedness to income from such asset in the manner and to the extent provided in §1.861–10T. For purposes of paragraph (b)(1) or (c)(2) of this section, a foreign corporation that allocates its interest expense under the direct allocation rule of this paragraph (a)(1)(ii)(A) shall reduce the basis of the asset that meets the requirements of §1.861–10T (b) or (c) by the principal amount of the indebtedness that meets the requirements of §1.861- 10T (b) or (c). The foreign corporation shall also disregard any indebtedness that meets the requirements of §1.861–10T (b) or (c) in determining the amount of the foreign corporation's liabilities under paragraphs (c)(2) and (d)(2) of this section and shall not take into account any interest expense paid or accrued with respect to such a liability for purposes of paragraph (d) or (e) of this section.

(B) *Partnership interest.* A foreign corporation that is a partner in a partnership that has a U.S. asset and indebtedness that meet the requirements of §1.861–10T (b) or (c), as limited by §1.861–10T(d)(1), shall directly allocate its distributive share of interest expense from that indebtedness to its distributive share of income from that asset in the manner and to the extent provided in §1.861–10T. A foreign corporation that allocates its distributive share of interest expense under the direct allocation rule of this paragraph (a)(1)(ii)(B) shall disregard any partnership indebtedness that meets the requirements of §1.861–10T (b) or (c) in determining the amount of its distributive share of partnership liabilities for purposes of paragraphs (b)(1), (c)(2)(vi), and (d)(2)(vii) or (e)(1)(ii) of this section, and shall not take into account any partnership interest expense paid or accrued with respect to such a liability for purposes of paragraph (d) or (e) of this section. For purposes of paragraph (b)(1) of this section, a foreign corporation that directly allocates its distributive share of interest expense under this paragraph (a)(1)(ii)(B) shall—

(*1*) Reduce the partnership's basis in such asset by the amount of such indebtedness in allocating its basis in the partnership under §1.884–1(d)(3)(ii); or

(*2*) Reduce the partnership's income from such asset by the partnership's interest expense from such indebtedness under §1.884–1(d)(3)(iii).

(2) *Coordination with tax treaties.* Except as expressly provided by or pursuant to a U.S. income tax treaty or accompanying documents (such as an exchange of notes), the provisions of this section provide the exclusive rules for determining the interest expense attributable to the business profits of a permanent establishment under a U.S. income tax treaty.

(3) *Limitation on interest expense.* In no event may the amount of interest expense computed under this section exceed the amount of interest on indebtedness paid or accrued by the taxpayer within the taxable year (translated into U.S. dollars at the weighted average exchange rate for each currency prescribed by §1.989(b)–1 for the taxable year).

(4) *Translation convention for foreign currency.* For each computation required by this section, the taxpayer shall translate values and amounts into the relevant currency at a spot rate or a weighted average exchange rate consistent with the method such taxpayer uses for financial reporting purposes, provided such method is applied consistently from year to year. Interest expense paid or accrued, however, shall be translated under the rules of §1.988–2. The director of field operations or the Assistant Commissioner (International) may require that any or all computations required by this section be made in U.S. dollars if the functional currency of the taxpayer's home office is a hyperinflationary currency, as defined in §1.985–1, and the computation in U.S. dollars is necessary to prevent distortions.

(5) *Coordination with other sections.* Any provision that disallows, defers, or capitalizes interest expense applies after determining the amount of interest expense allocated to ECI under this section. For example, in determining the amount of interest expense that is disallowed as a deduction under section 265 or 163(j), deferred under section 163(e)(3) or 267(a)(3), or capitalized under section 263A with respect to a United States trade or business, a taxpayer takes into account only the amount of interest expense allocable to ECI under this section.

(6) *Special rule for foreign governments.* The amount of interest expense of a foreign government, as defined in §1.892–2T(a), that is allocable to ECI is the total amount of interest paid or accrued within the taxable year by the

United States trade or business on U.S. booked liabilities (as defined in paragraph (d)(2) of this section). Interest expense of a foreign government, however, is not allocable to ECI to the extent that it is incurred with respect to U.S. booked liabilities that exceed 80 percent of the total value of U.S. assets for the taxable year (determined under paragraph (b) of this section). This paragraph (a)(6) does not apply to controlled commercial entities within the meaning of §1.892–5T.

(7) *Elections under §1.882–5*—(i) *In general.* A corporation must make each election provided in this section on the corporation's original timely filed Federal income tax return for the first taxable year it is subject to the rules of this section. An amended return does not qualify for this purpose, nor shall the provisions of §301.9100–1 of this chapter and any guidance promulgated thereunder apply. Except as provided elsewhere in this section, each election under this section, whether an election for the first taxable year or a subsequent change of election, shall be made by indicating the method used on Schedule I (Form 1120–F) attached to the corporation's timely filed return. An elected method (other than the fair market value method under paragraph (b)(2)(ii) of this section, or the annual 30-day London Interbank Offered Rate (LIBOR) election in paragraph (d)(5)(ii) of this section) must be used for a minimum period of five years before the taxpayer may elect a different method. To change an election before the end of the requisite five-year period, a taxpayer must obtain the consent of the Commissioner or his delegate. The Commissioner or his delegate will generally consent to a taxpayer's request to change its election only in rare and unusual circumstances. After the five-year minimum period, an elected method may be changed for any subsequent year on the foreign corporation's original timely filed tax return for the first year to which the changed election applies.

(ii) *Failure to make the proper election.* If a taxpayer, for any reason, fails to make an election provided in this section in a timely fashion, the Director of Field Operations may make any or all of the elections provided in this section on behalf of the taxpayer, and such elections shall be binding as if made by the taxpayer.

(iii) *Step 2 special election for banks.* For the first taxable year for which an original income tax return is due (including extensions) after August 17, 2006, in which a taxpayer that is a bank as described in paragraph (c)(4) of this section is subject to the requirements of this section, a taxpayer may make a new election to use the fixed ratio on an original timely filed return. A new fixed ratio election may be made in any subsequent year subject to the timely filing and five-year minimum period requirements of paragraph (a)(7)(i) of this section. A new fixed ratio election under this paragraph (a)(7)(iii) is subject to the adjusted basis or fair market value conforming election requirements of paragraph (b)(2)(ii)(A)(*2*) of this section and may not be made if a taxpayer elects or maintains a fair market value election for purposes of paragraph (b) of this section. Taxpayers that already use the fixed ratio method under an existing election may continue to use the new fixed ratio at the higher percentage without having to make a new five-year election in the first year that the higher percentage is effective.

(8) *Examples.* The following examples illustrate the application of paragraph (a) of this section:

Example 1. Direct allocations. (i) *Facts: FC* is a foreign corporation that conducts business through a branch, *B*, in the United States. Among *B*'s U.S. assets is an interest in a partnership, *P*, that is engaged in airplane leasing solely in the U.S. *FC* contributes 200 × to *P* in exchange for its partnership interest. *P* incurs qualified nonrecourse indebtedness within the meaning of §1.861–10T to purchase an airplane. *FC*'s share of the liability of *P*, as determined under section 752, is 800 ×.

(ii) *Analysis:* Pursuant to paragraph (a)(1)(ii)(B) of this section, *FC* is permitted to directly allocate its distributive share of the interest incurred with respect to the qualified nonrecourse indebtedness to *FC*'s distributive share of the rental income generated by the airplane. A liability the interest on which is allocated directly to the income from a particular asset under paragraph (a)(1)(ii)(B) of this section is disregarded for purposes of paragraphs (b)(1), (c)(2)(vi), and (d)(2)(vii) or (e)(1)(ii) of this section. Consequently, for purposes of determining the value of *FC*'s assets under paragraphs (b)(1) and (c)(2)(vi) of this section, *FC*'s basis in *P* is reduced by the 800 × liability as determined under section 752, but is not increased by the 800 × liability that is directly allocated under paragraph (a)(1)(ii)(B) of this section. Similarly, pursuant to paragraph (a)(1)(ii)(B) of this section, the 800 × liability is disregarded for purposes of determining *FC*'s liabilities under paragraphs (c)(2)(vi) and (d)(2)(vii) of this section.

Example 2. Limitation on interest expense. (i) *FC* is a foreign corporation that conducts a real estate business in the United States. In its 1997 tax year, *FC* has no outstanding indebtedness, and therefore incurs no interest expense. *FC* elects to use the 50% fixed ratio under paragraph (c)(4) of this section.

(ii) Under paragraph (a)(3) of this section, *FC* is not allowed to deduct any interest expense that exceeds the amount of interest on indebtedness paid or accrued in that taxable year. Since *FC* incurred no interest expense in taxable year 1997, *FC* will not be entitled to any interest deduction for that year under §1.882–5, notwithstanding the fact that *FC* has elected to use the 50% fixed ratio.

Example 3. Coordination with other sections. (i) *FC* is a foreign corporation that is a bank under section 585(a)(2) and a financial institution under section 265(b)(5). *FC* is a calendar year taxpayer, and operates a U.S. branch, *B*. Throughout its taxable year 1997, *B* holds only two assets that are U.S. assets within the meaning of paragraph (b)(1) of this section. *FC* does not make a fair-market value election under paragraph (b)(2)(ii) of this section, and, therefore, values its U.S. assets according to their bases under paragraph (b)(2)(i) of this section. The first asset is a taxable security with an adjusted basis of $100. The second asset is an obligation the interest on which is exempt from federal taxation under section 103, with an adjusted basis of $50. The tax-exempt obligation is not a qualified tax-exempt obligation as defined by section 265(b)(3)(B).

(ii) *FC* calculates its interest expense under §1.882–5 to be $12. Under paragraph (a)(5) of this section, however, a portion of the interest expense that is allocated to *FC*'s effectively connected income under §1.882–5 is disallowed in accordance with the provisions of section 265(b). Using the methodology prescribed under section 265, the amount of disallowed interest expense is $4, calculated as follows:

$$\$12 \times \frac{\$50 \text{ Tax-exempt U.S. assets}}{\$150 \text{ Total U.S. assets}} = \$4$$

(iii) Therefore, *FC* deducts a total of $8 ($12–$4) of interest expense attributable to its effectively connected income in 1997.

Example 4. Treaty exempt asset. (i) *FC* is a foreign corporation, resident in Country X, that is actively engaged in the banking business in the United States through a permanent establishment, *B*. The income tax treaty in effect between Country X and the United States provides that *FC* is not taxable on foreign source income earned by its U.S. permanent establishment. In its 1997 tax year, *B* earns $90 of U.S. source income from U.S. assets with an adjusted tax basis of $900, and $12 of foreign source interest income from U.S. assets with an adjusted tax basis of $100. *FC*'s U.S. interest expense deduction, computed in accordance with §1.882–5, is $500.

(ii) Under paragraph (a)(5) of this section, *FC* is required to apply any provision that disallows, defers, or capitalizes interest expense after determining the interest expense allocated to ECI under §1.882–5. Section 265(a)(2) disallows interest expense that is allocable to one or more classes of income that are wholly exempt from taxation under subtitle A of the Internal Revenue Code. Section 1.265–1(b) provides that income wholly exempt from taxes includes both income excluded from tax under any provision of subtitle A and income wholly exempt from taxes under any other law. Section 894 specifies that the provisions of subtitle A are applied with due regard to any relevant treaty obligation of the United States. Because the treaty between the United States and Country X exempts foreign source income earned by B from U.S. tax, *FC* has assets that produce income wholly exempt from taxes under subtitle A, and must therefore allocate a portion of its §1.882–5 interest expense to its exempt income. Using the methodology prescribed under section 265, the amount of disallowed interest expense is $50, calculated as follows:

$$\$500 \times \frac{\$100 \text{ Treaty-exempt U.S. assets}}{\$1000 \text{ Total U.S. assets}} = \$50$$

(iii) Therefore, *FC* deducts a total of $450 ($500–$50) of interest expense attributable to its effectively connected income in 1997.

(b) *Step 1: Determination of total value of U.S. assets for the taxable year*—(1) *Classification of an asset as a U.S. asset*—

(i) *General rule.* Except as otherwise provided in this paragraph (b)(1), an asset is a U.S. asset for purposes of this section to the extent that it is a U.S. asset under §1.884–1(d). For purposes of this section, the term *determination date,* as used in §1.884–1(d), means each day for which the total value of U.S. assets is computed under paragraph (b)(3) of this section.

(ii) *Items excluded from the definition of U.S. asset.* For purposes of this section, the term *U.S. asset* excludes an asset to the extent it produces income or gain described in sections 883 (a)(3) and (b).

(iii) *Items included in the definition of U.S. asset.* For purposes of this section, the term *U.S. asset* includes—

(A) U.S. real property held in a wholly-owned domestic subsidiary of a foreign corporation that qualifies as a bank under section 585(a)(2)(B) (without regard to the second sentence thereof), provided that the real property would qualify as used in the foreign corporation's trade or business within the meaning of §1.864–4(c) (2) or (3) if held directly by the foreign corporation and either was initially acquired through foreclosure or similar proceedings or is U.S. real property occupied by the foreign corporation (the value of which shall be adjusted by the amount of any indebtedness that is reflected in the value of the property);

(B) An asset that produces income treated as ECI under section 921(d) or 926(b) (relating to certain income of a FSC and certain dividends paid by a FSC to a foreign corporation);

(C) An asset that produces income treated as ECI under section 953(c)(3)(C) (relating to certain income of a captive insurance company that a corporation elects to treat as ECI) that is not otherwise ECI; and

(D) An asset that produces income treated as ECI under section 882(e) (relating to certain interest income of possessions banks).

(iv) *Interbranch transactions.* A transaction of any type between separate offices or branches of the same taxpayer does not create a U.S. asset.

(v) *Assets acquired to increase U.S. assets artificially.* An asset shall not be treated as a U.S. asset if one of the principal purposes for acquiring or using that asset is to increase artificially the U.S. assets of a foreign corporation on the determination date. Whether an asset is acquired or used for such purpose will depend upon all the facts and circumstances of each case. Factors to be considered in determining whether one of the principal purposes in acquiring or using an asset is to increase artificially the U.S. assets of a foreign corporation include the length of time during which the asset was used in a U.S. trade or business, whether the asset was acquired from a related person, and whether the aggregate value of the U.S. assets of the foreign corporation increased temporarily on or around the determination date. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately).

(2) *Determination of the value of a U.S. asset*—(i) *General rule.* The value of a U.S. asset is the adjusted basis of the asset for determining gain or loss from the sale or other disposition of that item, further adjusted as provided in paragraph (b)(2)(iii) of this section.

(ii) *Fair-market value election*—

(A) *In general*—(*1*) *Fair market value conformity requirement.* A taxpayer may elect to value all of its U.S. assets on the basis of fair market value, subject to the requirements of §1.861–9T(g)(1)(iii), and provided the taxpayer is eligible and uses the actual ratio method under paragraph (c)(2) of this section and the methodology prescribed in §1.861–9T(h). Once elected, the fair market value must be used by the taxpayer for both Step 1 and Step 2 described in paragraphs (b) and (c) of this section, and must be used in all subsequent taxable years unless the Commissioner or his delegate consents to a change.

(*2*) *Conforming election requirement.* Taxpayers that as of the effective date of this paragraph (b)(2)(ii)(A)(*2*) have elected and currently use both the fair market value method for purposes of paragraph (b) of this section and a fixed ratio for purposes of paragraph (c)(4) of this section must conform either the adjusted basis or fair market value methods in Step 1 and Step 2 of the allocation formula by making an adjusted basis election for paragraph

(b) of this section purposes while continuing the fixed ratio for Step 2, or by making an actual ratio election under paragraph (c)(2) of this section while remaining on the fair market value method under paragraph (b) of this section. Taxpayers who elect to conform Step 1 and Step 2 of the formula to the adjusted basis method must remain on both methods for the minimum five-year period in accordance with the provisions of paragraph (a)(7) of this section. Taxpayers that elect to conform Step 1 and Step 2 of the formula to the fair market value method must remain on the actual ratio method until the consent of the Commissioner or his delegate is obtained to switch to the adjusted basis method. If consent to use the adjusted basis method in Step 1 is granted in a later year, the taxpayer must remain on the actual ratio method for the minimum five-year period unless consent to use the fixed ratio is independently obtained under the requirements of paragraph (a)(7) of this section. For the first taxable year for which an original income tax return is due (including extensions) after August 17, 2006, taxpayers that are required to make a conforming election under this paragraph (b)(2)(ii)(A)(*2*), may do so on an original timely filed return. If a conforming election is not made within the timeframe provided in this paragraph, the Director of Field Operations or his delegate may make the conforming elections in accordance with the provisions of paragraph (a)(7)(ii) of this section.

(B) *Adjustment to partnership basis.* If a partner makes a fair market value election under paragraph (b)(2)(ii) of this section, the value of the partner's interest in a partnership that is treated as an asset shall be the fair market value of his partnership interest, increased by the fair market value of the partner's share of the liabilities determined under paragraph (c)(2)(vi) of this section. See §1.884–1(d)(3).

(iii) *Reduction of total value of U.S. assets by amount of bad debt reserves under section 585*—(A) *In general.* The total value of loans that qualify as U.S. assets shall be reduced by the amount of any reserve for bad debts additions to which are allowed as deductions under section 585.

(B) *Example.* The following example illustrates the provisions of paragraph (b)(2)(iii)(A) of this section:

Example. Foreign banks; bad debt reserves. FC is a foreign corporation that qualifies as a bank under section 585(a)(2)(B) (without regard to the second sentence thereof), but is not a large bank as defined in section 585(c)(2). *FC* conducts business through a branch, *B*, in the United States. Among *B*'s U.S. assets are a portfolio of loans with an adjusted basis of $500. *FC* accounts for its bad debts for U.S. federal income tax purposes under the reserve method, and *B* maintains a deductible reserve for bad debts of $50. Under paragraph (b)(2)(iii) of this section, the total value of *FC*'s portfolio of loans is $450 ($500 − $50).

(3) *Computation of total value of U.S. assets*—(i) *General rule.* The total value of U.S. assets for the taxable year is the average of the sums of the values (determined under paragraph (b)(2) of this section) of U.S. assets. For each U.S. asset, value shall be computed at the most frequent regular intervals for which data are reasonably available. In no event shall the value of any U.S. asset be computed less frequently than monthly (beginning of taxable year and monthly thereafter) by a large bank (as defined in section 585(c)(2)) or a dealer in securities (within the meaning of section 475) and semi-annually (beginning, middle and end of taxable year) by any other taxpayer.

(ii) *Adjustment to basis of financial instruments.* For purposes of determining the total average value of U.S. assets in this paragraph (b)(3), the value of a security or contract that is marked to market pursuant to section 475 or section 1256 shall be determined as if each determination date is the most frequent regular interval for which data are reasonably available that reflects the taxpayer's consistent business practices for reflecting mark-to-market valuations on its books and records.

(c) *Step 2: Determination of total amount of U.S.-connected liabilities for the taxable year*—(1) *General rule.* The amount of U.S.-connected liabilities for the taxable year equals the total value of U.S. assets for the taxable year (as determined under paragraph (b)(3) of this section) multiplied by the actual ratio for the taxable year (as determined under paragraph (c)(2) of this section) or, if the taxpayer has made an election in accordance with paragraph (c)(4) of this section, by the fixed ratio.

(2) *Computation of the actual ratio*—(i) *In general.* A taxpayer's actual ratio for the taxable year is the total amount of its worldwide liabilities for the taxable year divided by the total value of its worldwide assets for the taxable year. The total amount of worldwide liabilities and the total value of worldwide assets for the taxable year is the average of the sums of the amounts of the taxpayer's worldwide liabilities and the values of its worldwide assets (determined under paragraphs (c)(2) (iii) and (iv) of this section). In each case, the sums must be computed semi-annually (beginning, middle and end of taxable year) by a large bank (as defined in section 585(c)(2)) and annually (beginning and end of taxable year) by any other taxpayer.

(ii) *Classification of items.* The classification of an item as a liability or an asset must be consistent from year to year and in accordance with U.S. tax principles.

(iii) *Determination of amount of worldwide liabilities.* The amount of a liability must be determined consistently from year to year and must be substantially in accordance with U.S. tax principles. To be substantially in accordance with U.S. tax principles, the principles used to determine the amount of a liability must not differ from U.S. tax principles to a degree that will materially affect the value of taxpayer's worldwide liabilities or the taxpayer's actual ratio.

(iv) *Determination of value of worldwide assets.* The value of an asset must be determined consistently from year to year and must be substantially in accordance with U.S. tax principles. To be substantially in accordance with U.S. tax principles, the principles used to determine the value of an asset must not differ from U.S. tax principles to a degree that will materially affect the value of the taxpayer's worldwide assets or the taxpayer's actual ratio. The value of an asset is the adjusted basis of that asset for determining the gain or loss from the sale or other disposition of that asset, adjusted in the same manner as the basis of U.S. assets are adjusted under paragraphs (b)(2) (ii) through (iv) of this section. The rules of paragraph (b)(3) of this section apply in determining the total value of applicable worldwide assets for the taxable year, except that the minimum number of determination dates are those stated in paragraph (c)(2)(i) of this section.

(v) *Hedging transactions.* [Reserved]

(vi) *Treatment of partnership interests and liabilities.* For purposes of computing the actual ratio, the value of a partner's interest in a partnership that will be treated as an asset is the partner's adjusted basis in its partnership interest, reduced by the partner's share of liabilities of the partnership as determined under section 752 and increased by the partner's share of liabilities determined under this paragraph (c)(2)(vi). If the partner has made a fair market value election under paragraph (b)(2)(ii) of this section, the value of its interest in the partnership shall be increased by the fair market value of the partner's share of the liabilities determined under this paragraph (c)(2)(vi). For purposes of this section a partner shares in any liability of a partnership in the same proportion that it shares, for income tax purposes, in the expense attributable to that liability for the taxable year. A partner's adjusted basis in a partnership interest cannot be less than zero.

(vii) *Computation of actual ratio of insurance companies.* [Reserved]

(viii) *Interbranch transactions.* A transaction of any type between separate offices or branches of the same taxpayer does not create an asset or a liability.

(ix) *Amounts must be expressed in a single currency.* The actual ratio must be computed in either U.S. dollars or the functional currency of the home office of the taxpayer, and that currency must be used consistently from year to year. For example, a taxpayer that determines the actual ratio annually using British pounds converted at the spot rate for financial reporting purposes must translate the U.S. dollar values of assets and amounts of liabilities of the U.S. trade or business into pounds using the spot rate on the last day of its taxable year. The director of field operations or the Assistant Commissioner (International) may require that the actual ratio be computed in dollars if the functional currency of the taxpayer's home office is a hyperinflationary currency, as defined in §1.985–1, that materially distorts the actual ratio.

(3) *Adjustments.* The director of field operations or the Assistant Commissioner (International) may make appropriate adjustments to prevent a foreign corporation from intentionally and artificially increasing its actual ratio. For example, the director of field operations or the Assistant Commissioner (International) may offset a loan made from or to one person with a loan made to or from another person if any of the parties to the loans are related persons, within the meaning of section 267(b) or 707(b)(1), and one of the principal purposes for entering into the loans was to increase artificially the actual ratio of a foreign corporation. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately).

(4) *Elective fixed ratio method of determining U.S. liabilities.* A taxpayer that is a bank as defined in section 585(a)(2)(B) (without regard to the second sentence thereof or whether any such activities are effectively connected with a trade or business within the United States) may elect to use a fixed ratio of 95 percent in lieu of the actual ratio. A taxpayer that is neither a bank nor an insurance company may elect to use a fixed ratio of 50 percent in lieu of the actual ratio.

(5) *Examples.* The following examples illustrate the application of paragraph (c) of this section:

Example 1. Classification of item not in accordance with U.S. tax principles. Bank *Z*, a resident of country *X*, has a branch in the United States through which it conducts its banking business. In preparing its financial statements in country *X*, *Z* treats an instrument documented as perpetual subordinated debt as a liability. Under U.S. tax principles, however, this instrument is treated as equity. Consequently, the classification of this instrument as a liability for purposes of paragraph (c)(2)(iii) of this section is not in accordance with U.S. tax principles.

Example 2. Valuation of item not substantially in accordance with U.S. tax principles. Bank *Z*, a resident of country *X*, has a branch in the United States through which it conducts its banking business. Bank *Z* is a large bank as defined in section 585(c)(2). The tax rules of country *X* allow Bank *Z* to take deductions for additions to certain reserves. Bank *Z* decreases the value of the assets on its financial statements by the amounts of the reserves. The additions to the reserves under country *X* tax rules cause the value of Bank *Z*'s assets to differ from the value of those assets determined under U.S. tax principles to a degree that materially affects the value of taxpayer's worldwide assets. Consequently, the valuation of Bank *Z*'s worldwide assets under country *X* tax principles is not substantially in accordance with U.S. tax principles. Bank *Z* must increase the value of its worldwide assets under paragraph (c)(2)(iii) of this section by the amount of its country *X* reserves.

Example 3. Valuation of item substantially in accordance with U.S. tax principles. Bank *Z*, a resident of country *X*, has a branch in the United States through which it conducts its banking business. In determining the value of its worldwide assets, Bank *Z* computes the adjusted basis of certain non-U.S. assets according to the depreciation methodology provided under country *X* tax laws, which is different than the depreciation methodology provided under U.S. tax law. If the depreciation methodology provided under country *X* tax laws does not differ from U.S. tax principles to a degree that materially affects the value of Bank *Z*'s worldwide assets or Bank *Z*'s actual ratio as computed under paragraph (c)(2) of this section, then the valuation of Bank *Z*'s worldwide assets under paragraph (c)(2)(iv) of this section is substantially in accordance with U.S. tax principles.

Example 4. [Reserved]

Example 5. Adjustments. FC is a foreign corporation engaged in the active conduct of a banking business through a branch, *B*, in the United States. *P*, an unrelated foreign corporation, deposits $100,000 in the home office of *FC*. Shortly thereafter, in a transaction arranged by the home office of *FC*, *B* lends $80,000 bearing interest at an arm's length rate to *S*, a wholly owned U.S. subsidiary of *P*. The director of field operations or the Assistant Commissioner (International) determines that one of the principal purposes for making and incurring such loans is to increase *FC*'s actual ratio. For purposes of this section, therefore, *P* is treated as having directly lent $80,000 to S. Thus, for purposes of paragraph (c) of this section (Step 2), the director of field operations or the Assistant Commissioner (International) may offset *FC*'s liability and asset arising from this transaction, resulting in a net liability of $20,000 that is not a booked liability of *B*. Because the loan to *S* from *B* was initiated and arranged by the home office of *FC*, with no material participation by *B*, the loan to *S* will not be treated as a U.S. asset.

(d) *Step 3: Determination of amount of interest expense allocable to ECI under the adjusted U.S. booked liabilities method*—(1) *General rule.* The adjustment to the amount of interest expense paid or accrued on U.S. booked liabilities is determined by comparing the amount of U.S.-connected liabilities for the taxable year, as determined under paragraph (c) of this section, with the average total amount of U.S. booked liabilities, as determined under paragraphs (d)(2) and (3) of this section. If the average total amount of U.S. booked liabilities equals or exceeds the amount of U.S.-connected liabilities, the adjustment to the interest expense on U.S. booked liabilities is determined under paragraph (d)(4) of this section. If the amount of U.S.-connected liabilities exceeds the average total amount of U.S. booked liabilities, the adjustment to the amount of interest expense paid or accrued on U.S. booked liabilities is determined under paragraph (d)(5) of this section.

(2) *U.S. booked liabilities*—(i) *In general.* A liability is a *U.S. booked liability* if it is properly reflected on the books of the U.S. trade or business, within the meaning of paragraph (d)(2)(ii) or (iii) of this section.

(ii) *Properly reflected on the books of the U.S. trade or business of a foreign corporation that is not a bank*—(A) *In general.* A liability, whether interest bearing or non-interest bearing, is properly reflected on the books of the U.S. trade or business of a foreign corporation that is not a bank as described in section 585(a)(2)(B) (without regard to the second sentence thereof) if—

(*1*) The liability is secured predominantly by a U.S. asset of the foreign corporation;

(*2*) The foreign corporation enters the liability on a set of books reasonably contemporaneously with the time at which the liability is incurred and the liability relates to an activity that produces ECI.

(*3*) The foreign corporation maintains a set of books and records relating to an activity that produces ECI and the Director of Field Operations determines that there is a direct connection or relationship between the liability and that activity. Whether there is a direct connection between the liability and an activity that produces ECI depends on the facts and circumstances of each case.

(B) *Identified liabilities not properly reflected.* A liability is not properly reflected on the books of the U.S. trade or business merely because a foreign corporation identifies the liability pursuant to §1.884–4(b)(1)(ii) and (b)(3).

(iii) *Properly reflected on the books of the U.S. trade or business of a foreign corporation that is a bank*—

(A) *In general.* A liability, whether interest bearing or non-interest bearing, is properly reflected on the books of the U.S. trade or business of a foreign corporation that is a bank as described in section 585(a)(2)(B) (without regard to the second sentence thereof) if—

(*1*) The bank enters the liability on a set of books before the close of the day on which the liability is incurred, and the liability relates to an activity that produces ECI; and

(*2*) There is a direct connection or relationship between the liability and that activity. Whether there is a direct connection between the liability and an activity that produces ECI depends on the facts and circumstances of each case. For example, a liability that is used to fund an interbranch or other asset that produces non-ECI may have a direct connection to an ECI producing activity and may constitute a U.S.-booked liability if both the interbranch or non-ECI activity is the same type of activity in which ECI assets are also reflected on the set of books (for example, lending or money market interbank placements), and such ECI activities are not de minimis. Such U.S. booked liabilities may still be subject to paragraph (d)(2)(v) of this section.

(B) *Inadvertent error.* If a bank fails to enter a liability in the books of the activity that produces ECI before the close of the day on which the liability was incurred, the liability may be treated as a U.S. booked liability only if, under the facts and circumstances, the taxpayer demonstrates a direct connection or relationship between the liability and the activity that produces ECI and the failure to enter the liability in those books was due to inadvertent error.

(iv) *Liabilities of insurance companies.* [Reserved]

(v) *Liabilities used to increase artificially interest expense on U.S. booked liabilities.* U.S. booked liabilities shall not include a liability if one of the principal purposes for incurring or holding the liability is to increase artificially the interest expense on the U.S. booked liabilities of a foreign corporation. Whether a liability is incurred or held for the purpose of artificially increasing interest expense will depend upon all the facts and circumstances of each case. Factors to be considered in determining whether one of the principal purposes for incurring or holding a liability is to increase artificially the interest expense on U.S. booked liabilities of a foreign corporation include whether the interest expense on the liability is excessive when compared to other liabilities of the foreign corporation denominated in the same currency and whether the currency denomination of the liabilities of the U.S. branch substantially matches the currency denomination of the U.S. branch's assets. A purpose may be a principal purpose even though it is outweighed by other purposes (taken together or separately).

(vi) *Hedging transactions.* [Reserved]

(vii) *Amount of U.S. booked liabilities of a partner.* A partner's share of liabilities of a partnership is considered a booked liability of the partner provided that it is properly reflected on the books (within the meaning of paragraph (d)(2)(ii) of this section) of the U.S. trade or business of the partnership.

(viii) *Interbranch transactions.* A transaction of any type between separate offices or branches of the same taxpayer does not result in the creation of a liability.

(3) *Average total amount of U.S. booked liabilities.* The *average total amount* of U.S. booked liabilities for the taxable year is the average of the sums of the amounts (determined under paragraph (d)(2) of this section) of U.S. booked liabilities. The amount of U.S. booked liabilities shall be computed at the most frequent, regular intervals for which data are reasonably available. In no event shall the amount of U.S. booked liabilities be computed less frequently than monthly by a large bank (as defined in section 585(c)(2)) and semi-annually by any other taxpayer.

(4) *Interest expense where U.S. booked liabilities equal or exceed U.S. liabilities*—(i) *In general.* If the average total amount of U.S. booked liabilities (as determined in paragraphs (d)(2) and (3) of this section) exceeds the amount of U.S.-connected liabilities (as determined under paragraph (c) of this section (Step 2)), the interest expense allocable to ECI is the product of the total amount of interest paid or accrued within the taxable year by the U.S. trade or business on U.S. booked liabilities and the scaling ratio set out in paragraph (d)(4)(ii) of this section. For purposes of this section, the reduction resulting from the application of the scaling ratio is applied pro-rata to all interest expense paid or accrued by the foreign corporation. A similar reduction in income, expense, gain, or loss from a hedging transaction (as described in paragraph (d)(2)(vi) of this section) must also be determined by multiplying such income, expense, gain, or loss by the scaling ratio. If the average total amount of U.S. booked liabilities (as determined in paragraph (d)(3) of this section) equals the amount of U.S.-connected liabilities (as determined under *Step 2*), the interest expense allocable to ECI is the total amount of interest paid or accrued within the taxable year by the U.S. trade or business on U.S. booked liabilities.

(ii) *Scaling ratio.* For purposes of this section, the scaling ratio is a fraction the numerator of which is the amount of U.S.-connected liabilities and the denominator of which is the average total amount of U.S. booked liabilities.

(iii) *Special rules for insurance companies.* [Reserved]

(5) *U.S.-connected interest rate where U.S. booked liabilities are less than U.S.-connected liabilities*—(i) *In general.* If the amount of U.S.-connected liabilities (as determined under paragraph (c) of this section (Step 2)) exceeds the average total amount of U.S. booked liabilities, the interest expense allocable to ECI is the total amount of interest paid or accrued within the taxable year by the U.S. trade or business on U.S. booked liabilities, plus the excess of

the amount of U.S.-connected liabilities over the average total amount of U.S. booked liabilities multiplied by the interest rate determined under paragraph (d)(5)(ii) of this section.

(ii) *Interest rate on excess U.S.-connected liabilities*—(A) *General rule.* The applicable interest rate on excess U.S.-connected liabilities is determined by dividing the total interest expense paid or accrued for the taxable year on U.S.-dollar liabilities that are not U.S.-booked liabilities (as defined in paragraph (d)(2) of this section) and that are shown on the books of the offices or branches of the foreign corporation outside the United States by the average U.S.-dollar denominated liabilities (whether interest-bearing or not) that are not U.S.-booked liabilities and that are shown on the books of the offices or branches of the foreign corporation outside the United States for the taxable year.

(B) *Annual published rate election.* For each taxable year beginning with the first year end for which the original tax return due date (including extensions) is after August 17, 2006, in which a taxpayer is a bank within the meaning of section 585(a)(2)(B) (without regard to the second sentence thereof or whether any such activities are effectively connected with a trade or business within the United States), such taxpayer may elect to compute its excess interest by reference to a published average 30-day London Interbank Offering Rate (LIBOR) for the year. The election may be made for any eligible year by indicating the rate used on Schedule I (Form 1120–F) attached to the timely filed return. Once selected, the rate may not be changed by the taxpayer. If a taxpayer that is eligible to make the 30-day LIBOR election either does not file a timely return or files a calculation that allocates interest expense under the scaling ratio in paragraph (d)(4) of this section and it is determined by the Director of Field Operations that the taxpayer's U.S.-connected liabilities exceed its U.S.-booked liabilities, then the Director of Field Operations, and not the taxpayer, may choose whether to determine the taxpayer's excess interest rate under paragraph (d)(5)(ii)(A) or (B) of this section and may select the published 30-day LIBOR rate.

(6) *Examples.* The following examples illustrate the rules of this section:

Example 1. Computation of interest expense; actual ratio. (i) *Facts.* (A) *FC* is a foreign corporation that is not a bank and that actively conducts a real estate business through a branch, *B,* in the United States. For the taxable year, *FC*'s balance sheet and income statement is as follows (assume amounts are in U.S. dollars and computed in accordance with paragraphs (b)(2) and (b)(3) of this section):

	Value	
Asset 1	$2,000	
Asset 2	2,500	
Asset 3	5,500	
	Amount	Interest Expense
Liability 1	$800	56
Liability 2	3,200	256
Capital	6,000	0

(B) Asset 1 is the stock of *FC*'s wholly-owned domestic subsidiary that is also actively engaged in the real estate business. Asset 2 is a building in the United States producing rental income that is entirely ECI to *FC*. Asset 3 is a building in the home country of *FC* that produces rental income. Liabilities 1 and 2 are loans that bear interest at the rates of 7% and 8%, respectively. Liability 1 is a booked liability of B, and Liability 2 is booked in *FC*'s home country. Assume that *FC* has not elected to use the fixed ratio in Step 2.

(ii) *Step 1.* Under paragraph (b)(1) of this section, Assets 1 and 3 are not U.S. assets, while Asset 2 qualifies as a U.S. asset. Thus, under paragraph (b)(3) of this section, the total value of U.S. assets for the taxable year is $2,500, the value of Asset 2.

(iii) *Step 2.* Under paragraph (c)(1) of this section, the amount of *FC*'s U.S.-connected liabilities for the taxable year is determined by multiplying $2,500 (the value of U.S. assets determined under Step 1) by the actual ratio for the taxable year. The actual ratio is the average amount of *FC*'s worldwide liabilities divided by the average value of *FC*'s worldwide assets. The amount of Liability 1 is $800, and the amount of Liability 2 is $3,200. Thus, the numerator of the actual ratio is $4,000. The average value of worldwide assets is $10,000 (Asset 1 + Asset 2 + Asset 3). The actual ratio, therefore, is 40% ($4,000/$10,000), and the amount of U.S.-connected liabilities for the taxable year is $1,000 ($2,500 U.S. assets × 40%).

(iv) *Step 3.* Because the amount of *FC*'s U.S.-connected liabilities ($1,000) exceeds the average total amount of U.S. booked liabilities of *B* ($800), *FC* determines its interest expense in accordance with paragraph (d)(5) of this section by adding the interest paid or accrued on U.S. booked liabilities, and the interest expense associated with the excess of its U.S.-connected liabilities over its average total amount of U.S. booked liabilities. Under paragraph (d)(5)(ii) of this section, *FC* determines the interest rate attributable to its excess U.S.-connected liabilities by dividing the interest expense paid or accrued by the average amount of U.S.-dollar denominated liabilities, which produces an interest rate of 8% ($256/$3200). Therefore, *FC*'s allocable interest expense is $72 ($56 of interest expense from U.S. booked liabilities plus $16 ($200 × 8%) of interest expense attributable to its excess U.S.-connected liabilities).

Example 2. Computation of interest expense; fixed ratio. (i) The facts are the same as in *Example 1,* except that *FC* makes a fixed ratio election under paragraph (c)(4) of this section. The conclusions under Step 1 are the same as in *Example 1.*

(ii) *Step 2.* Under paragraph (c)(1) of this section, the amount of U.S.-connected liabilities for the taxable year is determined by multiplying $2,500 (the value of U.S. assets determined under Step 1) by the fixed ratio for the taxable year, which, under paragraph (c)(4) of this section is 50 percent. Thus, the amount of U.S.-connected liabilities for the taxable year is $1,250 ($2,500 U.S. assets × 50%).

(iii) *Step 3.* As in *Example 1,* the amount of *FC*'s U.S.-connected liabilities exceed the average total amount of U.S. booked liabilities of *B,* requiring *FC* to determine its interest expense under paragraph (d)(5) of this section. In this case, however, *FC* has excess U.S.-connected liabilities of $450 ($1,250 of U.S.-connected liabilities—$800 U.S. booked liabilities). *FC* therefore has allocable interest expense of $92 ($56 of interest expense from U.S. booked liabilities plus $36 ($450 × 8%) of interest expense attributable to its excess U.S.-connected liabilities).

Example 3. Scaling ratio. (i) *Facts.* Bank *Z,* a resident of country *X,* has a branch in the United States through which it conducts its banking business. For the taxable year, *Z* has U.S.-connected liabilities, determined under paragraph (c) of this section, equal to $300. *Z,* however, has U.S. booked liabilities of $300 and *U*500. Therefore, assuming an exchange rate of the *U* to the U.S. dollar of 5:1, *Z* has U.S. booked liabilities of $400 ($300 + (*U*500 ÷ 5)).

(ii) *U.S.-connected liabilities.* Because *Z*'s U.S. booked liabilities of $400 exceed its U.S.-connected liabilities by $100, all of *Z*'s interest expense allocable to its U.S. trade or business must be scaled back pro-rata. To determine the scaling ratio, *Z* divides its U.S.-connected liabilities by its U.S. booked liabilities, as required by paragraph (d)(4) of this section. *Z*'s interest expense is scaled back pro rata by the resulting ratio of ¾ ($300 ÷ $400). *Z*'s income, expense, gain or loss from hedging transactions described in paragraph (d)(2)(vi) of this section must be similarly reduced.

Example 4. [Reserved]

Example 5. U.S. booked liabilities—direct relationship. (i) *Facts.* Bank A, a resident of Country X maintains a banking office in the U.S. that records transactions on three sets of books for State A, an International Banking Facility (IBF) for its bank regulatory approved international transactions, and a shell branch licensed operation in Country C. Bank A records substantial ECI assets from its bank lending and placement activities and a mix of interbranch and non-ECI producing assets from the same or similar activities on the books of State A branch and on its IBF. Bank A's Country C branch borrows substantially from third parties, as well as from its home office, and lends all of its funding to its State A branch and IBF to fund the mix of ECI, interbranch and non-ECI activities on those two books. The consolidated books of State A branch and IBF indicate that a substantial amount of the total book assets constitute U.S. assets under paragraph (b) of this section. Some of the third-party borrowings on the books of the State A branch are used to lend directly to Bank A's home office in Country X. These borrowings reflect the average borrowing rate of the State A branch, IBF and Country C branches as a whole. All third-party borrowings reflected on the books of State A branch, the IBF and Country C branch were recorded on such books before the close of business on the day the liabilities were acquired by Bank A.

(ii) *U.S. booked liabilities.* The facts demonstrate that the separate State A branch, IBF and Country C branch books taken together, constitute a set of books within the meaning of paragraph (d)(2)(iii)(A)(*1*) of this section. Such set of books as a whole has a direct relationship to an ECI activity under paragraph (d)(2)(iii)(A)(*2*) of this section even though the Country C branch books standing alone would not. The third-party liabilities recorded on the books of Country C constitute U.S. booked liabilities because they were timely recorded and the overall set of books on which they were reflected has a direct relationship to a bank lending and interbank placement ECI producing activity. The third-party liabilities that were recorded on the books of State A branch that were used to lend funds to Bank A's home office also constitute U.S. booked liabilities because the interbranch activity the funds were used for is a lending activity of a type that also gives rise to a substantial amount of ECI that is properly reflected on the same set of books as the interbranch loans. Accordingly, the liabilities are not traced to their specific interbranch use but to the overall activity of bank lending and interbank placements which gives rise to substantial ECI. The facts show that the liabilities were not acquired to increase artificially the interest expense of Bank A's U.S. booked liabilities as a whole under paragraph (d)(2)(v) of this section. The third-party liabilities also constitute U.S. booked liabilities for purposes of determining Bank A's branch interest under §1.884–4(b)(1)(i)(A) regardless of whether Bank A uses the Adjusted U.S. booked liability method, or the Separate Currency Pool method to allocate its interest expense under paragraph 5(e) of this section.

(e) *Separate currency pools method*—(1) *General rule.* If a foreign corporation elects to use the method in this paragraph, its total interest expense allocable to ECI is the sum of the separate interest deductions for each of the currencies in which the foreign corporation has U.S. assets. The separate interest deductions are determined under the following three-step process.

(i) *Determine the value of U.S. assets in each currency pool.* First, the foreign corporation must determine the amount of its U.S. assets, using the methodology in paragraph (b) of this section, in each currency pool. The foreign corporation may convert into U.S. dollars any currency pool in which the foreign corporation holds less than 3% of its U.S. assets. A transaction (or transactions) that hedges a U.S. asset shall be taken into account for purposes of determining the currency denomination and the value of the U.S. asset.

(ii) *Determine the U.S.-connected liabilities in each currency pool.* Second, the foreign corporation must determine the amount of its U.S.-connected liabilities in each currency pool by multiplying the amount of U.S. assets (as determined under paragraph (b)(3) of this section) in the currency pool by the foreign corporation's actual ratio (as determined under paragraph (c)(2) of this section) for the taxable year or, if the taxpayer has made an election in accordance with paragraph (c)(4) of this section, by the fixed ratio.

(iii) *Determine the interest expense attributable to each currency pool.* Third, the foreign corporation must determine the interest expense attributable to each currency pool by multiplying the U.S.-connected liabilities in each currency pool by the prescribed interest rate as defined in paragraph (e)(2) of this section.

(2) *Prescribed interest rate.* For each currency pool, the prescribed interest rate is determined by dividing the total interest expense that is paid or accrued for the taxable year with respect to the foreign corporation's worldwide liabilities denominated in that currency, by the foreign corporation's average worldwide liabilities (whether interest bearing or not) denominated in that currency. The interest expense and liabilities are to be stated in that currency.

(3) *Hedging transactions.* [Reserved]

(4) *Election not available if excessive hyperinflationary assets.* The election to use the separate currency pools method of this paragraph (e) is not available if the value of the foreign corporation's U.S. assets denominated in a hyperinflationary currency, as defined in §1.985–1, exceeds ten percent of the value of the foreign corporation's total U.S. assets. If a foreign corporation made a valid election to use the separate currency pools method in a prior year but no longer qualifies to use such method pursuant to this paragraph (e)(4), the taxpayer must use the method provided by paragraphs (b) through (d) of this section.

(5) *Examples.* The separate currency pools method of this paragraph (e) is illustrated by the following examples:

Example 1. Separate currency pools method—(i) *Facts.* (A) Bank *Z*, a resident of country *X*, has a branch in the United States through which it conducts its banking business. For its 1997 taxable year, *Z* has U.S. assets, as defined in paragraph (b) of this section, that are denominated in U.S. dollars and in *U*, the country *X* currency. Accordingly, *Z*'s U.S. assets are as follows:

	Average value
U.S. Dollar Assets	$20,000
U Assets	*U* 5,000

(B) *Z*'s worldwide liabilities are also denominated in U.S. Dollars and in *U*. The average interest rates on *Z*'s worldwide liabilities, including those in the United States, are 6% on its U.S. dollar liabilities, and 12% on its liabilities denominated in *U*. Assume that *Z* has properly elected to use its actual ratio of 95% to determine its U.S.-connected liabilities in Step 2, and has also properly elected to use the separate currency pools method provided in paragraph (e) of this section.

(ii) *Determination of interest expense.* *Z* determines the interest expense attributable to its U.S.-connected liabilities according to the steps described below.

(A) First, *Z* separates its U.S. assets into two currency pools, one denominated in U.S. dollars ($20,000) and the other denominated in *U* (*U*5,000).

(B) Second, *Z* multiplies each pool of assets by the applicable ratio of worldwide liabilities to assets, which in this case is 95%. Thus, Z has U.S.-connected liabilities of $19,000 ($20,000 × 95%), and *U*4750 (*U*5000 × 95%).

(C) Third, *Z* calculates its interest expense by multiplying each pool of its U.S.-connected liabilities by the relevant interest rates. Accordingly, *Z*'s allocable interest expense for the year is $1140 ($19,000 × 6%), the sum of the expense associated with its U.S. dollar liabilities, plus *U*570 (*U*4750 × 12%), the interest expense associated with its liabilities denominated in *U*. *Z* must translate its interest expense denominated in *U* in accordance with the rules provided in section 988, and then must determine whether it is subject to any other provision of the Code that would disallow or defer any portion of its interest expense so determined.

Example 2. [Reserved]

(f)(1) *Effective/applicability date* (1) This section is applicable for taxable years ending on or after August 15, 2009. A taxpayer, however, may choose to apply §1.882–5T, rather than applying the final regulations, for any taxable year beginning on or after August 16, 2008 but before August 15, 2009.

(2) *Special rules for financial products.* [Reserved]

[T.D. 8658, 61 FR 9329, Mar. 8, 1996; 61 FR 15891, Apr. 10, 1996, as amended by T.D. 9281, 71 FR 47448, Aug. 17, 2006; 71 FR 56868, Sept. 28, 2006; T.D. 9465, 74 FR 49320, Sept. 28, 2009; 74 FR 57252, Nov. 5, 2009]

§ 1.883–0 Outline of major topics.

This section lists the major paragraphs contained in §§1.883–1 through 1.883–5.

§1.883–1 Exclusion of income from the international operation of ships or aircraft.

(B) Special rule for claiming simultaneous benefits under section 883 and an income tax convention.
(iii) Participation in certain joint ventures.
(iv) Independent interpretation of income tax conventions.
(4) Exemptions not qualifying as equivalent exemptions.
(i) General rule.
(ii) Reduced tax rate or time limited exemption.
(iii) Inbound or outbound freight tax.
(iv) Exemptions for limited types of cargo.
(v) Territorial tax systems.
(vi) Countries that tax on a residence basis.
(vii) Exemptions within categories of income.
(i) Treatment of possessions.
(j) Expenses related to qualified income.

§ 1.883–2 Treatment of publicly-traded corporations.

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(b) Established securities market.
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(2) Exchanges with multiple tiers.
(3) Computation of dollar value of stock traded.
(4) Over-the-counter market.
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(d) Regularly traded.
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(A) Related persons.
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(e) Substantiation that a foreign corporation is publicly traded.
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§ 1.883–3 Treatment of controlled foreign corporations.

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(b) Qualified U.S. person ownership test.
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(2) Qualified U.S. person.
(3) Treatment of bearer shares.
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(4) Three-year period of validity.
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§ 1.883–4 Qualified shareholder stock ownership test.

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(b) Qualified shareholder.
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(i) General rule.
(ii) Tax home.
(3) Certain income tax convention restrictions applied to shareholders.
(4) Not-for-profit organizations.
(5) Pension funds.
(i) Pension fund defined.
(ii) Government pension funds.
(iii) Nongovernment pension funds.
(iv) Beneficiary of a pension fund.
(c) Rules for determining constructive ownership.
(1) General rules for attribution.
(2) Partnerships.
(i) General rule.
(ii) Partners resident in the same country.
(iii) Examples.
(3) Trusts and estates.
(i) Beneficiaries.
(ii) Grantor trusts.
(4) Corporations that issue stock.
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(6) Mutual insurance companies and similar entities.
(7) Computation of beneficial interests in nongovernment pension funds.
(d) Substantiation of stock ownership.
(1) General rule.
(2) Application of general rule.
(i) Ownership statements.
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(3) Special rules.
(i) Substantiating residence of certain shareholders.
(ii) Special rule for registered shareholders owning less than one percent of widely-held corporations.
(iii) Special rule for beneficiaries of pension funds.
(A) Government pension fund.
(B) Nongovernment pension fund.
(iv) Special rule for stock owned by publicly-traded corporations.
(v) Special rule for not-for-profit organizations.
(vi) Special rule for a foreign airline covered by an air services agreement.
(vii) Special rule for taxable nonstock corporations.

[T.D. 9087, 68 FR 51399, Aug. 26, 2003, as amended by T.D. 9332, 72 FR 34604, June 25, 2007; T.D. 9502, 75 FR 56861, Sept. 17, 2010]

§ 1.883–1 Exclusion of income from the international operation of ships or aircraft.

(a) *General rule.* Qualified income derived by a qualified foreign corporation from its international operation of ships or aircraft is excluded from gross income and exempt from United States Federal income tax. Paragraph (b) of this section defines the term *qualified income*. Paragraph (c) of this section defines the term *qualified foreign corporation*. Paragraph (f) of this section defines the term *international operation of ships or aircraft*.

(b) *Qualified income.* Qualified income is income derived from the international operation of ships or aircraft that—

(1) Is properly includible in any of the income categories described in paragraph (h)(2) of this section; and

(2) Is the subject of an equivalent exemption, as defined in paragraph (h) of this section, granted by the qualified foreign country, as defined in paragraph (d) of this section, in which the foreign corporation seeking qualified foreign corporation status is organized.

(c) *Qualified foreign corporation*—(1) *General rule.* A qualified foreign corporation is a corporation that is organized in a qualified foreign country and considered engaged in the international operation of ships or aircraft. The term *corporation* is defined in section 7701(a)(3) and the regulations thereunder. Paragraph (d) of this section defines the term *qualified foreign country*. Paragraph (e) of this section defines the term *operation of ships or aircraft*, and paragraph (f) of this section defines the term *international operation of ships or aircraft*. To be a qualified foreign corporation, the corporation must satisfy the stock ownership test of paragraph (c)(2) of this section and satisfy the substantiation and reporting requirements described in paragraph (c)(3) of this section. A corporation may be a qualified foreign corporation with respect to one category of qualified income but not with respect to another such category. See paragraph (h)(2) of this section for a discussion of the categories of qualified income.

(2) *Stock ownership test.* To be a qualified foreign corporation, a foreign corporation must satisfy the publicly-traded test of § 1.883–2(a), the CFC stock ownership test of § 1.883–3(a), or the qualified shareholder stock ownership test of § 1.883–4(a).

(3) *Substantiation and reporting requirements*—(i) *General rule.* To be a qualified foreign corporation, a foreign corporation must include the following information in its Form 1120-F, ''U.S. Income Tax Return of a Foreign Corporation,'' in the manner prescribed by such form and its accompanying instructions—

(A) The corporation's name and address (including mailing code);

(B) The corporation's U.S. taxpayer identification number;

(C) The foreign country in which the corporation is organized;

(D) The applicable authority for an equivalent exemption, for example, the citation of a statute in the country where the corporation is organized, a diplomatic note between the United States and such country, or an income tax convention between the United States and such country in the case of a corporation described in paragraphs (h)(3)(i), (ii) and (iii) of this section;

(E) The category or categories of qualified income for which an exemption is being claimed;

(F) A reasonable estimate of the gross amount of income in each category of qualified income for which the exemption is claimed, to the extent such amounts are readily determinable;

(G) A statement as to whether any shares of the foreign corporation or of any intermediary corporation that are relied on to satisfy any stock ownership test described in paragraph (c)(2) of this section are issued in bearer form and whether the bearer shares are maintained in a dematerialized book-entry system in which the bearer shares are represented only by book entries and no physical certificates are issued or transferred, or in an immobilized book-entry system in which evidence of ownership is maintained on the books and records of the corporate issuer or by a broker or financial institution;

(H) Any other information required under §1.883–2(f), §1.883–3(d), or §1.883–4(e), as applicable; and

(I) Any other relevant information specified in Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation,'' and its accompanying instructions.

(ii) *Further documentation*—(A) *General rule*. Except as provided in paragraph (c)(3)(ii)(B) of this section, if the Commissioner requests in writing that the foreign corporation provide documentation or substantiate any representations made under paragraph (c)(3)(i) of this section, or under §1.883–2(f), §1.883–3(d), or §1.883–4(e), as applicable, the foreign corporation must provide the requested documentation or substantiation within 60 days of receiving the written request. If the foreign corporation does not provide the requested documentation or substantiation within the 60-day period, but demonstrates that the failure was due to reasonable cause and not willful neglect, the Commissioner may grant the foreign corporation a 30-day extension to provide the requested documentation or substantiation. Whether a failure to provide the documentation or substantiation in a timely manner was due to reasonable cause and not willful neglect shall be determined by the Commissioner based on all the facts and circumstances.

(B) *Names and permanent addresses of certain shareholders*. If the Commissioner requests the names and permanent addresses of individual qualified shareholders of a foreign corporation, as represented on each individual's ownership statement, to substantiate the requirements of the exception to the closely-held test in the publicly-traded test in §1.883–2(e), the qualified shareholder stock ownership test in §1.883–4(a), or the qualified U.S. person ownership test in §1.883–3(b), the foreign corporation must provide the requested information within 30 days of receiving the written request. If the foreign corporation does not provide the requested information within the 30-day period, but demonstrates that the failure was due to reasonable cause and not willful neglect, the Commissioner may grant the foreign corporation a 30-day extension to provide the requested information. Whether a failure to provide the requested information was due to reasonable cause and not willful neglect shall be determined by the Commissioner based on all the facts and circumstances.

(d) *Qualified foreign country*. A qualified foreign country is a foreign country that grants to corporations organized in the United States an equivalent exemption, as described in paragraph (h) of this section, for the category of qualified income, as described in paragraph (h)(2) of this section, derived by the foreign corporation seeking qualified foreign corporation status. A foreign country may be a qualified foreign country with respect to one category of qualified income but not with respect to another such category.

(e) *Operation of ships or aircraft*—(1) *General rule*. Except as provided in paragraph (e)(2) of this section, a foreign corporation is considered engaged in the operation of ships or aircraft only during the time it is an owner or lessee of one or more entire ships or aircraft and uses such ships or aircraft in one or more of the following activities—

(i) Carriage of passengers or cargo for hire;

(ii) In the case of a ship, the leasing out of the ship under a time or voyage charter (full charter), space or slot charter, or bareboat charter, as those terms are defined in paragraph (e)(5) of this section, provided the ship is used to carry passengers or cargo for hire; and

(iii) In the case of aircraft, the leasing out of the aircraft under a wet lease (full charter), space, slot, or block-seat charter, or dry lease, as those terms are defined in paragraph (e)(5) of this section, provided the aircraft is used to carry passengers or cargo for hire.

(2) *Pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement or other joint venture.* A foreign corporation is considered engaged in the operation of ships or aircraft within the meaning of paragraph (e)(1) of this section with respect to its participation in a pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement or other joint venture if it directly, or indirectly through one or more fiscally transparent entities under the income tax laws of the United States, as defined in paragraph (e)(5)(v) of this section—

(i) Owns an interest in a partnership, disregarded entity, or other fiscally transparent entity under the income tax laws of the United States that itself would be considered engaged in the operation of ships or aircraft under paragraph (e)(1) of this section if it were a foreign corporation; or

(ii) Participates in a pool, strategic alliance, joint operating agreement, code-sharing arrangement, or other joint venture that is not an entity, as defined in paragraph (e)(5)(iv) of this section, involving one or more activities described in paragraphs (e)(1)(i) through (iii) of this section, but only if—

(A) In the case of a direct interest, the foreign corporation is otherwise engaged in the operation of ships or aircraft under paragraph (e)(1) of this section; or

(B) In the case of an indirect interest, either the foreign corporation is otherwise engaged, or one of the fiscally transparent entities would be considered engaged if it were a foreign corporation, in the operation of ships or aircraft under paragraph (e)(1) of this section.

(3) *Activities not considered operation of ships or aircraft.* Activities that do not constitute operation of ships or aircraft include, but are not limited to—

(i) The activities of a nonvessel operating common carrier, as defined in paragraph (e)(5)(vii) of this section;

(ii) Ship or aircraft management;

(iii) Obtaining crews for ships or aircraft operated by another party;

(iv) Acting as a ship's agent;

(v) Ship or aircraft brokering;

(vi) Freight forwarding;

(vii) The activities of travel agents and tour operators;

(viii) Rental by a container leasing company of containers and related equipment; and

(ix) The activities of a concessionaire.

(4) *Examples.* The rules of paragraphs (e)(1) through (3) of this section are illustrated by the following examples:

Example 1. Three tiers of charters—(i) *Facts.* A, B, and C are foreign corporations. A purchases a ship. A and B enter into a bareboat charter of the ship for a term of 20 years, and B, in turn, enters into a time charter of the ship with C for a term of 5 years. Under the time charter, B is responsible for the complete operation of the ship, including providing the crew and maintenance. C uses the ship during the term of the time charter to carry its customers' freight between U.S. and foreign ports. C owns no ships.

(ii) *Analysis.* Because A is the owner of the entire ship and leases out the ship under a bareboat charter to B, and because the sublessor, C, uses the ship to carry cargo for hire, A is considered engaged in the operation of a ship under paragraph (e)(1) of this section during the term of the time charter. B leases in the entire ship from A and leases out the ship under a time charter to C, who uses the ship to carry cargo for hire. Therefore, B is considered engaged in the operation of a ship under paragraph (e)(1) of this section during the term of the time charter. C time charters the entire ship from B and uses the ship to carry its customers' freight during the term of the charter. Therefore, C is also engaged in the operation of a ship under paragraph (e)(1) of this section during the term of the time charter.

Example 2. Partnership with contributed shipping assets—(i) *Facts.* X, Y, and Z, each a foreign corporation, enter into a partnership, P. P is a fiscally transparent entity under the income tax laws of the United States, as defined in paragraph (e)(5)(v) of this section. Under the terms of the partnership agreement, each partner contributes all of the ships in its fleet to P in exchange for interests in the partnership and shares in the P profits from the international carriage of cargo. The partners share in the overall management of P, but each partner, acting in its capacity as partner, continues to crew and manage all ships previously in its fleet.

(ii) *Analysis.* P owns the ships contributed by the partners and uses these ships to carry cargo for hire. Therefore, if P were a foreign corporation, it would be considered engaged in the operation of ships within the meaning of paragraph (e)(1) of this section. Accordingly, because P is a fiscally transparent entity under the income tax laws of the United States, as defined in paragraph (e)(5)(v) of this section, X, Y, and Z are each considered engaged in the operation of ships through P, within the meaning of paragraph (e)(2)(i) of this section, with respect to their distributive share of income from P's international carriage of cargo.

Example 3. Joint venture with chartered in ships—(i) *Facts.* Foreign corporation A owns a number of foreign subsidiaries involved in various aspects of the shipping business, including S1, S2, S3, and S4. S4 is a foreign corporation that provides cruises but does not own any ships. S1, S2, and S3 are foreign corporations that own cruise ships. S1, S2, S3, and S4 form joint venture JV, in which they are all interest holders, to conduct cruises. JV is a fiscally transparent entity under the income tax laws of the United States, as defined in paragraph (e)(5)(v) of this section. Under the terms of the joint venture, S1, S2, and S3 each enter into time charter agreements with JV, pursuant to which S1, S2, and S3 retain control of the navigation and management of the individual ships, and JV will use the ships to carry passengers for hire. The overall management of the cruise line will be provided by S4.

(ii) *Analysis.* S1, S2, and S3 each owns ships and time charters those ships to JV, which uses the ships to carry passengers for hire. Accordingly, S1, S2, and S3 are each considered engaged in the operation of ships under paragraph (e)(1) of this section. JV leases in entire ships by means of the time charters, and JV uses those ships to carry passengers on cruises. Thus, JV would be engaged in the operation of ships within the meaning of paragraph (e)(1) of this section if it were a foreign corporation. Therefore, although S4 does not directly own or lease in a ship, S4 also is engaged in the operation of ships, within the meaning of paragraph (e)(2)(i) of this section, with respect to its participation in JV.

Example 4. Tiered partnerships—(i) *Facts.* Foreign corporations A, B, and C enter into a partnership, P1. P1 is one of several shareholders of Poolco, a foreign limited liability company that makes an election pursuant to §301.7701–3 of this chapter to be treated as a partnership for U.S. tax purposes. P1 acquires several ships and time charters them out to Poolco. Poolco slot or voyage charters such ships out to third parties for use in the carriage of cargo for hire. P1 and Poolco are fiscally transparent entities under the income tax laws of the United States, as defined in paragraph (e)(5)(v) of this section.

(ii) *Analysis.* A, B, and C are considered engaged in the operation of ships under paragraph (e)(2)(i) of this section with respect to their direct interest in P1 and with respect to their indirect interest in Poolco because both P1 and Poolco are fiscally transparent entities under the income tax laws of the United States and would be considered engaged in the operation of ships under paragraph (e)(1) of this section if they were foreign corporations. The result would be the same if Poolco were a single-member disregarded entity owned solely by P1.

(5) *Definitions*—(i) *Bareboat charter.* A bareboat charter is a contract for the use of a ship or aircraft whereby the lessee is in complete possession, control, and command of the ship or aircraft. For example, in a bareboat charter, the lessee is responsible for the navigation and management of the ship or aircraft, the crew, supplies, repairs and maintenance, fees, insurance, charges, commissions and other expenses connected with the use of the ship or aircraft. The lessor of the ship bears none of the expense or responsibility of operation of the ship or aircraft.

(ii) *Code-sharing arrangement.* A code-sharing arrangement is an arrangement in which one air carrier puts its identification code on the flight of another carrier. This arrangement allows the first carrier to hold itself out as providing service in markets where it does not otherwise operate or where it operates infrequently. Code-sharing arrangements can range from a very limited agreement between two carriers involving only one market to agreements involving multiple markets and alliances between or among international carriers which also include joint marketing, baggage handling, one-stop check-in service, sharing of frequent flyer awards, and other services. For rules involving the sale of code-sharing tickets, see paragraph (g)(1)(vi) of this section.

(iii) *Dry lease*. A dry lease is the bareboat charter of an aircraft.

(iv) *Entity*. For purposes of this paragraph (e), an entity is any person that is treated by the United States as other than an individual for U.S. Federal income tax purposes. The term includes disregarded entities.

(v) *Fiscally transparent entity under the income tax laws of the United States*. For purposes of this paragraph (e), an entity is fiscally transparent under the income tax laws of the United States if the entity would be considered fiscally transparent under the income tax laws of the United States under the principles of § 1.894–1(d)(3).

(vi) *Full charter*. Full charter (or full rental) means a time charter or a voyage charter of a ship or a wet lease of an aircraft but during which the full crew and management are provided by the lessor.

(vii) *Nonvessel operating common carrier*. A nonvessel operating common carrier is an entity that does not exercise control over any part of a vessel, but holds itself out to the public as providing transportation for hire, issues bills of lading, assumes responsibility or is liable by law as a common carrier for safe transportation of shipments, and arranges in its own name with other common carriers, including those engaged in the operation of ships, for the performance of such transportation.

(viii) *Space or slot charter*. A space or slot charter is a contract for use of a certain amount of space (but less than all of the space) on a ship or aircraft, and may be on a time or voyage basis. When used in connection with passenger aircraft this sort of charter may be referred to as the sale of block seats.

(ix) *Time charter*. A time charter is a contract for the use of a ship or aircraft for a specific period of time, during which the lessor of the ship or aircraft retains control of the navigation and management of the ship or aircraft (*i.e.*, the lessor continues to be responsible for the crew, supplies, repairs and maintenance, fees and insurance, charges, commissions and other expenses connected with the use of the ship or aircraft).

(x) *Voyage charter*. A voyage charter is a contract similar to a time charter except that the ship or aircraft is chartered for a specific voyage or flight rather than for a specific period of time.

(xi) *Wet lease*. A wet lease is the time or voyage charter of an aircraft.

(f) *International operation of ships or aircraft*—(1) *General rule*. The term *international operation of ships or aircraft* means the operation of ships or aircraft, as defined in paragraph (e) of this section, with respect to the carriage of passengers or cargo on voyages or flights that begin or end in the United States, as determined under paragraph (f)(2) of this section. The term does not include the carriage of passengers or cargo on a voyage or flight that begins and ends in the United States, even if the voyage or flight contains a segment extending beyond the territorial limits of the United States, unless the passenger disembarks or the cargo is unloaded outside the United States. Operation of ships or aircraft beyond the territorial limits of the United States does not constitute in itself international operation of ships or aircraft.

(2) *Determining whether income is derived from international operation of ships or aircraft*. Whether income is derived from international operation of ships or aircraft is determined on a passenger by passenger basis (as provided in paragraph (f)(2)(i) of this section) and on an item-of-cargo by item-of-cargo basis (as provided in paragraph (f)(2)(ii) of this section). In the case of the bareboat charter of a ship or the dry lease of an aircraft, whether the charter income for a particular period is derived from international operation of ships or aircraft is determined by reference to how the ship or aircraft is used by the lowest-tier lessee in the chain of lessees (as provided in paragraph (f)(2)(iii) of this section).

(i) *International carriage of passengers*—(A) *General rule*. Except in the case of a round trip described in paragraph (f)(2)(i)(B) of this section, income derived from the carriage of a passenger will be income from international operation of ships or aircraft if the passenger is carried between a beginning point in the United States and an ending point outside the United States, or vice versa. Carriage of a passenger will be treated as ending at the passenger's final destination even if, en route to the passenger's final destination, a stop is made at an intermediate point for refueling, maintenance, or other business reasons, provided the passenger does not change ships or aircraft at the intermediate point. Similarly, carriage of a passenger will be treated as beginning at the passenger's point of origin even if, en route to the passenger's final destination, a stop is made at an intermediate point, provided the passenger does not change ships or aircraft at the intermediate point. Carriage of a passenger will be treated as beginning or ending at a U.S. or foreign intermediate point if the passenger changes ships or aircraft at that intermediate point. Income derived from the sale of a ticket for international carriage of a passenger will be treated as income derived from international operation of ships or aircraft even if the passenger does not begin or complete an international journey because of unanticipated circumstances.

(B) *Round trip travel on ships.* In the case of income from the carriage of a passenger on a ship that begins its voyage in the United States, calls on one or more foreign intermediate ports, and returns to the same or another U.S. port, such income from carriage of a passenger on the entire voyage will be treated as income derived from international operation of ships or aircraft under paragraph (f)(2)(i)(A) of this section. This result obtains even if such carriage includes one or more intermediate stops at a U.S. port or ports and even if the passenger does not disembark at the foreign intermediate point.

(ii) *International carriage of cargo.* Income from the carriage of cargo will be income derived from international operation of ships or aircraft if the cargo is carried between a beginning point in the United States and an ending point outside the United States, or vice versa. Carriage of cargo will be treated as ending at the final destination of the cargo even if, en route to that final destination, a stop is made at a U.S. intermediate point, provided the cargo is transported to its ultimate destination on the same ship or aircraft. If the cargo is transferred to another ship or aircraft, the carriage of the cargo may nevertheless be treated as ending at its final destination, if the same taxpayer transports the cargo to and from the U.S. intermediate point and the cargo does not pass through customs at the U.S. intermediate point. Similarly, carriage of cargo will be treated as beginning at the cargo's point of origin, even if en route to its final destination a stop is made at a U.S. intermediate point, provided the cargo is transported to its ultimate destination on the same ship or aircraft. If the cargo is transferred to another ship or aircraft at the U.S. intermediate point, the carriage of the cargo may nevertheless be treated as beginning at the point of origin, if the same taxpayer transports the cargo to and from the U.S. intermediate point and the cargo does not pass through customs at the U.S. intermediate point. Repackaging, recontainerization, or any other activity involving the unloading of the cargo at the U.S. intermediate point does not change these results, provided the same taxpayer transports the cargo to and from the U.S. intermediate point and the cargo does not pass through customs at the U.S. intermediate point. A lighter vessel that carries cargo to, or picks up cargo from, a vessel located beyond the territorial limits of the United States and correspondingly loads or unloads that cargo at a U.S. port, carries cargo between a point in the United States and a point outside the United States. However, a lighter vessel that carries cargo to, or picks up cargo from, a vessel located within the territorial limits of the United States, and correspondingly loads or unloads that cargo at a U.S. port, is not engaged in international operation of ships or aircraft. Income from the carriage of military cargo on a voyage that begins in the United States, stops at a foreign intermediate port or a military prepositioning location, and returns to the same or another U.S. port without unloading its cargo at the foreign intermediate point, will nevertheless be treated as derived from international operation of ships or aircraft.

(iii) *Bareboat charter of ships or dry lease of aircraft used in international operation of ships or aircraft.* If a qualified foreign corporation bareboat charters a ship or dry leases an aircraft to a lessee, and the lowest tier lessee in the chain of ownership uses such ship or aircraft for the international carriage of passengers or cargo for hire, as described in paragraphs (f)(2)(i) and (ii) of this section, then the amount of charter income attributable to the period the ship or aircraft is used by the lowest tier lessee is income from international operation of ships or aircraft. The foreign corporation generally must determine the amount of the charter income that is attributable to such international operation of ships or aircraft by multiplying the amount of charter income by a fraction, the numerator of which is the total number of days of uninterrupted travel on voyages or flights of such ship or aircraft between the United States and the farthest point or points where cargo or passengers are loaded en route to, or discharged en route from, the United States during the smaller of the taxable year or the particular charter period, and the denominator of which is the total number of days in the smaller of the taxable year or the particular charter period. For this purpose, the number of days during which the ship or aircraft is not generating transportation income, within the meaning of section 863(c)(2), are not included in the numerator or denominator of the fraction. However, the foreign corporation may adopt an alternative method for determining the amount of the charter income that is attributable to the international operation of ships or aircraft if it can establish that the alternative method more accurately reflects the amount of such income.

(iv) *Charter of ships or aircraft for hire.* For purposes of this section, if a foreign corporation time, voyage, or bareboat charters out a ship or aircraft, and the lowest-tier lessee uses the ship or aircraft to carry passengers or cargo on a fee basis, the ship or aircraft is considered used to carry passengers or cargo for hire, regardless of whether the ship or aircraft may be empty during a portion of the charter period due to a backhaul voyage or flight or for purposes of repositioning. If a foreign corporation time, voyage, or bareboat charters out a ship or aircraft, and the lowest-tier lessee uses the ship or aircraft for the carriage of proprietary goods, including an empty backhaul voyage or flight or repositioning related to such carriage of proprietary goods, the ship or aircraft similarly will be treated as used to carry cargo for hire.

(g) *Activities incidental to the international operation of ships or aircraft*—(1) *General rule.* Certain activities of a foreign corporation engaged in the international operation of ships or aircraft are so closely related to the international operation of ships or aircraft that they are considered incidental to such operation, and income derived by the foreign corporation from its performance of these incidental activities is deemed to be income derived from the international operation of ships or aircraft. Examples of such activities include—

(i) Temporary investment of working capital funds to be used in the international operation of ships or aircraft by the foreign corporation;

(ii) Sale of tickets by the foreign corporation engaged in the international operation of ships for the international carriage of passengers by ship on behalf of another corporation engaged in the international operation of ships;

(iii) Sale of tickets by the foreign corporation engaged in the international operation of aircraft for the international carriage of passengers by air on behalf of another corporation engaged in the international operation of aircraft;

(iv) Contracting with concessionaires for performance of services onboard during the international operation of the foreign corporation's ships or aircraft;

(v) Providing (either by subcontracting or otherwise) for the carriage of cargo preceding or following the international carriage of cargo under a through bill of lading, airway bill or similar document through a related corporation or through an unrelated person (and the rules of section 267(b) shall apply for purposes of determining whether a corporation or other person is related to the foreign corporation);

(vi) To the extent not described in paragraph (g)(1)(iii) of this section, the sale or issuance by the foreign corporation engaged in the international operation of aircraft of intraline, interline, or code-sharing tickets for the carriage of persons by air between a U.S. gateway and another U.S. city preceding or following international carriage of passengers, provided that all such flight segments are provided pursuant to the passenger's original invoice, ticket or itinerary and in the case of intraline tickets are a part of uninterrupted international air transportation (within the meaning of section 4262(c)(3));

(vii) Arranging for port city hotel accommodations within the United States for a passenger for the one night before or after the international carriage of that passenger by the foreign corporation engaged in the international operation of ships;

(viii) Bareboat charter of ships or dry lease of aircraft normally used by the foreign corporation in international operation of ships or aircraft but currently not needed, if the ship or aircraft is used by the lessee for international carriage of cargo or passengers;

(ix) Arranging by means of a space or slot charter for the carriage of cargo listed on a bill of lading or airway bill or similar document issued by the foreign corporation on the ship or aircraft of another corporation engaged in the international operation of ships or aircraft;

(x) The provision of containers and related equipment by the foreign corporation in connection with the international carriage of cargo for use by its customers, including short-term use within the United States immediately preceding or following the international carriage of cargo (for this purpose, a period of five days or less shall be presumed to be short-term); and

(xi) The provision of goods and services by engineers, ground and equipment maintenance staff, cargo handlers, catering staff, and customer services personnel, and the provision of facilities such as passenger lounges, counter space, ground handling equipment, and hangars.

(2) *Activities not considered incidental to the international operation of ships or aircraft.* Examples of activities that are not considered incidental to the international operation of ships or aircraft include—

(i) The sale of or arranging for train travel, bus transfers, single day shore excursions, or land tour packages;

(ii) Arranging for hotel accommodations within the United States other than as provided in paragraph (g)(1)(vii) of this section;

(iii) The sale of airline tickets or cruise tickets other than as provided in paragraph (g)(1)(ii), (iii), or (vi) of this section;

(iv) The sale or rental of real property;

(v) Treasury activities involving the investment of excess funds or funds awaiting repatriation, even if derived from the international operation of ships or aircraft;

(vi) The carriage of passengers or cargo on ships or aircraft on domestic legs of transportation not treated as either international operation of ships or aircraft under paragraph (f) of this section or as an activity that is incidental to such operation under paragraph (g)(1) of this section;

(vii) The carriage of cargo by bus, truck or rail by a foreign corporation between a U.S. inland point and a U.S. gateway port or airport preceding or following the international carriage of such cargo by the foreign corporation; and

(viii) The provision of containers or other related equipment by the foreign corporation within the United States other than as provided in paragraph (g)(1)(x) of this section, including warehousing.

(3) *Other services.* [Reserved]

(4) *Activities involved in a pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement or other joint venture.* Notwithstanding paragraph (g)(1) of this section, an activity is considered incidental to the

international operation of ships or aircraft by a foreign corporation, and income derived by the foreign corporation with respect to such activity is deemed to be income derived from the international operation of ships or aircraft, if the activity is performed by or pursuant to a pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement or other joint venture in which such foreign corporation participates directly, or indirectly through a fiscally transparent entity under the income tax laws of the United States, provided that—

(i) Such activity is incidental to the international operation of ships or aircraft by the pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement or other joint venture, and provided that it is described in paragraph (e)(2)(i) of this section; or

(ii) Such activity would be incidental to the international operation of ships or aircraft by the foreign corporation, or fiscally transparent entity if it performed such activity itself, and provided the foreign corporation is engaged or the fiscally transparent entity would be considered engaged if it were a foreign corporation in the operation of ships or aircraft under paragraph (e)(1) of this section.

(h) *Equivalent exemption*—(1) *General rule*. A foreign country grants an equivalent exemption when it exempts from taxation income from the international operation of ships or aircraft derived by corporations organized in the United States. Whether a foreign country provides an equivalent exemption must be determined separately with respect to each category of income, as provided in paragraph (h)(2) of this section. An equivalent exemption may be available for income derived from the international operation of ships even though income derived from the international operation of aircraft may not be exempt, and vice versa. For rules regarding foreign corporations organized in countries that provide exemptions only through an income tax convention, see paragraph (h)(3) of this section. An equivalent exemption may exist where the foreign country—

(i) Generally imposes no tax on income, including income from the international operation of ships or aircraft;

(ii) Provides an exemption from tax for income derived from the international operation of ships or aircraft, either by statute, decree, income tax convention, or otherwise; or

(iii) Exchanges diplomatic notes with the United States, or enters into an agreement with the United States, that provides for a reciprocal exemption for purposes of section 883.

(2) *Determining equivalent exemptions for each category of income*. Whether a foreign country grants an equivalent exemption must be determined separately with respect to income from the international operation of ships and income from the international operation of aircraft for each category of income listed in paragraphs (h)(2)(i) through (v), (vii), and (viii) of this section. If an exemption is unavailable in the foreign country for a particular category of income, the foreign country is not considered to grant an equivalent exemption with respect to that category of income. Income in that category is not considered to be the subject of an equivalent exemption and, thus, is not eligible for exemption from income tax in the United States, even though the foreign country may grant an equivalent exemption for other categories of income. With respect to paragraph (h)(2)(vi) of this section, a foreign country may be considered to grant an equivalent exemption for one or more types of income described in paragraph (g)(1) of this section. The following categories of income derived from the international operation of ships or aircraft may be exempt from United States income tax if an equivalent exemption is available—

(i) Income from the carriage of passengers and cargo;

(ii) Time or voyage (full) charter income of a ship or wet lease income of an aircraft;

(iii) Bareboat charter income of a ship or dry charter income of an aircraft;

(iv) Incidental bareboat charter income or incidental dry lease income;

(v) Incidental container-related income;

(vi) Income incidental to the international operation of ships or aircraft other than incidental income described in paragraphs (h)(2)(iv) and (v) of this section;

(vii) Capital gains derived by a qualified foreign corporation engaged in the international operation of ships or aircraft from the sale, exchange or other disposition of a ship, aircraft, container or related equipment or other moveable property used by that qualified foreign corporation in the international operation of ships or aircraft; and

(viii) Income from participation in a pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement, international operating agency, or other joint venture described in paragraph (e)(2) of this section.

(3) *Special rules with respect to income tax conventions*—(i) *Countries with only an income tax convention.* If a foreign country grants an exemption from tax for profits from the international operation of ships or aircraft only under an income tax convention with the United States, that exemption shall constitute an equivalent exemption with respect to a foreign corporation organized in that country only if—

(A) The foreign corporation satisfies the conditions for claiming benefits with respect to such profits under the income tax convention; and

(B) The profits that are exempt from tax pursuant to the shipping and air transport or gains article of the income tax convention and are described within a category of income included in paragraphs (h)(2)(i) through (viii) of this section.

(ii) *Countries with both an income tax convention and an equivalent exemption*—(A) *General rule.* If a foreign country grants an exemption from tax for profits from the international operation of ships or aircraft under the shipping and air transport or gains article of an income tax convention with the United States and also by some other means (for example, by diplomatic note or domestic law of the foreign country), a foreign corporation may elect annually whether to claim an exemption from tax under section 883 or the income tax convention. Except as provided in paragraph (h)(3)(ii)(B) of this section, the foreign corporation must apply the elected exemption (section 883 or the income tax convention) to all categories of income described in paragraph (h)(2) of this section. If the foreign corporation elects to claim the exemption under section 883, it must satisfy all of the requirements for claiming the exemption under section 883. If the foreign corporation elects to claim the exemption under the income tax convention, it must satisfy all of the requirements and conditions for claiming benefits under the income tax convention. *See* §1.883–4(b)(3) for rules concerning relying on shareholders resident in a foreign country that grants an equivalent exemption under an income tax convention to satisfy the stock ownership test of paragraph (c)(2) of this section.

(B) *Special rule for claiming simultaneous benefits under section 883 and an income tax convention.* If a foreign corporation that is organized in a country that grants an exemption from tax under an income tax convention and also by some other means (such as by diplomatic note or domestic law of the foreign country) with respect to a specific category of income described in paragraph (h)(2) of this section, and the foreign corporation elects to claim the exemption under the income tax convention, the foreign corporation may nonetheless simultaneously claim an exemption under section 883 with respect to a category of income exempt from tax by such other means if the foreign corporation—

(*1*) Satisfies the requirements of paragraphs (h)(3)(i)(A) and (B) of this section for each category of income;

(*2*) Satisfies one of the stock ownership tests of paragraph (c)(2) of this section; and

(*3*) Complies with the substantiation and reporting requirements in paragraph (c)(3) of this section.

(iii) *Participation in certain joint ventures.* If a foreign country grants an exemption for a category of income only through an income tax convention, a foreign corporation that is organized in that country and that derives income, directly or indirectly, through a participation in a pool, partnership, strategic alliance, joint operating agreement, code-sharing arrangement, or other joint venture described in paragraph (e)(2) of this section, may treat that exemption as an equivalent exemption even if the foreign corporation would not be eligible to claim benefits under the income tax convention for that category of income solely because the joint venture was not fiscally transparent, within the meaning of §1.894–1(d)(3)(iii)(A), with respect to that category of income under the income tax laws of the foreign corporation's country of residence.

(iv) *Independent interpretation of income tax conventions.* Nothing in this section nor §§1.883–2 through 1.883–5 affects the rights or obligations under any income tax convention between the United States and a foreign country. The definitions provided in this section and §§1.883–2 through 1.883–5 shall not give meaning to similar or identical terms used in an income tax convention, or provide guidance regarding the scope of any exemption provided by such convention, unless the income tax convention entered into force after August 26, 2003, and it, or its legislative history, explicitly refers to section 883 and guidance promulgated under that section for its meaning.

(4) *Exemptions not qualifying as equivalent exemptions*—(i) *General rule.* Certain types of exemptions provided to corporations organized in the United States by foreign countries do not satisfy the equivalent exemption requirements of this section. Paragraphs (h)(4)(ii) through (vii) of this section provide descriptions of some of the types of exemptions that do not qualify as equivalent exemptions for purposes of this section.

(ii) *Reduced tax rate or time limited exemption.* The exemption granted by the foreign country's law or income tax convention must be a complete exemption. The exemption may not constitute merely a reduction to a nonzero rate of tax levied against the income of corporations organized in the United States derived from the international operation of ships or aircraft or a temporary reduction to a zero rate of tax, such as in the case of a tax holiday.

(iii) *Inbound or outbound freight tax.* With respect to the carriage of cargo, the foreign country must provide an exemption from tax for income from transporting freight both inbound and outbound. For example, a foreign country that imposes tax only on outbound freight will not be treated as granting an equivalent exemption for income from transporting freight inbound into that country.

(iv) *Exemptions for limited types of cargo.* A foreign country must provide an exemption from tax for income from transporting all types of cargo. For example, if a foreign country were generally to impose tax on income from the international carriage of cargo but were to provide a statutory exemption for income from transporting agricultural products, the foreign country would not be considered to grant an equivalent exemption with respect to income from the international carriage of cargo, including agricultural products.

(v) *Territorial tax systems.* A foreign country with a territorial tax system will be treated as granting an equivalent exemption if it treats all income derived from the international operation of ships or aircraft derived by a U.S. corporation as entirely foreign source and therefore not subject to tax, including income derived from a voyage or flight that begins or ends in that foreign country.

(vi) *Countries that tax on a residence basis.* A foreign country that provides an equivalent exemption to corporations organized in the United States but also imposes a residence-based tax on certain corporations organized in the United States may nevertheless be considered to grant an equivalent exemption if the residence-based tax is imposed only on a corporation organized in the United States that maintains its center of management and control or other comparable attributes in that foreign country. If the residence-based tax is imposed on corporations organized in the United States and engaged in the international operation of ships or aircraft that are not managed and controlled in that foreign country, the foreign country shall not be treated as a qualified foreign country and shall not be considered to grant an equivalent exemption for purposes of this section.

(vii) *Exemptions within categories of income.* With respect to paragraphs (h)(2)(i) through (v), (vii), and (viii) of this section, a foreign country must provide an exemption from tax for all income in a category of income, as defined in paragraph (h)(2) of this section. For example, a country that exempts income from the bareboat charter of passenger aircraft but not the bareboat charter of cargo aircraft does not provide an equivalent exemption. However, an equivalent exemption may be available for income derived from the international operation of ships even though income derived from the international operation of aircraft may not be exempt, and vice versa. With respect to paragraph (h)(2)(vi) of this section, a foreign country may be considered to grant an equivalent exemption for one or more types of income described in paragraph (g)(1) of this section.

(i) *Treatment of possessions.* For purposes of this section, a possession of the United States will be treated as a foreign country. A possession of the United States will be considered to grant an equivalent exemption and will be treated as a qualified foreign country if it applies a mirror system of taxation. If a possession does not apply a mirror system of taxation, the possession may nevertheless be a qualified foreign country if, for example, it provides for an equivalent exemption through its internal law. A possession applies the mirror system of taxation if the U.S. Internal Revenue Code of 1986, as amended, applies in the possession with the name of the possession used instead of ''United States'' where appropriate.

(j) *Expenses related to qualified income.* If a qualified foreign corporation derives qualified income from the international operation of ships or aircraft as well as income that is not qualified income, and the nonqualified income is effectively connected with the conduct of a trade or business within the United States, the foreign corporation may not deduct from such nonqualified income any amount otherwise allowable as a deduction from qualified income, if that qualified income is excluded under this section. See section 265(a)(1).

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§ 1.883–2 Treatment of publicly-traded corporations.

(a) *General rule.* A foreign corporation satisfies the stock ownership test of § 1.883–1(c)(2) if it is considered a publicly-traded corporation and satisfies the substantiation and reporting requirements of paragraphs (e) and (f) of this section. To be considered a publicly-traded corporation, the stock of the foreign corporation must be primarily traded and regularly traded, as defined in paragraphs (c) and (d) of this section, respectively, on one or more established securities markets, as defined in paragraph (b) of this section, in either the United States or any qualified foreign country.

(b) *Established securities market*—(1) *General rule.* For purposes of this section, the term *established securities market* means, for any taxable year—

(i) A foreign securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority of the qualified foreign country in which the market is located, and has an annual value of shares traded on the exchange exceeding $1 billion during each of the three calendar years immediately preceding the beginning of the taxable year;

(ii) A national securities exchange that is registered under section 6 of the Securities Act of 1934 (15 U.S.C. 78f);

(iii) A United States over-the-counter market, as defined in paragraph (b)(4) of this section;

(iv) Any exchange designated under a Limitation on Benefits article in a United States income tax convention; and

(v) Any other exchange that the Secretary may designate by regulation or otherwise.

(2) *Exchanges with multiple tiers.* If an exchange in a foreign country has more than one tier or market level on which stock may be separately listed or traded, each such tier shall be treated as a separate exchange.

(3) *Computation of dollar value of stock traded.* For purposes of paragraph (b)(1)(i) of this section, the value in U.S. dollars of shares traded during a calendar year shall be determined on the basis of the dollar value of such shares traded as reported by the International Federation of Stock Exchanges located in Paris, or, if not so reported, then by converting into U.S. dollars the aggregate value in local currency of the shares traded using an exchange rate equal to the average of the spot rates on the last day of each month of the calendar year.

(4) *Over-the-counter market.* An over-the-counter market is any market reflected by the existence of an inter-dealer quotation system. An inter-dealer quotation system is any system of general circulation to brokers and dealers that regularly disseminates quotations of stocks and securities by identified brokers or dealers, other than by quotation sheets that are prepared and distributed by a broker or dealer in the regular course of business and that contain only quotations of such broker or dealer.

(5) *Discretion to determine that an exchange does not qualify as an established securities market.* The Commissioner may determine that a securities exchange that otherwise meets the requirements of paragraph (b) of this section does not qualify as an established securities market, if—

(i) The exchange does not have adequate listing, financial disclosure, or trading requirements (or does not adequately enforce such requirements); or

(ii) There is not clear and convincing evidence that the exchange ensures the active trading of listed stocks.

(c) *Primarily traded.* For purposes of this section, stock of a corporation is primarily traded in a country on one or more established securities markets, as defined in paragraph (b) of this section, if, with respect to each class of stock described in paragraph (d)(1)(i) of this section (relating to classes of stock relied on to meet the regularly traded test)—

(1) The number of shares in each such class that are traded during the taxable year on all established securities markets in that country exceeds

(2) The number of shares in each such class that are traded during that year on established securities markets in any other single country.

(d) *Regularly traded*—(1) *General rule.* For purposes of this section, stock of a corporation is regularly traded on one or more established securities markets, as defined in paragraph (b) of this section, if—

(i) One or more classes of stock of the corporation that, in the aggregate, represent more than 50 percent of the total combined voting power of all classes of stock of such corporation entitled to vote and of the total value of the stock of such corporation are listed on such market or markets during the taxable year; and

(ii) With respect to each class relied on to meet the more than 50 percent requirement of paragraph (d)(1)(i) of this section—

(A) Trades in each such class are effected, other than in *de minimis* quantities, on such market or markets on at least 60 days during the taxable year (or ⅙ of the number of days in a short taxable year); and

(B) The aggregate number of shares in each such class that are traded on such market or markets during the taxable year are at least 10 percent of the average number of shares outstanding in that class during the taxable year (or, in the case of a short taxable year, a percentage that equals at least 10 percent of the average number of shares outstanding in that class during the taxable year multiplied by the number of days in the short taxable year, divided by 365).

(2) *Classes of stock traded on a domestic established securities market treated as meeting trading requirements.* A class of stock that is traded during the taxable year on an established securities market located in the United States shall be considered to meet the trading requirements of paragraph (d)(1)(ii) of this section if the stock is regularly quoted by dealers making a market in the stock. A dealer makes a market in a stock only if the dealer regularly and actively offers to, and in fact does, purchase the stock from, and sell the stock to, customers who are not related persons (as defined in section 954(d)(3)) with respect to the dealer in

the ordinary course of a trade or business.

(3) *Closely-held classes of stock not treated as meeting trading requirements*—(i) *General rule*. Except as provided in paragraph (d)(3)(ii) of this section, a class of stock of a foreign corporation that otherwise meets the requirements of paragraph (d)(1) or (2) of this section shall not be treated as meeting such requirements for a taxable year if, for more than half the number of days during the taxable year, one or more persons who own at least 5 percent of the vote and value of the outstanding shares of the class of stock, as determined under paragraph (d)(3)(iii) of this section (each a 5-percent shareholder), own, in the aggregate, 50 percent or more of the vote and value of the outstanding shares of the class of stock. If one or more 5-percent shareholders own, in the aggregate, 50 percent or more of the vote and value of the outstanding shares of the class of stock, such shares held by the 5-percent shareholders will constitute a closely-held block of stock.

(ii) *Exception*. Paragraph (d)(3)(i) of this section shall not apply to a class of stock if the foreign corporation can establish that qualified shareholders, as defined in §1.883–4(b), applying the attribution rules of §1.883–4(c), own sufficient shares in the closely-held block of stock to preclude nonqualified shareholders in the closely-held block of stock from owning 50 percent or more of the total value of the class of stock of which the closely-held block is a part for more than half the number of days during the taxable year. Any shares that are owned, after application of the attribution rules in §1.883–4(c), by a qualified shareholder shall not also be treated as owned by a nonqualified shareholder in the chain of ownership for purposes of the preceding sentence. A foreign corporation must obtain the documentation described in §1.883–4(d) from the qualified shareholders relied upon to satisfy this exception. However, no person otherwise treated as a qualified shareholder under §1.883–4(b) may be treated for purposes of this paragraph (d)(3) as a qualified shareholder if such person's interest in the foreign corporation, or in any intermediary corporation, is held through bearer shares that are not maintained during the relevant period in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G).

(iii) *Five-percent shareholders*—(A) *Related persons*. Solely for purposes of determining whether a person is a 5-percent shareholder, persons related within the meaning of section 267(b) shall be treated as one person. In determining whether two or more corporations are members of the same controlled group under section 267(b)(3), a person is considered to own stock owned directly by such person, stock owned through the application of section 1563(e)(1), and stock owned through the application of section 267(c). In determining whether a corporation is related to a partnership under section 267(b)(10), a person is considered to own the partnership interest owned directly by such person and the partnership interest owned through the application of section 267(e)(3).

(B) *Investment companies*. For purposes of this paragraph (d)(3), an investment company registered under the Investment Company Act of 1940, as amended (54 Stat. 789), shall not be treated as a 5-percent shareholder.

(4) *Anti-abuse rule*. Trades between or among related persons described in section 267(b), as modified by paragraph (d)(3)(iii) of this section, and trades conducted in order to meet the requirements of paragraph (d)(1) of this section shall be disregarded. A class of stock shall not be treated as meeting the trading requirements of paragraph (d)(1) of this section if there is a pattern of trades conducted to meet the requirements of that paragraph. For example, trades between two persons that occur several times during the taxable year may be treated as an arrangement or a pattern of trades conducted to meet the trading requirements of paragraph (d)(1)(ii) of this section.

(5) *Example*. The closely-held test in paragraph (d)(3) of this section is illustrated by the following example:

Example. Closely-held exception. (i) *Facts.* X is a foreign corporation organized in a qualified foreign country and engaged in the international operation of ships. X has one class of stock, which is primarily traded on an established securities market in the qualified foreign country. The stock of X meets the regularly traded requirements of paragraph (d)(1)(ii) of this section without regard to paragraph (d)(3)(i) of this section. A, B, C and D are four members of the corporation's founding family who each own, during the entire taxable year, 25 percent of the stock of Hold Co, a company that issues registered shares. Hold Co, in turn, owns 60 percent of the stock of X during the entire taxable year. The remaining 40 percent of the stock of X is not owned by any 5-percent shareholder, as determined under paragraph (d)(3)(iii) of this section. A, B, and C are not residents of a qualified foreign country, but D is a resident of a qualified foreign country.

(ii) *Analysis.* Because Hold Co owns 60 percent of the stock of X for more than half the number of days during the taxable year, Hold Co is a 5-percent shareholder that owns 50 percent or more of the value of the stock of X. Thus, the shares owned by Hold Co constitute a closely-held block of stock. Under paragraph (d)(3)(i) of this section, the stock of X will not be regularly traded within the meaning of paragraph (d)(1) of this section unless X can establish, under paragraph (d)(3)(ii) of this section, that qualified shareholders within the closely-held block of stock own sufficient shares in the closely-held block of stock to preclude nonqualified shareholders in the closely-held block of stock from owning 50 percent or more of the value of the outstanding shares in the class of stock for more than half the number of days during the taxable year. A, B, and C are not qualified shareholders within the meaning of §1.883–4(b) because they are not residents of a qualified foreign country, but D is a resident of a qualified foreign country and therefore is a qualified shareholder. D owns 15 percent of the outstanding shares of X through Hold Co (25 percent × 60 percent = 15 percent) while A, B, and C in the aggregate own 45 percent of the outstanding shares of X through Hold Co. D, therefore, owns sufficient shares in the closely-held block of stock to preclude the nonqualified shareholders in the closely-held block of stock, A, B and C, from owning 50 percent or more of the value of the class of stock (60 percent − 15 percent = 45 percent) of which the closely-held block is a part. Provided that X obtains from D the documentation described in §1.883–4(d), X's sole class of stock meets the exception in paragraph (d)(3)(ii) of this section and will not be disqualified from the regularly traded test by virtue of paragraph (d)(3)(i) of this section.

(e) *Substantiation that a foreign corporation is publicly traded*—(1) *General rule.* A foreign corporation that relies on the publicly traded test of this section to meet the stock ownership test of §1.883–1(c)(2) must substantiate that the stock of the foreign corporation is primarily and regularly traded on one or more established securities markets, as that term is defined in paragraph (b) of this section. If one of the classes of stock on which the foreign corporation relies to meet this test is closely-held within the meaning of paragraph (d)(3)(i) of this section, the foreign corporation must obtain an ownership statement described in §1.883–4(d) from each qualified shareholder and intermediary that it relies upon to satisfy the exception to the closely-held test, but only to the extent such statement would be required if the foreign corporation were relying on the qualified shareholder stock ownership test of §1.883–4 with respect to those shares of stock. The foreign corporation must also maintain and provide to the Commissioner upon request a list of its shareholders of record and any other relevant information known to the foreign corporation supporting its entitlement to an exemption under this section.

(2) *Availability and retention of documents for inspection.* A foreign corporation seeking qualified foreign corporation status must retain the documentation described in paragraph (e)(1) of this section until the expiration of the statute of limitations for its taxable year to which the documentation relates. The foreign corporation must make such documentation available for inspection at such time and such place as the Commissioner requests in writing under §1.883–1(c)(3)(ii)(A) or (B).

(f) *Reporting requirements.* A foreign corporation relying on this section to satisfy the stock ownership test of §1.883–1(c)(2) must provide the following information in addition to the information required in §1.883–1(c)(3) to be included in its Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation,'' for the taxable year. The information must be current as of the end of the corporation's taxable year and must include the following—

(1) The name of the country in which the stock is primarily traded;

(2) The name of the established securities market or markets on which the stock is listed;

(3) A description of each class of stock relied upon to meet the requirements of paragraph (d) of this section, including whether the class is issued in registered or bearer form and whether any such bearer shares are maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), the number of shares issued and outstanding in that class as of the close of the taxable year, and the relative value of each class in relation to the total value of all shares of stock of the corporation that are outstanding as of the close of the taxable year;

(4) For each class of stock relied upon to meet the requirements of paragraph (d) of this section, if one or more 5-percent shareholders, as defined in paragraph (d)(3)(i) of this section, own in the aggregate 50 percent or more of the vote and value of the outstanding shares of that class of stock for more than half the number of days during the taxable year—

(i) The days during the taxable year of the corporation in which the stock was closely-held without regard to the exception in paragraph (d)(3)(ii) of this section and the percentage of the vote and value of the class of stock that is owned by 5-percent shareholders during such days;

(ii) With respect to all qualified shareholders that own directly, or by application of the attribution rules in §1.883–4(c), shares of the closely-held block of stock and that the foreign corporation relies on to satisfy the exception provided by paragraph (d)(3)(ii) of this section—

(A) The number of such qualified shareholders;

(B) The total percentage of the value of the shares owned, directly or indirectly, by such qualified shareholders by country of residence, determined under §1.883–4(b)(2) (residence of individual shareholders) or §1.883–4(d)(3) (special rules for residence of certain shareholders); and

(C) The number of days during the taxable year of the foreign corporation that such qualified shareholders owned, directly or indirectly, their shares in the closely held block of stock.

(5) Any other relevant information specified by Form 1120–F and its accompanying instructions.

[T.D. 9087, 68 FR 51406, Aug. 26, 2003, as amended by T.D. 9332, 72 FR 34606, June 25, 2007; T.D. 9502, 75 FR 56862, Sept. 17, 2010; 75 FR 63380, Oct. 15, 2010]

§ 1.883–3 Treatment of controlled foreign corporations.

(a) *General rule.* A foreign corporation satisfies the stock ownership test of §1.883–1(c)(2) if it satisfies the qualified U.S. person ownership test in paragraph (b) of this section and the substantiation and reporting requirements of paragraphs (c) and (d) of this section, respectively. A foreign corporation that fails the qualified U.S. person ownership test of paragraph (b) of this section can satisfy the stock ownership test of §1.883–1(c)(2) if it meets either the publicly-traded test of §1.883–2(a) or the qualified shareholder stock ownership test of §1.883–4(a).

(b) *Qualified U.S. person ownership test*—(1) *General rule.* A foreign corporation satisfies the qualified U.S. person ownership test only if the following two conditions are satisfied concurrently during more than half the days in its taxable year:

(i) The foreign corporation is a controlled foreign corporation (within the meaning of section 957(a)).

(ii) One or more qualified U.S. persons own more than 50 percent of the total value of all the outstanding stock of the foreign corporation (within the meaning of section 958(a) and paragraph (b)(4) of this section).

(2) *Qualified U.S. person.* For purposes of this section, a *qualified U.S. person* is a United States citizen or resident alien, a domestic corporation, or a domestic trust described in section 501(a), but only if the person provides the controlled foreign corporation an ownership statement described in paragraph (c)(2) of this section, and the controlled foreign corporation meets the reporting requirements of paragraph (d) of this section with respect to that person.

(3) *Treatment of bearer shares.* For purposes of paragraph (b)(1)(ii) of this section, any shares of the foreign corporation or of any intermediary corporation that are issued in bearer form,

shall be treated as not owned by qualified U.S. persons if the bearer shares are not maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G).

(4) *Ownership attribution through certain domestic entities.* For purposes of paragraph (b)(1)(ii) of this section, stock owned, directly or indirectly, by or for a domestic partnership, a domestic trust not described in section 501(a), or a domestic estate, shall be treated as owned proportionately by the partners, beneficiaries, grantors, or other interest holders, respectively, under the rules of section 958(a), which shall be applied by treating each domestic entity as a foreign entity. Stock that is considered owned by a person under this paragraph (b)(4) shall, for purposes of applying this paragraph (b)(4) to such person, be treated as actually owned by such person.

(5) *Examples.* The following examples illustrate the qualified U.S. person ownership test of paragraph (b)(1) of this section:

Example 1. Ship Co is a controlled foreign corporation (within the meaning of section 957(a)) for more than half the days of its taxable year and is organized in a qualified foreign country. A domestic partnership owns all of the outstanding stock of Ship Co for the entire taxable year. All of the partners in the domestic partnership are residents of foreign countries and not citizens of the United States. Ship Co does not satisfy the qualified U.S. person ownership test of paragraph (b)(1) of this section because qualified U.S. persons do not own shares of Ship Co stock with a value that is greater than 50 percent of the total value of the outstanding stock of the corporation for at least half the days of Ship Co's taxable year. Therefore, to satisfy the stock ownership test of §1.883–1(c)(2) and constitute a qualified foreign corporation, Ship Co must meet the qualified shareholder stock ownership test of §1.883–4(a).

Example 2. Ship Co is a controlled foreign corporation (within the meaning of section 957(a)) for more than half the days of its taxable year and is organized in a qualified foreign country. Ship Co has a single class of stock outstanding. For Ship Co's entire taxable year, a foreign corporation (Corp A), that is wholly owned by a resident of a foreign country who is not a U.S. citizen, owns 40 percent of the outstanding Ship Co stock. During that same period, a domestic partnership owns the remaining 60 percent of the outstanding Ship Co stock. The domestic partnership is wholly owned by 20 United States citizens, each of whom owns a 5-percent partnership interest for Ship Co's entire taxable year. Ship Co meets the qualified U.S. person ownership test of paragraph (b)(1) of this section because during more than half the days in its taxable year it was a controlled foreign corporation within the meaning of section 957(a), and, applying the ownership attribution rules of paragraph (b)(4) of this section, qualified U.S. persons (the partners in the domestic partnership) owned Ship Co stock with a value that is greater than 50 percent of the total value of all the outstanding Ship Co shares. Therefore, Ship Co will meet the stock ownership test of §1.883–1(c)(2) if it satisfies the substantiation and reporting requirements of paragraphs (c) and (d) of this section with respect to the partners in the domestic partnership. Alternatively, if four or more partners in the domestic partnership were not qualified U.S. persons, Ship Co would not meet the qualified U.S. person ownership test of paragraph (b)(1) of this section because, even though during more than half the days in its taxable year it would have been a controlled foreign corporation within the meaning of section 957(a), qualified U.S. persons would not have owned Ship Co stock with a value that is greater than 50 percent of the total value of all the outstanding Ship Co shares during that period.

Example 3. Ship Co is a controlled foreign corporation (within the meaning of section 957(a)) and is organized in a qualified foreign country. Ship Co has two classes of stock outstanding, Class A representing 60 percent of the vote and value and Class B representing the remaining 40 percent of the vote and value of all the shares outstanding of Ship Co. The Class A stock is issued in bearer form and is maintained in a dematerialized book-entry system, as described in §1.883–1(c)(3)(i)(G). The Class B stock is also issued in bearer form, but is not maintained in a dematerialized or immobilized book-entry system. For Ship Co's entire taxable year, a United States citizen A holds all the Class A stock and nonresident alien individual B owns all the Class B stock. Although the Class A stock is issued in bearer form, Ship Co will satisfy the qualified U.S. person ownership test of paragraph (b)(1) of this section because the Class A stock is maintained in a dematerialized book-entry system on behalf of A. The Class B stock is not owned by a qualified U.S. person but is taken into account in determining the total value of Ship Co's outstanding stock. Alternatively, if the Class B stock were owned by a qualified U.S. person, the results would be similar. Class B stock would not be taken into account in determining if the qualified U.S. person ownership test were satisfied, but would be taken into account in determining the total value of Ship Co's outstanding stock.

(c) *Substantiation of CFC stock ownership*—(1) *In general*. A controlled foreign corporation must establish all of the facts necessary to demonstrate to the Commissioner that it satisfies the qualified U.S. person ownership test of paragraph (b)(1) of this section by obtaining a written ownership statement (described in paragraph (c)(2) or (3) of this section, as applicable), signed under penalties of perjury by an individual authorized to sign that person's Federal tax or information return, from—

(i) Each qualified U.S. person whose ownership of stock of the controlled foreign corporation is taken into account for purposes of meeting the qualified U.S. person ownership test; and

(ii) Each domestic intermediary described in paragraph (b)(4) of this section, each foreign intermediary (including a foreign corporation, partnership, trust, or estate), and mere legal owners or record holders acting as nominees in the chain of ownership between each such qualified U.S. person and the controlled foreign corporation, if any.

(2) *Ownership statements from qualified U.S. persons*. An ownership statement from a qualified U.S. person must include—

(i) The qualified U.S. person's name, permanent address, and taxpayer identification number;

(ii) If the qualified U.S. person directly owns shares in the controlled foreign corporation, the number of shares of each class of stock of the controlled foreign corporation owned by the qualified U.S. person, whether any shares are issued in bearer form, whether any bearer shares are maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), and the period (or periods) in the taxable year of the controlled foreign corporation during which the qualified U.S. person owned the shares;

(iii) If the qualified U.S. person indirectly owns shares in the controlled foreign corporation through a foreign or domestic intermediary described in paragraph (c)(1)(ii) of this section, the name of each intermediary, the amount and nature of the qualified U.S. person's interest in each intermediary, the period (or periods) in the taxable year of the controlled foreign corporation during which the qualified U.S. person held such interest, and, with respect to any intermediary foreign corporation, whether any shares are issued in bearer form and whether any such bearer shares are maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G); and

(iv) Any other information specified in published guidance by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(3) *Ownership statements from intermediaries*. An ownership statement from a domestic or foreign intermediary must include:

(i) The intermediary's name, permanent address, and taxpayer identification number, if any.

(ii) If the intermediary directly owns stock in the controlled foreign corporation, the number of shares of each class of stock of the controlled foreign corporation owned by the intermediary, whether such shares are issued in bearer form and maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), and the period (or periods) in the taxable year of the controlled foreign corporation during which the intermediary owned the shares.

(iii) If the intermediary indirectly owns the stock of the controlled foreign corporation, the name and address of each intermediary in the chain of ownership between it and the controlled foreign corporation, the period (or periods) in the taxable year of the controlled foreign corporation during which the intermediary owned the shares, the percentage of its indirect ownership interest in the controlled foreign corporation, and, if any intermediary in the chain of ownership is a foreign corporation, whether any shares of such intermediary are issued in bearer form and if any such bearer shares are maintained in a dematerialized or immobilized book- entry system, as described in §1.883–1(c)(3)(i)(G).

(iv) Any other information specified in published guidance by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(4) *Three-year period of validity.* The rules of §1.883–4(d)(2)(ii) shall apply for determining the validity of the ownership statements required under paragraph (c)(2) of this section.

(5) *Availability and retention of documents for inspection.* The foreign corporation seeking qualified foreign corporation status must retain the ownership statements described in this paragraph (c) until the expiration of the statute of limitations for its taxable year to which the ownership statements relate. The ownership statements must be made available for inspection at such time and place as the Commissioner may request in writing in accordance with §1.883–1(c)(3)(ii).

(d) *Reporting requirements.* A controlled foreign corporation that relies on this section to satisfy the stock ownership test of §1.883–1(c)(2) must include the following information (in addition to the information required by §1.883–1(c)(3)) with its Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation'', filed for its taxable year. This information must be consistent with the ownership statements obtained by the controlled foreign corporation pursuant to paragraph (c) of this section and must be current as of the end of the corporation's taxable year—

(1) The relative value of the shares of the controlled foreign corporation that are owned (directly, and indirectly applying the rules of paragraph (b)(4) of this section) by all qualified U.S. persons identified in paragraph (c)(2) of this section as compared to the value of all outstanding shares of the corporation;

(2) The period (or periods) in the taxable year during which such qualified U.S. persons held such shares;

(3) The period (or periods) in the taxable year during which the foreign corporation was a controlled foreign corporation;

(4) A statement as to whether the controlled foreign corporation or any intermediary corporation had bearer shares outstanding during the taxable year, and whether any such bearer shares taken into account for purposes of satisfying the qualified U.S. person ownership test are maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G); and

(5) Any other information specified by Form 1120–F, and its accompanying instructions, or in published guidance by the Internal Revenue Service (*see* §601.601(d)(2) of this chapter).

[T.D. 9502, 75 FR 56863, Sept. 17, 2010]

§1.883–4 Qualified shareholder stock ownership test.

(a) *General rule.* A foreign corporation satisfies the stock ownership test of §1.883–1(c)(2) if more than 50 percent of the value of its outstanding shares is owned, or treated as owned by applying the attribution rules of paragraph (c) of this section, for at least half of the number of days in the foreign corporation's taxable year by one or more qualified shareholders, as defined in paragraph (b) of this section. A shareholder may be a qualified shareholder with respect to one category of income while not being a qualified shareholder with respect to another. A foreign corporation will not be considered to satisfy the stock ownership test of §1.883–1(c)(2) pursuant to this section unless the foreign corporation meets the substantiation and reporting requirements of paragraphs (d) and (e) of this section.

(b) *Qualified shareholder*—(1) *General rule.* A shareholder is a qualified shareholder only if the shareholder—

(i) With respect to the category of income for which the foreign corporation is seeking an exemption, is—

(A) An individual who is a resident, as described in paragraph (b)(2) of this section, of a qualified foreign country;

(B) The government of a qualified foreign country (or a political subdivision or local authority of such country);

(C) A foreign corporation that is organized in a qualified foreign country and meets the publicly traded test of §1.883–2(a);

(D) A not-for-profit organization described in paragraph (b)(4) of this section that is not a pension fund as defined in paragraph (b)(5) of this section and that is organized in a qualified foreign country;

(E) An individual beneficiary of a pension fund (as defined in paragraph (b)(5)(iv) of this section) that is administered in or by a qualified foreign country, who is treated as a resident under paragraph (d)(3)(iii) of this section, of a qualified foreign country; or

(F) A shareholder of a foreign corporation that is an airline covered by a bilateral Air Services Agreement in force between the United States and the qualified foreign country in which the airline is organized, provided the United States has not waived the ownership requirement in the Air Services Agreement, or that the ownership requirement has not otherwise been made ineffective;

(ii) Does not own its interest in the foreign corporation through bearer shares, either directly or by applying the attribution rules of paragraph (c) of this section, unless such bearer shares are maintained in a dematerialized or immobilized book-entry system, as described in § 1.883–1(c)(3)(i)(G); and

(iii) Provides to the foreign corporation the documentation required in paragraph (d) of this section and the foreign corporation meets the reporting requirements of paragraph (e) of this section with respect to such shareholder.

(2) *Residence of individual shareholders*—(i) *General rule.* An individual described in paragraph (b)(1)(i)(A) of this section is a resident of a qualified foreign country only if the individual is fully liable to tax as a resident in such country (e.g., an individual who is liable to tax on a remittance basis in a foreign country will not be treated as a resident of that country unless all residents of that country are taxed on a remittance basis only) and, in addition—

(A) The individual has a tax home, within the meaning of paragraph (b)(2)(ii) of this section, in that qualified foreign country for 183 days or more of the taxable year; or

(B) The individual is treated as a resident of a qualified foreign country based on special rules pursuant to paragraph (d)(3) of this section.

(ii) *Tax home.* For purposes of this section, an individual's tax home is considered to be located at the individual's regular or principal (if more than one regular) place of business. If the individual has no regular or principal place of business because of the nature of his business (or lack of a business), then the individual's tax home is located at his regular place of abode in a real and substantial sense. If an individual has no regular or principal place of business and no regular place of abode in a real and substantial sense in a qualified foreign country for 183 days or more of the taxable year, that individual does not have a tax home for purposes of this section. A foreign estate or trust, as defined in section 7701(a)(31), does not have a tax home for purposes of this section. See paragraph (c)(3) of this section for alternative rules in the case of trusts or estates.

(3) *Certain income tax convention restrictions applied to shareholders.* For purposes of paragraph (b)(1) of this section, a shareholder described in paragraph (b)(1) of this section may be considered a resident of, or organized in, a qualified foreign country if that foreign country provides an exemption by means of an income tax convention with the United States, but only if the shareholder demonstrates that it is treated as a resident of that country under the convention and qualifies for benefits under any Limitation on Benefits article, and that the convention provides an exemption for the relevant category of income. If the convention has a requirement in the shipping and air transport article other than residence, such as place of registration or documentation of the ship or aircraft, the shareholder is not required to demonstrate that the corporation seeking qualified foreign corporation status could satisfy any such additional requirement.

(4) *Not-for-profit organizations.* The term *not-for-profit organization* means an organization that meets the following requirements—

(i) It is a corporation, association taxable as a corporation, trust, fund, foundation, league or other entity operated exclusively for religious, charitable, educational, or recreational purposes, and not organized for profit;

(ii) It is generally exempt from tax in its country of organization by virtue of its not-for-profit status; and

(iii) Either—

(A) More than 50 percent of its annual support is expended on behalf of individuals described in paragraph (b)(1)(i)(A) of this section (see paragraph (d)(3)(v) of this section for special rules to substantiate the residence of individual beneficiaries of not-for-profit organizations) and on behalf of U.S. exempt organizations that have received determination letters under section 501(c)(3); or

(B) More than 50 percent of its annual support is derived from individuals described in paragraph (b)(1)(i)(A) of this section (see paragraph (d)(3)(v) of this section for special rules to substantiate the residence of individual supporters of not-for-profit organizations).

(5) *Pension funds*—(i) *Pension fund defined.* The term *pension fund* shall mean a government pension fund or a nongovernment pension fund, as those terms are defined, respectively, in paragraphs (b)(5)(ii) and (iii) of this section, that is a trust, fund, foundation, or other entity that is established exclusively for the benefit of employees or former employees of one or more employers, the principal purpose of which is to provide retirement, disability, and death benefits to beneficiaries of such entity and persons designated by such beneficiaries in consideration for prior services rendered.

(ii) *Government pension funds.* A government pension fund is a pension fund that is a controlled entity of a foreign sovereign within the principles of § 1.892–2T(c)(1) (relating to pension funds established for the benefit of employees or former employees of a foreign government).

(iii) *Nongovernment pension funds.* A nongovernment pension fund is a pension fund that—

(A) Is administered in a foreign country and is subject to supervision or regulation by a governmental authority (or other authority delegated to perform such supervision or regulation by a governmental authority) in such country;

(B) Is generally exempt from income taxation in its country of administration;

(C) Has 100 or more beneficiaries; and

(D) The trustees, directors or other administrators of which pension fund provide the documentation required in paragraph (d) of this section.

(iv) *Beneficiary of a pension fund.* The term *beneficiary of a pension fund* shall mean any person who has made contributions to a pension fund, as that term is defined in paragraph (b)(5)(i) of this section, or on whose behalf contributions have been made, and who is currently receiving retirement, disability, or death benefits from the pension fund or can reasonably be expected to receive such benefits in the future, whether or not the person's right to receive benefits from the fund has vested. See paragraph (c)(7) of this section for rules regarding the computation of stock ownership through nongovernment pension funds.

(c) *Rules for determining constructive ownership* (1) *General rules for attribution.* For purposes of applying paragraph (a) of this section and the exception to the closely-held test in § 1.883–1(d)(3)(ii), stock owned by or for a corporation, partnership, trust, estate, or mutual insurance company or similar entity shall be treated as owned proportionately by its shareholders, partners, beneficiaries, grantors, or other interest holders, as provided in paragraphs (c)(2) through (7) of this section. The proportionate interest rules of this paragraph (c) shall apply successively upward through the chain of ownership, and a person's proportionate interest shall be computed for the relevant days or period taken into account in determining whether a foreign corporation satisfies the requirements of paragraph (a) of this section. Stock treated as owned by a person by reason of this paragraph (c) shall be treated as actually owned by such person for purposes of this section. An owner of an interest in an association taxable as a corporation shall be treated as a shareholder of such association for purposes of this paragraph (c). Stock issued in bearer form will not be treated as owned proportionately by its shareholders unless the shares are maintained in a dematerialized or immobilized book-entry system, as described in § 1.883–1(c)(3)(i)(G).

(2) *Partnerships*—(i) *General rule.* A partner shall be treated as having an interest in stock of a foreign corporation owned by a partnership in proportion to the least of—

(A) The partner's percentage distributive share of the partnership's dividend income from the stock;

(B) The partner's percentage distributive share of gain from disposition of the stock by the partnership; or

(C) The partner's percentage distributive share of the stock (or proceeds from the disposition of the stock) upon liquidation of the partnership.

(ii) *Partners resident in the same country*. For purposes of this paragraph, all qualified shareholders that are partners in a partnership and that are residents of, or organized in, the same qualified foreign country shall be treated as one partner. Thus, the percentage distributive shares of dividend income, gain and liquidation rights of all qualified shareholders that are partners in a partnership and that are residents of, or organized in, the same qualified foreign country are aggregated prior to determining the least of the three percentages set out in paragraph (c)(2)(i) of this section. For the meaning of the term *resident*, see paragraph (b)(2) of this section.

(iii) *Examples*. The rules of paragraph (c)(2)(ii) of this section are illustrated by the following examples:

Example 1. Stock held solely by qualified shareholders through a partnership. Country X grants an equivalent exemption. A and B are individual residents of Country X and are qualified shareholders within the meaning of paragraph (b)(1) of this section. A and B are the sole partners of Partnership P. P's only asset is the stock of Corporation Z, a Country X corporation seeking a reciprocal exemption under this section. A's distributive share of P's income and gain on the disposition of P's assets is 80 percent, but A's distributive share of P's assets (or the proceeds therefrom) on P's liquidation is 20 percent. B's distributive share of P's income and gain is 20 percent and B is entitled to 80 percent of the assets (or proceeds therefrom) on P's liquidation. Under the attribution rules of paragraph (c)(2)(ii) of this section, A and B will be treated as a single partner owning in the aggregate 100 percent of the stock of Z owned by P.

Example 2. Stock held by both qualified and nonqualified shareholders through a partnership. Assume the same facts as in *Example 1* except that C, an individual who is not a resident of a qualified foreign country, is also a partner in P and that C's distributive share of P's income is 60 percent. The distributive shares of A and B are the same as in *Example 1*, except that A's distributive share of income is 20 percent. Under the attribution rules of paragraph (c)(2)(ii) of this section, qualified shareholders A and B will be treated as a single partner owning in the aggregate 40 percent of the stock of Z owned by P (i.e., the lowest aggregate percentage of A and B's distributive shares of dividend income (40 percent), gain (100 percent), and liquidation rights (100 percent) with respect to the Z stock). Thus, only 40 percent of the Z stock is treated as owned by qualified shareholders.

Example 3. Stock held through tiered partnerships. Country X grants an equivalent exemption. A and B are individual residents of Country X and are qualified shareholders within the meaning of paragraph (b)(1) of this section. A and B are the sole partners of Partnership P. P is a partner in Partnership P1, which owns the stock of Corporation Z, a Country X corporation seeking a reciprocal exemption under this section. Assume that P's distributive share of the dividend income, gain and liquidation rights with respect to the Z stock held by P1 is 40 percent. Assume that of the remaining partners of P1 only D is a qualified shareholder. D's distributive share of P1's dividend income and gain is 15 percent; D's distributive share of P1's assets on liquidation is 25 percent. Under the attribution rules of paragraph (c)(2)(ii) of this section, A and B, treated as a single partner, will own 40 percent of the Z stock owned by P1 (100 percent × 40 percent) and D will be treated as owning 15 percent of the Z stock owned by P1 (the least of D's dividend income (15 percent), gain (15 percent), and liquidation rights (25 percent) with respect to the Z stock). Thus, 55 percent of the Z stock owned by P1 is treated as owned by qualified shareholders.

(3) *Trusts and estates*—(i) *Beneficiaries*. In general, an individual shall be treated as having an interest in stock of a foreign corporation owned by a trust or estate in proportion to the individual's actuarial interest in the trust or estate, as provided in section 318(a)(2)(B)(i), except that an income beneficiary's actuarial interest in the trust will be determined as if the trust's only asset were the stock. The interest of a remainder beneficiary in stock will be equal to 100 percent minus the sum of the percentages of any interest in the stock held by income beneficiaries. The ownership of an interest in stock owned by a trust shall not be attributed to any beneficiary whose interest cannot be determined under the preceding sentence, and any such interest, to the extent

not attributed by reason of this paragraph (c)(3)(i), shall not be considered owned by a beneficiary unless all potential beneficiaries with respect to the stock are qualified shareholders. In addition, a beneficiary's actuarial interest will be treated as zero to the extent that someone other than the beneficiary is treated as owning the stock under paragraph (c)(3)(ii) of this section. A substantially separate and independent share of a trust, within the meaning of section 663(c), shall be treated as a separate trust for purposes of this paragraph (c)(3)(i), provided that payment of income, accumulated income or corpus of a share of one beneficiary (or group of beneficiaries) cannot affect the proportionate share of income, accumulated income or corpus of another beneficiary (or group of beneficiaries).

(ii) *Grantor trusts.* A person is treated as the owner of stock of a foreign corporation owned by a trust to the extent that the stock is included in the portion of the trust that is treated as owned by the person under sections 671 through 679 (relating to grantors and others treated as substantial owners).

(4) *Corporations that issue stock.* A shareholder of a corporation that issues stock shall be treated as owning stock of a foreign corporation that is owned by such corporation on any day in a proportion that equals the value of the stock owned by such shareholder to the value of all stock of such corporation. If, however, there is an agreement, express or implied, that a shareholder of a corporation will not receive distributions from the earnings of stock owned by the corporation, the shareholder will not be treated as owning that stock owned by the corporation.

(5) *Taxable nonstock corporations.* A taxable nonstock corporation that is entitled in its country of organization to deduct from its taxable income amounts distributed for charitable purposes may deem a recipient of such charitable distributions to be a shareholder of such taxable nonstock corporation in the same proportion as the amount that such beneficiary receives in the taxable year bears to the total income of such taxable nonstock corporation in the taxable year. Whether each such recipient is a qualified shareholder may then be determined under paragraph (b) of this section or under the special rules of paragraph (d)(3)(vii) of this section.

(6) *Mutual insurance companies and similar entities.* Stock held by a mutual insurance company, mutual savings bank, or similar entity (including an association taxable as a corporation that does not issue stock interests) shall be considered owned proportionately by the policyholders, depositors, or other owners in the same proportion that such persons share in the surplus of such entity upon liquidation or dissolution.

(7) *Computation of beneficial interests in nongovernment pension funds.* Stock held by a pension fund shall be considered owned by the beneficiaries of the fund equally on a pro-rata basis if—

(i) The pension fund meets the requirements of paragraph (b)(5)(iii) of this section;

(ii) The trustees, directors or other administrators of the pension fund have no knowledge, and no reason to know, that a pro-rata allocation of interests of the fund to all beneficiaries would differ significantly from an actuarial allocation of interests in the fund (or, if the beneficiaries' actuarial interest in the stock held directly or indirectly by the pension fund differs from the beneficiaries' actuarial interest in the pension fund, the actuarial interests computed by reference to the beneficiaries' actuarial interest in the stock);

(iii) Either—

(A) Any overfunding of the pension fund would be payable, pursuant to the governing instrument or the laws of the foreign country in which the pension fund is administered, only to, or for the benefit of, one or more corporations that are organized in the country in which the pension fund is administered, individual beneficiaries of the pension fund or their designated beneficiaries, or social or charitable causes (the reduction of the obligation of the sponsoring company or companies to make future contributions to the pension fund by reason of overfunding shall not itself result in such overfunding being deemed to be payable to or for the benefit of such company or companies); or

(B) The foreign country in which the pension fund is administered has laws that are designed to prevent overfunding of a pension fund and the funding of the pension fund is within the guidelines of such laws; or

(C) The pension fund is maintained to provide benefits to employees in a particular industry, profession, or group of industries or professions and employees of at least 10 companies (other than companies that are owned or controlled, directly or indirectly, by the same interests) contribute to the pension fund or receive benefits from the pension fund; and

(iv) The trustees, directors or other administrators provide the relevant documentation as required in paragraph (d) of this section.

(d) *Substantiation of stock ownership*—(1) *General rule.* A foreign corporation that relies on this section to satisfy the stock ownership test of §1.883–1(c)(2), must establish all the facts necessary to satisfy the Commissioner that more than 50 percent of the value of its shares is owned, or treated as owned applying paragraph (c) of this section, by qualified shareholders for the relevant period. If a foreign corporation relies upon bearer shares in the chain of ownership to satisfy one of the stock ownership tests, the foreign corporation must also establish all of the facts necessary to satisfy the Commissioner that such shares are maintained in a dematerialized book-entry system, as described in §1.883–1(c)(3)(i)(G), for the benefit of the relevant shareholder.

(2) *Application of general rule*—(i) *Ownership statements.* Except as provided in paragraph (d)(3) of this section, a person shall only be treated as a qualified shareholder of a foreign corporation if—

(A) For the relevant period, the person completes an ownership statement described in paragraph (d)(4) of this section or has a valid ownership statement in effect under paragraph (d)(2)(ii) of this section;

(B) In the case of a person owning stock in the foreign corporation indirectly through one or more intermediaries (including mere legal owners or recordholders acting as nominees), each intermediary in the chain of ownership between that person and the foreign corporation seeking qualified foreign corporation status completes an intermediary ownership statement described in paragraph (d)(4)(v) of this section or has a valid intermediary ownership statement in effect under paragraph (d)(2)(ii) of this section; and

(C) The foreign corporation seeking qualified foreign corporation status obtains the statements described in paragraphs (d)(2)(i)(A) and (B) of this section.

(ii) *Three-year period of validity.* The ownership statements required in paragraph (d)(2)(i) of this section shall remain valid until the earlier of the last day of the third calendar year following the year in which the ownership statement is signed, or the day that a change of circumstance occurs that makes any information on the ownership statement incorrect. For example, an ownership statement signed on September 30, 2000, remains valid through December 31, 2003, unless a change of circumstance occurs that makes any information on the ownership statement incorrect.

(3) *Special rules*—(i) *Substantiating residence of certain shareholders.* A foreign corporation seeking qualified foreign corporation status or an intermediary that is a direct or indirect shareholder of such foreign corporation may substantiate the residence of certain shareholders, for purposes of paragraph (b)(2)(i)(B) of this section, under one of the following special rules in paragraphs (d)(3)(ii) through (viii) of this section, in lieu of obtaining the ownership statements required in paragraph (d)(2)(i) of this section from such shareholders.

(ii) *Special rule for registered shareholders owning less than one percent of widely-held corporations.* A foreign corporation with at least 250 registered shareholders, that is not a publicly-traded corporation, as described in §1.883–2 (a widely-held corporation), is not required to obtain an ownership statement from an individual shareholder owning less than one percent of the widely-held corporation at all times during the taxable year if the requirements of paragraphs (d)(3)(ii)(A) and (B) of this section are satisfied. If the widely-held foreign corporation is the foreign corporation seeking qualified foreign corporation status, or an intermediary that meets the documentation requirements of paragraphs (d)(4)(v)(A) and (B) of this section, the widely-held foreign corporation may treat the address of record in its ownership records as the residence of any less than one percent individual shareholder if—

(A) The individual's address of record is a specific street address and not a nonresidential address, such as a post office box or in care of a financial intermediary or stock transfer agent; and

(B) The officers and directors of the widely-held corporation neither know nor have reason to know that the individual does not reside at that address.

(iii) *Special rule for beneficiaries of pension funds*—(A) *Government pension fund.* An individual who is a beneficiary of a government pension fund, as defined in paragraph (b)(5)(ii) of this section, may be treated as a resident of the country in which the pension fund is administered if the pension fund satisfies the documentation requirements of paragraphs (d)(4)(v)(A) and (C)(*1*) of this section.

(B) *Nongovernment pension fund.* An individual who is a beneficiary of a nongovernment pension fund, as described in paragraph (b)(5)(iii) of this section, may be treated as a resident of the country of the beneficiary's address as it appears on the records of the fund, provided it is not a nonresidential address, such as a post office box or an address in care of a financial intermediary, and provided none of the trustees, directors or other administrators of the pension fund know, or have reason to know, that the beneficiary is not an individual resident of such foreign country. The rules of this paragraph (d)(3)(iii)(B) shall apply only if the nongovernment pension fund satisfies the documentation requirements of paragraphs (d)(4)(v)(A) and (C)(*2*) of this section.

(iv) *Special rule for stock owned by publicly-traded corporations.* Any stock in a foreign corporation seeking qualified foreign corporation status that is owned by a publicly-traded corporation will be treated as owned by an individual resident in the country where the publicly-traded corporation is organized if the foreign corporation receives the statement described in paragraph (d)(4)(iii) of this section from the publicly-traded corporation and copies of any relevant ownership statements from shareholders of the publicly-traded corporation relied on to satisfy the exception to the closely-held test of §1.883–2(d)(3)(ii), as required in paragraph (d)(2)(i) of this section.

(v) *Special rule for not-for-profit organizations.* For purposes of meeting the ownership requirements of paragraph (a) of this section, a not-for-profit organization may rely on the addresses of record of its individual beneficiaries and supporters to determine the residence of an individual beneficiary or supporter, within the meaning of paragraph (b)(2)(i)(B) of this section, to the extent required under paragraph (b)(4) of this section, provided that—

(A) The addresses of record are not nonresidential addresses such as a post office box or in care of a financial intermediary;

(B) The officers, directors or administrators of the organization do not know or have reason to know that the individual beneficiaries or supporters do not reside at that address; and

(C) The foreign corporation seeking qualified foreign corporation status receives the statement required in paragraph (d)(4)(iv) of this section from the not-for-profit organization.

(vi) *Special rule for a foreign airline covered by an air services agreement.* A foreign airline that is covered by a bilateral Air Services Agreement in force between the United States and the qualified foreign country in which the airline is organized may rely exclusively on the Air Services Agreement currently in effect and will not have to otherwise substantiate its ownership under this section, provided that the United States has not waived the ownership requirements in the agreement or that the ownership requirements have not otherwise been made ineffective. Such an airline will be treated as owned by qualified shareholders resident in the country where the foreign airline is organized.

(vii) *Special rule for taxable nonstock corporations.* Any stock in a foreign corporation seeking qualified foreign corporation status that is owned by a taxable nonstock corporation will be treated as owned, in any taxable year, by the recipients of distributions made during that taxable year, as set out in paragraph (c)(5) of this section. The taxable nonstock corporation may treat the address of record in its distribution records as the residence of any recipient if—

(A) An individual recipient's address is in a qualified foreign country and is a specific street address and not a nonresidential address, such as a post office box or in care of a financial intermediary or stock transfer agent;

(B) The address of a nonindividual recipient's principal place of business is in a qualified foreign country;

(C) The officers and directors of the taxable nonstock corporation neither know nor have reason to know that the recipients do not reside or have their principal place of business at such addresses; and

(D) The foreign corporation receives the statement described in paragraph (d)(4)(v)(D) of this section from the taxable nonstock corporation intermediary.

(viii) *Special rule for closely-held corporations traded in the United States.* To demonstrate that a class of stock is not closely-held for purposes of §1.883–2(d)(3)(i), a foreign corporation whose stock is traded on an established securities market in the United States may rely on current Schedule 13D and Schedule 13G filings with the Securities and Exchange Commission to identify its 5-percent shareholders in each class of stock relied upon to meet the regularly traded test, without having to make any independent investigation to determine the identity of the 5-percent shareholder. However, if any class of stock is determined to be closely-held within the meaning of §1.883–2(d)(3)(i), the publicly traded corporation cannot satisfy the requirements of §1.883–2(e) unless it obtains sufficient documentation described in this paragraph (d) to demonstrate that the requirements of §1.883–2(d)(3)(ii) are met with respect to the 5-percent shareholders.

(4) *Ownership statements from shareholders*—(i) *Ownership statements from individuals.* An ownership statement from an individual is a written statement signed by the individual under penalties of perjury stating—

(A) The individual's name, permanent address, and country where the individual is fully liable to tax as a resident, if any;

(B) If the individual was not a resident of the country for the entire taxable year of the foreign corporation seeking qualified foreign corporation status, each of the foreign countries in which the individual resided and the dates of such residence during the taxable year of such foreign corporation;

(C) If the individual directly owns shares of stock in the corporation seeking qualified foreign corporation status, the name of the corporation, the number of shares in each class of stock of the corporation owned by the individual, whether any such shares are issued in bearer form and maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), and the period (or periods) in the taxable year of the foreign corporation during which the individual owned the shares;

(D) If the individual directly owns an interest in a corporation, partnership, trust, estate, or other intermediary that directly or indirectly owns stock in the corporation seeking qualified foreign corporation status, the name of the intermediary, the number and class of shares or the amount and nature of the interest that the individual holds in such intermediary, and, if the intermediary is a corporation, whether any such shares are issued in bearer form and maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), and the period (or periods) in the taxable year of the foreign corporation seeking qualified foreign corporation status during which the individual held such interest;

(E) To the extent known by the individual, a description of the chain of ownership through which the individual owns stock in the corporation seeking qualified foreign corporation status, including the name and address of each intermediary standing between the intermediary described in paragraph (d)(4)(i)(D) of this section and the foreign corporation and whether this interest is owned either directly or indirectly through bearer shares; and

(F) Any other information as specified in guidance published by the Internal Revenue Service (see § 601.601(d)(2) of this chapter).

(ii) *Ownership statements from foreign governments.* An ownership statement from a foreign government that is a qualified shareholder is a written statement—

(A) Signed by any one of the following—

(*1*) An official of the governmental authority, agency or office who has supervisory authority with respect to the government's ownership interest and who is authorized to sign such a statement on behalf of the authority, agency or office; or

(*2*) The competent authority of the foreign country (as defined in the income tax convention between the United States and the foreign country); or

(*3*) An income tax return preparer that, for purposes of this paragraph (d)(4)(ii) only, shall mean a firm of licensed or certified public accountants, a law firm whose principals or members are admitted to practice in one or more states, territories or possessions of the United States or the country of such government, or a bank or other financial institution licensed to do business in such foreign country and having assets at least equivalent to 50 million U.S. dollars and who is authorized to represent the government or governmental authority; and

(B) That provides—

(*1*) The title of the official or other person signing the statement;

(*2*) The name and address of the government authority, agency or office that has supervisory authority and, if applicable, the income tax preparer which has prepared such ownership statement;

(*3*) The information described in paragraphs (d)(4)(i)(C) through (E) of this section (as if the language applied ''government'' instead of ''individual'') with respect to the government's direct or indirect ownership of stock in the corporation seeking qualified resident status;

(*4*) In the case of an ownership statement prepared by an income tax return preparer, a statement under penalties of perjury identifying the documentation relied upon in the conduct of due diligence for the taxable year to determine the aggregate government investment in the stock of the shipping or aircraft company in preparation of such ownership statement attached to a valid power of attorney to represent the taxpayer for the taxable year; and

(*5*) Any other information as specified in guidance published by the Internal Revenue Service (see § 601.601(d)(2) of this chapter).

(iii) *Ownership statements from publicly-traded corporate shareholders.* An ownership statement from a publicly-traded corporation that is a direct or indirect owner of the corporation seeking qualified foreign corporation status is a written statement, signed under penalties of perjury by a person that would be authorized to sign a tax return on behalf of the shareholder corporation containing the following information—

(A) The name of the country in which the stock is primarily traded;

(B) The name of the established securities market or markets on which the stock is listed;

(C) A description of each class of stock relied upon to meet the requirements of § 1.883–2(d)(1), including the number of shares issued and outstanding as of the close of the taxable year;

(D) For each class of stock relied upon to meet the requirements of § 1.883–2(d)(1), if one or more 5-percent shareholders, as defined in § 1.883–2(d)(3)(i), own in the aggregate 50 percent or more of the vote and value of the outstanding shares of that class of stock for more than half the number of days during the taxable year—

(*1*) The days during the taxable year of the corporation in which the stock was closely-held without regard to the exception in paragraph (d)(3)(ii) of this section and the percentage of the vote and value of the class of stock that is owned by 5-percent shareholders during such days;

(*2*) For each qualified shareholder who owns or is treated as owning stock in the closely-held block upon whom the corporation intends to rely to satisfy the exception to the closely-held test of §1.883–2(d)(3)(ii)—

(*i*) The name of each such shareholder;

(*ii*) The percentage of the total value of the class of stock held by each such shareholder and the days during which the stock was held;

(*iii*) The address of record of each such shareholder; and

(*iv*) The country of residence of each such shareholder, determined under paragraph (b)(2) or (d)(3) of this section;

(E) The information described in paragraphs (d)(4)(i)(C) through (E) of this section (as if the language applied ''publicly-traded corporation'' instead of ''individual'') with respect to the publicly-traded corporation's direct or indirect ownership of stock in the corporation seeking qualified resident status; and

(F) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(iv) *Ownership statements from not-for-profit organizations.* An ownership statement from a not-for-profit organization (other than a pension fund as defined in paragraph (b)(5) of this section) is a written statement signed by a person authorized to sign a tax return on behalf of the organization under penalties of perjury stating—

(A) The name, permanent address, and principal location of the activities of the organization (if different from its permanent address);

(B) The information described in paragraphs (d)(4)(i)(C) through (E) of this section (as if the language applied ''not-for-profit organization'' instead of ''individual'');

(C) A representation that the not-for-profit organization satisfies the requirements of paragraph (b)(4) of this section; and

(D) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(v) *Ownership statements from intermediaries*—(A) *General rule.* The foreign corporation seeking qualified foreign corporation status under the shareholder stock ownership test must obtain an intermediary ownership statement from each intermediary standing in the chain of ownership between it and the qualified shareholders on whom it relies to meet this test. An intermediary ownership statement is a written statement signed under penalties of perjury by the intermediary (if the intermediary is an individual) or a person who would be authorized to sign a tax return on behalf of the intermediary (if the intermediary is not an individual) containing the following information—

(*1*) The name, address, country of residence, and principal place of business (in the case of a corporation or partnership) of the intermediary, and, if the intermediary is a trust or estate, the name and permanent address of all trustees or executors (or equivalent under foreign law), or if the intermediary is a pension fund, the name and permanent address of place of administration of the intermediary;

(*2*) The information described in paragraphs (d)(4)(i)(C) through (E) of this section (as if the language applied ''intermediary'' instead of ''individual'');

(*3*) If the intermediary is a nominee for a shareholder or another intermediary, the name and permanent address of the shareholder, or the name and principal place of business of such other intermediary;

(*4*) If the intermediary is not a nominee for a shareholder or another intermediary, the name and country of residence (within the meaning of paragraph (b)(2) of this section) and the proportionate interest in the intermediary of each direct shareholder, partner, beneficiary, grantor, or other interest holder (or if the direct holder is a nominee, of its beneficial shareholder, partner, beneficiary, grantor, or other interest holder), on which the foreign corporation seeking qualified foreign corporation status intends to rely to satisfy the requirements of paragraph (a) of this section. In addition, such intermediary must obtain from all such persons an ownership statement that includes the period of time during the taxable year for which the interest in the intermediary was owned by the shareholder, partner, beneficiary, grantor or other interest holder. For purposes of this paragraph (d)(4)(v)(A), the proportionate interest of a person in an intermediary is the percentage interest (by value) held by such person, determined using the principles for attributing ownership in paragraph (c) of this section;

(*5*) If the intermediary is a widely-held corporation with registered shareholders owning less than one percent of the stock of such widely-held corporation, the statement set out in paragraph (d)(4)(v)(B) of this section, relating to ownership statements from widely-held intermediaries with registered shareholders owning less than one percent of such widely-held intermediaries;

(*6*) If the intermediary is a pension fund, within the meaning of paragraph (b)(5) of this section, the statement set out in paragraph (d)(4)(v)(C) of this section, relating to ownership statements from pension funds;

(*7*) If the intermediary is a taxable nonstock corporation, within the meaning of paragraph (c)(5) of this section, the statement set out in paragraph (d)(4)(v)(D) of this section, relating to ownership statements from intermediaries that are taxable nonstock corporations; and

(*8*) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(B) *Ownership statements from widely-held intermediaries with registered shareholders owning less than one percent of such widely-held intermediary*. An ownership statement from an intermediary that is a corporation with at least 250 registered shareholders, but that is not a publicly-traded corporation within the meaning of §1.883–2, and that relies on paragraph (d)(3)(ii) of this section, relating to the special rule for registered shareholders owning less than one percent of widely-held corporations, must provide the following information in addition to the information required in paragraph (d)(4)(v)(A) of this section—

(*1*) The aggregate proportionate interest by country of residence in the widely-held corporation of such registered shareholders or other interest holders whose address of record is a specific street address and not a nonresidential address, such as a post office box or in care of a financial intermediary or stock transfer agent; and

(*2*) A representation that the officers and directors of the widely-held intermediary neither know nor have reason to know that the individual shareholder does not reside at his or her address of record in the corporate records; and

(*3*) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(C) *Ownership statements from pension funds*—(*1*) *Ownership statements from government pension funds*. A government pension fund (as defined in paragraph (b)(5)(ii) of this section) that relies on paragraph (d)(3)(iii) of this section (relating to the special rules for pension funds) generally must provide the documentation required in paragraph (d)(4)(v)(A) of this section, and, in addition, the government pension fund must also provide the following information—

(*i*) The name of the country in which the plan is administered;

(*ii*) A representation that the fund is established exclusively for the benefit of employees or former employees of a foreign government, or employees or former employees of a foreign government and nongovernmental employees or former employees that perform or performed governmental or social services;

(*iii*) A representation that the funds that comprise the trust are managed by trustees who are employees of, or persons appointed by, the foreign government;

(*iv*) A representation that the trust forming part of the pension plan provides for retirement, disability, or death benefits in consideration for prior services rendered;

(*v*) A representation that the income of the trust satisfies the obligations of the foreign government to the participants under the plan, rather than inuring to the benefit of a private person; and (*vi*) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(*2*) *Ownership statements from nongovernment pension funds.* The trustees, directors, or other administrators of the nongovernment pension fund, as defined in paragraph (b)(5)(iii) of this section, that rely on paragraph (d)(3)(iii) of this section, relating to the special rules for pension funds, generally must provide the pension fund's intermediary ownership statement described in paragraph (d)(4)(v)(A) of this section. In addition, the nongovernment pension fund must also provide the following information—

(*i*) The name of the country in which the pension fund is administered;

(*ii*) A representation that the pension fund is subject to supervision or regulation by a governmental authority (or other authority delegated to perform such supervision or regulation by a governmental authority) in such country, and, if so, the name of the governmental authority (or other authority delegated to perform such supervision or regulation);

(*iii*) A representation that the pension fund is generally exempt from income taxation in its country of administration;

(*iv*) The number of beneficiaries in the pension plan;

(*v*) The aggregate percentage interest of beneficiaries by country of residence based on addresses shown on the books and records of the fund, provided the addresses are not nonresidential addresses, such as a post office box or an address in care of a financial intermediary, and provided none of the trustees, directors or other administrators of the pension fund know, or have reason to know, that the beneficiary is not a resident of such foreign country;

(*vi*) A representation that the pension fund meets the requirements of paragraph (b)(5)(iii) of this section;

(*vii*) A representation that the trustees, directors or other administrators of the pension fund have no knowledge, and no reason to know, that a pro-rata allocation of interests of the fund to all beneficiaries would differ significantly from an actuarial allocation of interests in the fund (or, if the beneficiaries' actuarial interest in the stock held directly or indirectly by the pension fund differs from the beneficiaries' actuarial interest in the pension fund, the actuarial interests computed by reference to the beneficiaries' actuarial interest in the stock);

(*viii*) A representation that any overfunding of the pension fund would be payable, pursuant to the governing instrument or the laws of the foreign country in which the pension fund is administered, only to, or for the benefit of, one or more corporations that are organized in the country in which the pension fund is administered, individual beneficiaries of the pension fund or their designated beneficiaries, or social or charitable causes (the reduction of the obligation of the sponsoring company or companies to make future contributions to the pension fund by reason of overfunding shall not itself result in such overfunding being deemed to be payable to or for the benefit of such company or companies); or that the foreign country in which the pension fund is administered has laws that are designed to prevent overfunding of a pension fund and the funding of the pension fund is within the guidelines of such laws; or that the pension fund is maintained to provide benefits to employees in a particular industry, profession, or group of industries or professions, and that employees of at least 10 companies (other than companies that are owned or controlled, directly or indirectly, by the same interests) contribute to the pension fund or receive benefits from the pension fund; and

(*ix*) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(*3*) *Time for making determinations.* The determinations required to be made under this paragraph (d)(4)(v)(C) shall be made using information shown on the records of the pension fund for a date during the foreign corporation's taxable year to which the determination is relevant.

(D) *Ownership statements from taxable nonstock corporations.* An ownership statement from an intermediary that is a taxable nonstock corporation must provide the following information in addition to the information required in paragraph (d)(4)(v)(A) of this section—

(*1*) With respect to paragraph (d)(4)(v)(A)(*7*) of this section, for each beneficiary that is treated as a qualified shareholder, the name, address of residence (in the case of an individual beneficiary, the address must be a specific street address and not a nonresidential address, such as a post office box or in care of a financial intermediary; in the case of a nonindividual beneficiary, the address of the principal place of business) and percentage that is the same proportion as the amount that the beneficiary receives in the tax year bears to the total net income of the taxable nonstock corporation in the tax year;

(*2*) A representation that the officers and directors of the taxable nonstock corporation neither know nor have reason to know that the individual beneficiaries do not reside at the address listed in paragraph (d)(4)(v)(D)(*1*) of this section or that any other nonindividual beneficiary does not conduct its primary activities at such address or in such country of residence; and

(*3*) Any other information as specified in guidance published by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

(5) *Availability and retention of documents for inspection.* The documentation described in paragraphs (d)(3) and (4) of this section must be retained by the corporation seeking qualified foreign corporation status (the foreign corporation) until the expiration of the statute of limitations for the taxable year of the foreign corporation to which the documentation relates. Such documentation must be made available for inspection by the Commissioner at such time and place as the Commissioner may request in writing.

(e) *Reporting requirements.* A foreign corporation relying on the qualified shareholder stock ownership test of this section to meet the stock ownership test of §1.883–1(c)(2) must provide the following information in addition to the information required in §1.883–1(c)(3) to be included in its Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation,'' for each taxable year. The information should be current as of the end of the corporation's taxable year. The information must include the following—

(1) A representation that more than 50 percent of the value of the outstanding shares of the corporation is owned (or treated as owned by reason of paragraph (c) of this section) by qualified shareholders for each category of income for which the exemption is claimed;

(2) With respect to all qualified shareholders relied upon to satisfy the 50 percent ownership test of paragraph (a) of this section, the total number of such qualified shareholders as defined in paragraph (b)(1) of this section; the total percentage of the value of the outstanding shares owned, applying the attribution rules of paragraph (c) of this section, by such qualified shareholders by country of residence or organization, whichever is applicable; and the period during the taxable year of the foreign corporation that such stock was held by qualified shareholders; and

(3) Any other relevant information specified by the Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation,'' and its accompanying instructions, or in published guidance by the Internal Revenue Service (see §601.601(d)(2) of this chapter).

[T.D. 9087, 68 FR 51406, Aug. 26, 2003; 69 FR 7995, Feb. 20, 2004, as amended by T.D. 9332, 72 FR 34608, June 25, 2007; T.D. 9502, 75 FR 56865, Sept. 17, 2010]

§ 1.883–5 Effective/applicability dates.

(a) *General rule.* Sections 1.883–1 through 1.883–4 apply to taxable years of a foreign corporation seeking qualified foreign corporation status beginning after September 24, 2004.

(b) *Election for retroactive application.* Taxpayers may elect to apply §§1.883–1 through 1.883–4 for any open taxable year of the foreign corporation beginning after December 31, 1986, except that the substantiation and reporting requirements of §1.883–1(c)(3) (relating to the substantiation and reporting required to be treated as a qualified foreign corporation) or §§1.883–2(f), 1.883–3(d) and 1.883–4(e) (relating to additional information to be included in the return to demonstrate whether the foreign corporation satisfies the stock ownership test) will not apply to any year beginning before September 25, 2004. Such election shall apply to the taxable year of the election and to all subsequent taxable years beginning before September 25, 2004.

(c) *Transitional information reporting rule.* For taxable years of the foreign corporation beginning after September 24, 2004, and until such time as the Form 1120–F, ''U.S. Income Tax Return of a Foreign Corporation,'' or its instructions are revised to provide otherwise, the information required in §1.883–1(c)(3) and §1.883–2(f), §1.883–3(d) or §1.883–4(e), as applicable, must be included on a wirtten statement attached to the Form 1120–F and file with the return.

(d) *Effective/applicability dates.* Except as otherwise provided in this paragraph (d), §§1.883–1, 1.883–2, 1.883–3, and 1.883–4 apply to taxable years of the foreign corporation beginning after June 25, 2007, and may be applied to any open taxable years of the foreign corporation beginning on or after December 31, 2004. The portion of any provision concerning bearer shares maintained in a dematerialized or immobilized book-entry system, as described in §1.883–1(c)(3)(i)(G), applies to taxable years of a foreign corporation beginning on or after September 17, 2010.

[T.D. 9218, 70 FR 45530, Aug. 8, 2005, as amended by T.D. 9332, 72 FR 34609, June 25, 2007; T.D. 9502, 75 FR 56865, Sept. 17, 2010; 75 FR 63380, Oct. 15, 2010]

§1.884–0 Overview of regulation provisions for section 884.

(a) *Introduction.* Section 884 consists of three main parts: a branch profits tax on certain earnings of a foreign corporation's U.S. trade or business; a branch-level interest tax on interest paid, or deemed paid, by a foreign corporation's U.S. trade or business; and an anti-treaty shopping rule. A foreign corporation is subject to section 884 by virtue of owning an interest in a partnership, trust, or estate that is engaged in a U.S. trade or business or has income treated as effectively connected with the conduct of a trade or business in the United States. An international organization (as defined in section 7701(a)(18)) is not subject to the branch profits tax by reason of section 884(e)(5). A foreign government treated as a corporate resident of its country of residence under section 892(a)(3) shall be treated as a corporation for purposes of section 884. The preceding sentence shall be effective for taxable years ending on or after September 11, 1992, except that, for the first taxable year ending on or after that date, the branch profits tax shall not apply to effectively connected earnings and profits of the foreign government earned prior to that date nor to decreases in the U.S. net equity of a foreign government occurring after the close of the preceding taxable year and before that date. Similarly, §1.884–4 shall apply, in the case of branch interest, only with respect to amounts of interest accrued and paid by a foreign government on or after that date, or, in the case of excess interest, only with respect to amounts attributable to interest accrued by a foreign government on or after that date and apportioned to ECI, as defined in §1.884–1(d)(1)(iii). Except as otherwise provided, for purposes of the regulations under section 884, the term ''U.S. trade or business'' includes all the U.S. trades or businesses of a foreign corporation.

(1) *The branch profits tax.* Section 1.884–1 provides rules for computing the branch profits tax and defines various terms that affect the computation of the tax. In general, section 884(a) imposes a 30-percent branch profits tax on the after-tax earnings of a foreign corporation's U.S. trade or business that are not reinvested in a U.S. trade or business by the close of the taxable year, or are disinvested in a later taxable year. Changes in the value of the equity of the foreign corporation's U.S. trade or business are used as the measure of whether earnings have been reinvested in, or disinvested form, a U.S. trade or business. An increase in the equity during the taxable year is generally treated as a reinvestment of the earnings for the current taxable year; a decrease in the equity during the taxable year is generally treated as a disinvestment of prior years' earnings that have not previously been subject to the branch profits tax. The amount subject to the branch profits tax for the taxable year is the dividend equivalent amount. Section 1.884–2T contains special rules relating to the effect on

the branch profits tax of the termination or incorporation of a U.S. trade or business or the liquidation or reorganization of a foreign corporation or its domestic subsidiary.

(2) *The branch-level interest tax.* Section 1.884–4 provides rules for computing the branch-level interest tax. In general, interest paid by a U.S. trade or business of a foreign corporation (''branch interest'', as defined in §1.884–4(b)) is treated as if it were paid by a domestic corporation and may be subject to tax under section 871(a) or 881, and to withholding under section 1441 or 1442. In addition, if the interest apportioned to ECI exceeds branch interest, the excess is treated as interest paid to the foreign corporation by a wholly-owned domestic corporation and is subject to tax under section 881(a).

(3) *Qualified resident.* Section 1.884–5 provides rules for determining whether a foreign corporation is a qualified resident of a foreign country. In general, a foreign corporation must be a qualified resident of a foreign country with which the United States has an income tax treaty in order to claim an exemption or rate reduction with respect to the branch profits tax, the branch-level interest tax, and the tax on dividends paid by the foreign corporation.

(b) *Special rules for U.S. possessions.* (1) Section 884 does not apply to a corporation created or organized in, or under the law of, American Samoa, Guam, the Northern Mariana Islands, or the U.S. Virgin Islands, provided that the conditions of §1.881–5(c)(1) through (c)(3) are satisfied with respect to such corporation. The preceding sentence applies for taxable years ending after April 9, 2008.

(2) Section 884 does not apply for purposes of determining tax liability incurred to a section 935 possession or the U.S. Virgin Islands by a corporation created or organized in, or under the law of, such possession or the United States. The preceding sentence applies for taxable years ending after April 9, 2008.

(c) *Outline of major topics in §§1.884–1 through 1.884–5.*

§1.884–1 Branch profits tax.

(a) General rule.
(b) Dividend equivalent amount.
(1) Definition.
(2) Adjustment for increase in U.S. net equity.
(3) Adjustment for decrease in U.S. net equity.
(4) Examples.
(c) U.S. net equity.
(1) Definition.
(2) Definition of amount of a U.S. asset.
(3) Definition of determination date.
(d) U.S. assets.
(1) Definition of a U.S. asset.
(2) Special rules for certain assets.
(3) Interest in a partnership.
(4) Interest in a trust or estate.
(5) Property that is not a U.S. asset.
(6) E&P basis of a U.S. asset.
(e) U.S. liabilities.
(1) Liabilities based on §1.882–5.
(2) Insurance reserves.
(3) Election to reduce liabilities.
(4) Artificial decrease in U.S. liabilities.
(5) Examples.
(f) Effectively connected earnings and profits.
(1) In general.
(2) Income that does not produce ECEP.
(3) Allocation of deductions attributable to income that does not produce ECEP.
(4) Examples.
(g) Corporations resident in countries with which the United States has an income tax treaty.
(1) General rule.
(2) Special rules for foreign corporations that are qualified residents on the basis of their ownership.
(3) Exemptions for foreign corporations resident in certain countries with income tax treaties in effect on January 1, 1987.
(4) Modifications with respect to other income tax treaties.
(5) Benefits under treaties other than income tax treaties.
(h) Stapled entities.
(i) Effective date.
(1) General rule.
(2) Election to reduce liabilities.
(3) Separate election for installment obligations.
(4) Special rule for certain U.S. assets and liabilities.
(j) Transition rules.
(1) General rule.
(2) Installment obligations.

§1.884–2T Special rules for termination or incorporation of a U.S. trade or business or liquidation or reorganization of a foreign corporation or its domestic subsidiary (temporary).

(a) Complete termination of a U.S. trade or business.

(1) General rule.
(2) Operating rules.
(3) Complete termination in the case of a section 338 election.
(4) Complete termination in the case of a foreign corporation with income under section 864(c)(6) or 864(c)(7).
(5) Special rule if a foreign corporation terminates an interest in a trust. [Reserved]
(6) Coordination with second-level withholding tax.
(b) Election to remain engaged in a U.S. trade or business.
(1) General rule.
(2) Marketable security.
(3) Identification requirements.
(4) Treatment of income from deemed U.S. assets.
(5) Method of election.
(6) Effective date.
(c) Liquidation, reorganization, etc., of a foreign corporation.
(1) Inapplicability of paragraph (a)(1) to section 381 (a) transactions.
(2) Transferor's dividend equivalent amount for the taxable year in which a section 381 (a) transaction occurs.
(3) Transferor's dividend equivalent amount for any taxable year succeeding the taxable year in which the section 381 (a) transaction occurs.
(4) Earnings and profits of the transferor carried over to the transferee pursuant to the section 381 (a) transaction.
(5) Determination of U.S. net equity of a transferee that is a foreign corporation.
(6) Special rules in the case of the disposition of stock or securities in a domestic transferee or in the transferor.
(d) Incorporation under section 351.
(1) In general.
(2) Inapplicability of paragraph (a)(1) of this section to section 351 transactions.
(3) Transferor's dividend equivalent amount for the taxable year in which a section 351 transaction occurs.
(4) Election to increase earnings and profits.
(5) Dispositions of stock or securities of the transferee by the transferor.
(6) Example.
(e) Certain transactions with respect to a domestic subsidiary.
(f) Effective date.

§ 1.884–3T Coordination of branch profits tax with second-tier withholding (temporary). [Reserved]

§ 1.884–4 Branch-level interest tax.

(a) General rule.
(1) Tax on branch interest.
(2) Tax on excess interest.
(3) Original issue discount.
(4) Examples.
(b) Branch interest.
(1) Definition of branch interest.
(2) [Reserved]
(3) Requirements relating to specifically identified liabilities.
(4) [Reserved]
(5) Increase in branch interest where U.S. assets constitute 80 percent or more of a foreign corporation's assets.
(6) Special rule where branch interest exceeds interest apportioned to ECI of a foreign corporation.
(7) Effect of election under paragraph (c)(1) of this section to treat interest as if paid in year of accrual.
(8) Effect of treaties.
(c) Rules relating to excess interest.
(1) Election to compute excess interest by treating branch interest that is paid and accrued in different years as if paid in year of accrual.
(2) Interest paid by a partnership.
(3) Effect of treaties.
(4) Examples.
(d) Stapled entities.
(e) Effective dates.
(1) General rule.
(2) Special rule.
(f) Transition rules.
(1) Election under paragraph (c)(1) of this section.
(2) Waiver of notification requirement for non-banks under Notice 89–80.
(3) Waiver of legending requirement for certain debt issued prior to January 3, 1989.

§ 1.884–5 Qualified resident.

(a) Definition of qualified resident.
(b) Stock ownership requirement.
(1) General rule.
(2) Rules for determining constructive ownership.
(3) Required documentation.
(4) Ownership statements from qualifying shareholders.
(5) Certificate of residency.
(6) Intermediary ownership statement.
(7) Intermediary verification statement.
(8) Special rules for pension funds.
(9) Availability of documents for inspection.
(10) Examples.
(c) Base erosion.
(d) Publicly-traded corporations.
(1) General rule.
(2) Established securities market.
(3) Primary traded.
(4) Regularly traded.
(5) Burden of proof for publicly-traded corporations.
(e) Active trade or business.
(1) General rule.
(2) Active conduct of a trade or business.
(3) Substantial presence test.
(4) Integral part of an active trade or business in the foreign corporation's country of residence.
(f) Qualified resident ruling.
(1) Basis for ruling.

(2) Factors.
(3) Procedural requirements.
(g) Effective dates.
(h) Transition rule.

[T.D. 8432, 57 FR 41649, Sept. 11, 1992; 57 FR 49117, Oct. 29, 1992; 57 FR 60126, Dec. 18, 1992, as amended by T.D. 8657, 61 FR 9338, Mar. 8, 1996; T.D. 9194, 70 FR 18930, Apr. 11, 2005; T.D. 9391, 73 FR 19360, Apr. 9, 2008; 73 FR 27728, May 14, 2008]

§ 1.884–1 Branch profits tax.

(a) *General rule.* A foreign corporation shall be liable for a branch profits tax in an amount equal to 30 percent of the foreign corporation's dividend equivalent amount for the taxable year. The branch profits tax shall be in addition to the tax imposed by section 882 and shall be reported on a foreign corporation's income tax return for the taxable year. The tax shall be due and payable as provided in section 6151 and such other provisions of Subtitle F of the Internal Revenue Code as apply to the income tax liability of corporations. However, no estimated tax payments shall be due with respect to a foreign corporation's liability for the branch profits tax. See paragraph (g) of this section for the application of the branch profits tax to corporations that are residents of countries with which the United States has an income tax treaty, and §1.884–2T for the effect on the branch profits tax of the termination or incorporation of a U.S. trade or business, or the liquidation or reorganization of a foreign corporation or its domestic subsidiary.

(b) *Dividend equivalent amount*—(1) *Definition.* The term "dividend equivalent amount" means a foreign corporation's effectively connected earnings and profits ("ECEP", as defined in paragraph (f)(1) of this section) for the taxable year, adjusted pursuant to paragraph (b) (2) or (3) of this section, as applicable. The dividend equivalent amount cannot be less than zero.

(2) *Adjustment for increase in U.S. net equity.* If a foreign corporation's U.S. net equity (as defined in paragraph (c) of this section) as of the close of the taxable year exceeds the foreign corporation's U.S. net equity as of the close of the preceding taxable year, then, for purposes of computing the foreign corporation's dividend equivalent amount for the taxable year, the foreign corporation's ECEP for the taxable year shall be reduced (but not below zero) by the amount of such excess.

(3) *Adjustment for decrease in U.S. net equity*—(i) *In general.* Except as provided in paragraph (b)(3)(ii) of this section, if a foreign corporation's U.S. net equity as of the close of the taxable year is less than the foreign corporation's U.S. net equity as of the close of the preceding taxable year, then, for purposes of computing the foreign corporation's dividend equivalent amount for the taxable year, the foreign corporation's ECEP for the taxable year shall be increased by the amount of such difference.

(ii) *Limitation based on accumulated ECEP.* The increase of a foreign corporation's ECEP under paragraph (b)(3)(i) of this section shall not exceed the accumulated ECEP of the foreign corporation as of the beginning of the taxable year. The term "accumulated ECEP" means the aggregate amount of ECEP of a foreign corporation for preceding taxable years beginning after December 31, 1986, minus the aggregate dividend equivalent amounts for such preceding taxable years. Accumulated ECEP may be less than zero.

(4) *Examples.* The principles of paragraph (b) (2) and (3) of this section are illustrated by the following examples.

Example 1. Reinvestment of all ECEP. Foreign corporation A, a calendar year taxpayer, had $1,000 U.S. net equity as of the close of 1986 and $100 of ECEP for 1987. A acquires $100 of additional U.S. assets during 1987 and its U.S. net equity as of the close of 1987 is $1,100. In computing A's dividend equivalent amount for 1987, A's ECEP of $100 is reduced under paragraph (b)(2) of this section by the $100 increase in U.S. net equity between the close of 1986 and the close of 1987. A has no dividend equivalent amount for 1987.

Example 2. Partial reinvestment of ECEP. Assume the same facts as in *Example 1* except that A acquires $40 (rather than $100) of U.S. assets during 1987 and its U.S. net equity as of the close of 1987 is $1,040. In computing A's dividend equivalent amount for 1987, A's ECEP of $100 is reduced under paragraph (b)(2) of this section by the $40 increase in U.S. net equity between the close of 1986 and the close of 1987. A has a dividend equivalent amount of $60 for 1987.

Example 3. Disinvestment of prior year's ECEP. Assume the same facts as in *Example 1* for 1987. A has no ECEP for 1988. A's U.S.

net equity decreases by $40 (to $1,060) as of the close of 1988. A has a dividend equivalent amount of $40 for 1988, even though it has no ECEP for 1988. A's ECEP of $0 for 1988 is increased under paragraph (b)(3)(i) of this section by the $40 reduction in U.S. net equity (subject to the limitation in paragraph (b)(3)(ii) of this section of $100 of accumulated ECEP).

Example 4. Accumulated ECEP limitation. Assume the same facts as in *Example 2* for 1987. For 1988, A has $125 of ECEP and its U.S. net equity decreases by $50. A's U.S. net equity as of the close of 1988 is $990 ($1,040–$50). In computing A's dividend equivalent amount for 1988, the $125 of ECEP for 1988 is not increased under paragraph (b)(3)(i) of this section by the full amount of the $50 decrease in U.S. net equity during 1988. Rather, the increase in ECEP resulting from the decrease in U.S. net equity is limited to A's accumulated ECEP as of the beginning of 1988. A had $100 of ECEP for 1987 and a dividend equivalent amount of $60 for that year, so A had $40 of accumulated ECEP as of the beginning of 1988. The increase in ECEP resulting from a decrease in U.S. net equity is thus limited to $40, and the dividend equivalent amount for 1988 is $165 ($125 ECEP + $40 decrease in U.S. net equity).

Example 5. Effect of deficits in ECEP. Foreign corporation A, a calendar year taxpayer, has $150 of accumulated ECEP as of the beginning of 1991 ($200 aggregate ECEP less $50 aggregate dividend equivalent amounts for years preceding 1991). A has U.S. net equity of $450 as of the close of 1990, U.S. net equity of $350 as of the close of 1991 (i.e., a $100 decrease in U.S. net equity) and a $90 deficit in ECEP for 1991. A's dividend equivalent amount is $10 for 1991, i.e., A's deficit of $90 in ECEP for 1991 increased by $100, the decrease in A's U.S. net equity during 1991. A portion of the reduction in U.S. net equity in 1991 ($90) is attributable to A's deficit in ECEP for that year. The reduction in U.S. net equity in 1991 ($100) triggers a dividend equivalent amount only to the extent it exceeds the $90 current year deficit in ECEP for 1991. As of the beginning of 1992, A has $50 of accumulated ECEP (i.e., $110 aggregate ECEP less $60 aggregate dividend equivalent amounts for years preceding 1992).

Example 6. Nimble dividend equivalent amount. Foreign corporation A, a calendar year taxpayer, had a deficit in ECEP of $100 for 1987 and $100 for 1988, and has $90 of ECEP for 1989. A had $2,000 U.S. net equity as of the close of 1988 and has $2,000 U.S. net equity as of the close of 1989. A has a dividend equivalent amount of $90 for 1989, its ECEP for the year, even though it has a net deficit of $110 in ECEP for the period 1987–1989.

(c) *U.S. net equity*—(1) *Definition.* The term ''U.S. net equity'' means the aggregate amount of the U.S. assets (as defined in paragraphs (c)(2) and (d)(1) of this section) of a foreign corporation as of the determination date (as defined in paragraph (c)(3) of this section), reduced (including below zero) by the U.S. liabilities (as defined in paragraph (e) of this section) of the foreign corporation as of the determination date.

(2) *Definition of the amount of a U.S. asset*—(i) *In general.* For purposes of this section, the term ''amount of a U.S. asset'' means the U.S. asset's adjusted basis for purposes of computing earnings and profits (''E&P basis'') multiplied by the proportion of the asset that is treated as a U.S. asset under paragraphs (d) (1) through (4) of this section. The amount of a U.S. asset that is money shall be its face value. See paragraph (d)(6) of this section for rules concerning the computation of the E&P basis of a U.S. asset.

(ii) *Bad debt reserves.* A bank described in section 585(a)(2)(B) (without regard to the second sentence thereof) that uses the reserve method of accounting for bad debts for U.S. federal income tax purposes shall decrease the amount of loans that qualify as U.S. assets by any reserve that is permitted under section 585.

(3) *Definition of determination date.* For purposes of this section, the term ''determination date'' means the close of the day on which the amount of U.S. net equity is required to be determined. Unless otherwise provided, the U.S. net equity of a foreign corporation is required to be determined as of the close of the foreign corporation's taxable year.

(d) *U.S. assets*—(1) *Definition of a U.S. asset*—(i) *General rule.* Except as provided in paragraph (d)(5) of this section, the term ''U.S. asset'' means an asset of a foreign corporation (other than an interest in a partnership, trust, or estate) that is held by the corporation as of the determination date if—

(A) All income produced by the asset on the determination date is ECI (as defined in paragraph (d)(1)(iii) of this section) (or would be ECI if the asset produced income on that date); and

(B) All gain from the disposition of the asset would be ECI if the asset were disposed of on that date and the disposition produced gain.

For purposes of determining whether income or gain from an asset would be ECI under this paragraph (d)(1)(i), it is immaterial whether the asset is of a type that is unlikely to, or cannot, produce income or gain. For example, money may be a U.S. asset although it does not produce income or gain. In the case of an asset that does not produce income, however, the determination of whether income from the asset would be ECI shall be made under the principles of section 864 and the regulations thereunder, but without regard to §1.864–4(c)(2)(iii)(*b*). For purposes of determining whether an asset is a U.S. asset under this paragraph (d)(1), a foreign corporation may presume, unless it has reason to know otherwise, that gain from the sale of personal property (including inventory property) would be U.S. source if gain from the sale of that type of property would ordinarily be attributable to an office or other fixed place of business of the foreign corporation within the United States (within the meaning of section 865(e)(2)).

(ii) *Special rules for assets not described in paragraph (d)(1)(i) of this section.* An asset of a foreign corporation that is held by the corporation as of the determination date and is not described in paragraph (d)(1)(i) of this section shall be treated as a U.S. asset to the extent provided in paragraph (d)(2) of this section (relating to special rules for certain assets, including assets that produce income or gain at least a portion of which is ECI), and in paragraphs (d) (3) and (4) of this section (relating to special rules for interests in a partnership, trust, and estate).

(iii) *Definition of ECI.* For purposes of the regulations under section 884, the term ''ECI'' means income that is effectively connected with the conduct of a trade or business in the United States and income that is treated as effectively connected with the conduct of a trade or business in the United States under any provision of the Code. The term ''ECI'' also includes all income that is or is treated as effectively connected with the conduct of a U.S. trade or business whether or not the income is included in gross income (for example, interest income earned with respect to tax-exempt bonds).

(2) *Special rules for certain assets*—(i) *Depreciable and amortizable property.* An item of depreciable personal property or an item of amortizable intangible property shall be treated as a U.S. asset of a foreign corporation in the same proportion that the amount of the depreciation or amortization with respect to the item of property that is allowable as a deduction, or is includible in cost of goods sold, for the taxable year in computing the effectively connected taxable income of the foreign corporation bears to the total amount of depreciation or amortization computed for the taxable year with respect to the item of property.

(ii) *Inventory.* An item or pool of inventory property (as defined in section 865(i)(1)) shall be treated as a U.S. asset in the same proportion as the amount of gross receipts from the sale or exchange of such property for the three preceding taxable years (or for such part of the three-year period as the corporation has been in existence) that is effectively connected with the conduct of a U.S. trade or business bears to the total amount of gross receipts from the sale or exchange of such property during such period (or part thereof). If a foreign corporation has not sold or exchanged such property during such three-year period (or part thereof), then the property shall be treated as a U.S. asset in the same proportion that the anticipated amount of gross receipts from the sale or exchange of the property that is reasonably anticipated to be ECI bears to the anticipated total amount of gross receipts from the sale or exchange of the property.

(iii) *Installment obligations.* An installment obligation received in connection with an installment sale (as defined in section 453(b)) for which an election under section 453(d) has not been made shall be treated as a U.S. asset to the extent that it is received in connection with the sale of a U.S. asset. If an obligation is received in connection with the sale of an asset that is wholly a U.S. asset, it shall be treated as a U.S. asset in its entirety. If a single obligation is received in connection with the sale of an asset that is in part a U.S. asset under the rules of paragraphs (d) (2) through (4) of this section, or in connection with the sale of several assets including one or more non-U.S. assets, the obligation shall be treated as a U.S. asset in the same proportion as—

(A) The sum of the amount of gain from the installment sale that would be ECI if the obligation were satisfied in full on the determination date and the adjusted basis of the obligation on such date (as determined under section 453B) attributable to the amount of gain that would be ECI bears to

(B) The sum of the total amount of gain from the sale if the obligation were satisfied in full and the adjusted basis of the obligation on such date (as determined under section 453B).

However, the obligation will only be treated as a U.S. asset if the interest income or original issue discount with respect to the obligation is ECI or the foreign corporation elects to treat the interest or original issue discount as ECI in the same proportion that the obligation is treated as a U.S. asset. A foreign corporation may elect to treat interest income or original issue discount as ECI by reporting such interest income or original issue discount as ECI on its income tax return or an amended return for the taxable year. See paragraph (d)(6)(ii) of this section to determine the E&P basis of an installment obligation for purposes of this paragraph (d)(2)(iii).

(iv) *Receivables*—(A) *Receivables arising from the sale or exchange of inventory property*. An account or note receivable (whether or not bearing stated interest) with a maturity not exceeding six months that arises from the sale or exchange of inventory property (as defined in section 865(i)(1)) shall be treated as a U.S. asset in the proportion determined under paragraph (d)(2)(iii) of this section as if the receivable were an installment obligation.

(B) *Receivables arising from the performance of services or leasing of property*. An account or note receivable (whether or not bearing stated interest) with a maturity not exceeding six months that arises from the performance of services or the leasing of property in the ordinary course of a foreign corporation's trade or business shall be treated as a U.S. asset in the same proportion that the amount of gross income represented by the receivable that is ECI bears to the total amount of gross income represented by the receivable. For purposes of this paragraph (d)(2)(iv)(B), the amount of income represented by a receivable shall not include interest income or original issue discount.

(v) *Bank and other deposits*. A deposit or credit balance with a person described in section 871(i)(3) or a Federal Reserve Bank that is interest-bearing shall be treated as a U.S. asset if all income derived by the foreign corporation with respect to the deposit or credit balance during the taxable year is ECI. Any other deposit or credit balance shall only be treated as a U.S. asset if the deposit or credit balance is needed in a U.S. trade or business within the meaning of §1.864–4(c)(2)(iii)(*a*).

(vi) *Debt instruments*. A debt instrument, as defined in section 1275(a)(1) (other than an asset treated as a U.S. asset under any other subdivision of this paragraph (d)) shall be treated as a U.S. asset, notwithstanding the fact that gain from the sale or exchange of the obligation on the determination date would not be ECI, if—

(A) All income derived by the foreign corporation from such obligation during the taxable year is ECI; and

(B) The yield for the period that the instrument was held during the taxable year equals or exceeds the Applicable Federal Rate for instruments of similar type and maturity.

Shares in a regulated investment company that purchases solely instruments that, under this paragraph (d)(2)(vi), would be U.S. assets if held directly by the foreign corporation shall also be treated as a U.S. asset.

(vii) *Securities held by a foreign corporation engaged in a banking, financing or similar business*. Securities described in §1.864–4(c)(5)(ii)(*b*)(*3*) held by a foreign corporation engaged in the active conduct of a banking, financing, or similar business in the United States during the taxable year shall be treated as U.S. assets in the same proportion that income, gain, or loss from such securities is ECI for the taxable year under §1.864–4(c)(5)(ii).

(viii) *Federal income taxes*. An overpayment of Federal income taxes shall be treated as a U.S. asset to the extent that the tax would reduce a foreign corporation's ECEP for the taxable year but for the fact that the tax does not accrue during the taxable year.

(ix) *Losses involving U.S. assets.* A foreign corporation that sustains, with respect to a U.S. asset, a loss for which a deduction is not allowed under section 165 (in whole or in part) because there exists a reasonable prospect of recovering compensation for the loss shall be treated as having a U.S. asset (''loss property'') from the date of the loss in the same proportion that the asset was treated as a U.S. asset immediately before the loss. See paragraph (d)(6)(iv) of this section to determine the E&P basis of the loss property.

(x) *Ruling for involuntary conversion.* If property that is a U.S. asset of a foreign corporation is compulsorily or involuntarily converted into property not similar or related in service or use (within the meaning of section 1033), the foreign corporation may apply to the Commissioner for a ruling to determine its U.S. assets for the taxable year of the involuntary conversion.

(xi) *Examples.* The principles of paragraphs (c) and (d) (1) and (2) of this section are illustrated by the following examples.

Example 1. Depreciable property. Foreign corporation A, a calendar year taxpayer, is engaged in a trade or business in the United States. A owns equipment that is used in its manufacturing business in country X and in the United States. Under §1.861–8, A's depreciation deduction with respect to the equipment is allocated to sales income and is apportioned 70 percent to ECI and 30 percent to income that is not ECI. Under paragraph (d)(2)(ii) of this section, the equipment is 70 percent a U.S. asset. The equipment has an E&P basis of $100 at the beginning of 1993. A's depreciation deduction (for purposes of computing earnings and profits) with respect to the equipment is $10 for 1993. To determine the amount of A's U.S. asset at the close of 1993, the equipment's $90 E&P basis at the close of 1993 is multiplied by 70 percent (the proportion of the asset that is a U.S. asset). The amount of the U.S. asset as of the close of 1993 is $63.

Example 2. U.S. real property interest connected to a U.S. business. FC is a foreign corporation that is a bank, within the meaning of section 585(a)(2)(B) (without regard to the second sentence thereof), and is engaged in the business of taking deposits and making loans through its branch in the United States. In 1996, FC makes a loan in the ordinary course of its lending business in the United States, securing the loan with a mortgage on the U.S. real property being financed by the borrower. In 1997, after the borrower has defaulted on the loan, FC takes title to the real property that secures the loan. On December 31, 1997, FC continues to hold the property, classifying it on its financial statement as *Other Real Estate Owned.* Because all income and gain from the property would be ECI to FC under the principles of section 864(c)(2), the U.S. real property constitutes a U.S. asset within the meaning of paragraph (d) of this section.

Example 3. U.S. real property interest not connected to a U.S. business. Foreign corporation A owns a condominium apartment in the United States. Assume that holding the apartment does not constitute a U.S. trade or business and the foreign corporation has not made an election under section 882(d) to treat income with respect to the property as ECI. The condominium apartment is not a U.S. asset of A because the income, if any, from the asset would not be ECI. However, the disposition by A of the condominium apartment at a gain will give rise to ECEP.

Example 4. Stock in a domestically-controlled REIT. As an investment, foreign corporation A owns stock in a domestically-controlled REIT, within the meaning of section 897(h)(4)(B). Under section 897(h)(2), gain on disposition of stock in the REIT is not treated as ECI. For this reason the stock does not qualify as a U.S. asset under paragraph (d)(1) of this section even if dividend distributions from the REIT are treated as ECI. Thus, A will have a dividend equivalent amount based on the ECEP attributable to a distribution of ECI from the REIT, even if A invests the proceeds from the dividend in additional stock of the REIT. (Stock in a REIT that is not a domestically-controlled REIT is also not a U.S. asset. See §1.884–1(d)(5)).

Example 5. Section 864(c)(7) property. Foreign corporation A is engaged in the equipment leasing business in the United States and Canada. A transfers the equipment leased by its U.S. trade or business to its Canadian business after the equipment is fully depreciated in the United States. The Canadian business sells the equipment two years later. Section 864(c)(7) would treat the gain on the disposition of the equipment by A as taxable under section 882 as if the sale occurred immediately before the equipment was transferred to the Canadian business. The equipment would not be treated as a U.S. asset even if the gain was ECI because the income from the equipment in the year of the sale in Canada would not be ECI.

(3) *Interest in a partnership*—(i) *In general.* A foreign corporation that is a partner in a partnership must take

into account its interest in the partnership (and not the partnership assets) in determining its U.S. assets. For purposes of determining the proportion of the partnership interest that is a U.S. asset, a foreign corporation may elect to use either the asset method described in paragraph (d)(3)(ii) of this section or the income method described in paragraph (d)(3)(iii) of this section.

(ii) *Asset method*—(A) *In general.* A partner's interest in a partnership shall be treated as a U.S. asset in the same proportion that the sum of the partner's proportionate share of the adjusted bases of all partnership assets as of the determination date, to the extent that the assets would be treated as U.S. assets if the partnership were a foreign corporation, bears to the sum of the partner's proportionate share of the adjusted bases of all partnership assets as of the determination date. Generally a partner's proportionate share of a partnership asset is the same as its proportionate share of all items of income, gain, loss, and deduction that may be generated by the asset.

(B) *Non-uniform proportionate shares.* If a partner's proportionate share of all items of income, gain, loss, and deduction that may be generated by a single asset of the partnership throughout the period that includes the taxable year of the partner is not uniform, then, for purposes of determining the partner's proportionate share of the adjusted basis of that asset, a partner must take into account the portion of the adjusted basis of the asset that reflects the partner's economic interest in that asset. A partner's economic interest in an asset of the partnership must be determined by applying the following presumptions. These presumptions may, however, be rebutted if the partner or the Internal Revenue Service shows that the presumption is inconsistent with the partner's true economic interest in the asset during the corporation's taxable year.

(*1*) If a partnership asset ordinarily generates directly identifiable income, a partner's economic interest in the asset is determined by reference to its proportionate share of income that may be generated by the asset for the partnership's taxable year ending with or within the partner's taxable year.

(*2*) If a partnership asset ordinarily generates current deductions and ordinarily generates no directly identifiable income, for example because the asset contributes equally to the generation of all the income of the partnership (such as an asset used in general and administrative functions), a partner's economic interest in the asset is determined by reference to its proportionate share of the total deductions that may be generated by the asset for the partnership's taxable year ending with or within the partner's taxable year.

(*3*) For other partnership assets not described in paragraph (d)(3)(ii)(B) (*1*) or (*2*) of this section, a partner's economic interest in the asset is determined by reference to its proportionate share of the total gain or loss to which it would be entitled if the asset were sold at a gain or loss in the partnership's taxable year ending with or within the partner's taxable year.

(C) *Partnership election under section 754.* If a partnership files an election in accordance with section 754, then for purposes of this paragraph (d)(3)(ii), the basis of partnership property shall reflect adjustments made pursuant to sections 734 (relating to distributions of property to a partner) and 743 (relating to the transfer of an interest in a partnership). However, adjustments made pursuant to section 743 may be made with respect to a transferee partner only.

(iii) *Income method.* Under the income method, a partner's interest in a partnership shall be treated as a U.S. asset in the same proportion that its distributive share of partnership ECI for the partnership's taxable year that ends with or within the partner's taxable year bears to its distributive share of all partnership income for that taxable year.

(iv) *Manner of election*—(A) *In general.* In determining the proportion of a foreign corporation's interest in a partnership that is a U.S. asset, a foreign corporation must elect one of the methods described in paragraph (d)(3) of this section on a timely filed return for the first taxable year beginning on or after the effective date of this section. An amended return does not qualify for this purpose, nor shall the provisions of § 301.9100–1 of this chapter and any guidance promulgated thereunder apply. An election shall be made by the foreign corporation calculating its U.S. assets in accordance with the method elected. An elected method must be used for a minimum period of five years before the foreign corporation may elect a different method. To change an election before the end of the requisite five-year period, a foreign corporation must obtain the consent of the Commissioner or her delegate. The Commissioner or her delegate will generally consent to a foreign corporation's request to change its election only in rare and unusual circumstances. A foreign corporation that is a partner in more than one partnership is not required to elect to use the same method for each partnership interest.

(B) *Elections with tiered partnerships.* If a foreign corporation elects to use the asset method with respect to an interest in a partnership, and that partnership is a partner in a lower-tier partnership, the foreign corporation may apply either the asset method or the income method to determine the proportion of the upper-tier partnership's interest in the lower-tier partnership that is a U.S. asset.

(v) *Failure to make proper election.* If a foreign corporation, for any reason, fails to make an election to use one of the methods required by paragraph (d)(3) of this section in a timely fashion, the director of field operations or the Assistant Commissioner (International) may make the election on behalf of the foreign corporation and such election shall be binding as if made by that corporation.

(vi) *Special rule for determining a partner's adjusted basis in a partnership interest.* For purposes of paragraphs (d)(3) and (6) of this section, a partner's adjusted basis in a partnership interest shall be the partner's basis in such interest (determined under section 705) reduced by the partner's share of the liabilities of the partnership determined under section 752 and increased by a proportionate share of each liability of the partnership equal to the partner's proportionate share of the expense, for income tax purposes, attributable to such liability for the taxable year. A partner's adjusted basis in a partnership interest cannot be less than zero.

(vii) *E&P basis of a partnership interest.* See paragraph (d)(6)(iii) of this section for special rules governing the calculation of a foreign corporation's E&P basis in a partnership interest.

(viii) The application of this paragraph (d)(3) is illustrated by the following examples:

Example 1. General rule. (i) *Facts.* Foreign corporation, FC, is a partner in partnership ABC, which is engaged in a trade or business within the United States. FC and ABC are both calendar year taxpayers. ABC owns and manages two office buildings located in the United States, each with an adjusted basis of $50. ABC also owns a non-U.S. asset with an adjusted basis of $100. ABC has no liabilities. Under the partnership agreement, FC has a 50 percent interest in the capital of ABC and a 50 percent interest in all items of income, gain, loss, and deduction that may be generated by the partnership's assets. FC's adjusted basis in ABC is $100. In determining the proportion of its interest in ABC that is a U.S. asset, FC elects to use the asset method described in paragraph (d)(3)(ii) of this section.

(ii) *Analysis.* FC's interest in ABC is treated as a U.S. asset in the same proportion that the sum of FC's proportionate share of the adjusted bases of all ABC's U.S. assets (50% of $100), bears to the sum of FC's proportionate share of the adjusted bases of all of ABC's assets (50% of $200). Under the asset method, the amount of FC's interest in ABC that is a U.S. asset is $50 ($100 × $50/$100).

Example 2. Special allocation of gain with respect to real property. (i) *Facts.* The facts are the same as in *Example 1*, except that under the partnership agreement, FC is allocated 20 percent of the income from the partnership property but 80 percent of the gain on disposition of the partnership property.

(ii) *Analysis.* Assuming that the buildings ordinarily generate directly identifiable income, there is a rebuttable presumption under paragraph (d)(3)(ii)(B)(*1*) of this section that FC's proportionate share of the adjusted basis of the buildings is FC's proportionate share of the income generated by the buildings (20%) rather than the total gain that it would be entitled to under the partnership agreement (80%) if the buildings were sold at a gain on the determination date. Thus, the sum of FC's proportionate share of the adjusted bases in ABC's U.S. assets (the buildings) is presumed to be $20 [(20% of $50) + (20% of $50)]. Assuming that the non-U.S. asset is not income-producing and does not generate current deductions, there is a rebuttable presumption under paragraph (d)(3)(ii)(B)(*3*) of this section that FC's proportionate share of the adjusted basis of that asset is FC's interest in the gain on the disposition of the asset (80%) rather than its proportionate share of the income that may be generated by the asset (20%). Thus, FC's proportionate share of the adjusted basis of ABC's non-U.S. asset is presumed to be $80 (80% of $100). FC's proportionate share of the adjusted bases of all of the assets of ABC is $100 ($20 + $80). The amount of FC's interest in ABC that is a U.S. asset is $20 ($100 × $20/$100).

Example 3. Tiered partnerships (asset method). (i) *Facts.* The facts are the same as in *Example 1,* except that FC's adjusted basis in ABC is $175 and ABC also has a 50 percent interest in the capital of partnership DEF. DEF owns and operates a commercial shopping center in the United States with an adjusted basis of $200 and also owns non-U.S. assets with an adjusted basis of $100. DEF has no liabilities. ABC's adjusted basis in its interest in DEF is $150 and ABC has a 50 percent interest in all the items of income, gain, loss and deduction that may be generated by the assets of DEF.

(ii) *Analysis.* Because FC has elected to use the asset method described in paragraph (d)(3)(ii) of this section, it must determine what proportion of ABC's partnership interest in DEF is a U.S. asset. As permitted by paragraph (d)(3)(iv)(B) of this section, FC also elects to use the asset method with respect to ABC's interest in DEF. ABC's interest in DEF is treated as a U.S. asset in the same proportion that the sum of ABC's proportionate share of the adjusted bases of all DEF's U.S. assets (50% of $200), bears to the sum of ABC's proportionate share of the adjusted bases of all of DEF's assets (50% of $300). Thus, the amount of ABC's interest in DEF that is a U.S. asset is $100 ($150 × $100/$150). FC must then apply the rules of paragraph (d)(3)(ii) of this section to all the assets of ABC, including ABC's interest in DEF that is treated in part as a U.S. asset ($100) and in part as a non-U.S. asset ($50). FC's interest in ABC is treated as a U.S. asset in the same proportion that the sum of FC's proportionate share of the adjusted bases of the U.S. assets of ABC (including ABC's interest in DEF), bears to the sum of FC's proportionate share of the adjusted bases of all ABC's assets (including ABC's interest in DEF). Thus, the amount of FC's interest in ABC that is a U.S. asset is $100 (FC's adjusted basis in ABC ($175) multiplied by FC's proportionate share of the sum of the adjusted bases of ABC's U.S. assets ($100)) over FC's proportionate share of the sum of the adjusted bases of ABC's assets ($175)).

Example 4. Tiered partnerships (income method). (i) *Facts.* The facts are the same as in *Example 3,* except that FC has elected to use the income method described in paragraph (d)(3)(iii) of this section to determine the proportion of its interest in ABC that is a U.S. asset. The two office buildings located in the United States generate $60 of income that is ECI for the taxable year. The non-U.S. asset is not-income producing. In addition ABC's distributive share of income from DEF consists of $40 of income that is ECI and $140 of income that is not ECI.

(ii) *Analysis.* Because FC has elected to use the income method it does need to determine what proportion of ABC's partnership interest in DEF is a U.S. asset. FC's interest in ABC is treated as a U.S. asset in the same proportion that its distributive share of ABC's income for the taxable year that is ECI ($50) ($30 earned directly by ABC + $20 distributive share from DEF) bears to its distributive share of all ABC's income for the taxable year ($55) ($30 earned directly by ABC + $25 distributive share from DEF). Thus, FC's interest in ABC that is a U.S. asset is $159 ($175 × $50/$55).

(4) *Interest in a trust or estate*—(i) *Estates and non-grantor trusts.* A foreign corporation that is a beneficiary of a trust or estate shall not be treated as having a U.S. asset by virtue of its interest in the trust or estate.

(ii) *Grantor trusts.* If, under sections 671 through 678, a foreign corporation is treated as owning a portion of a trust that includes all the income and gain that may be generated by a trust asset (or pro rata portion of a trust asset), the foreign corporation will be treated as owning the trust asset (or pro rata portion thereof) for purposes of determining its U.S. assets under this section.

(5) *Property that is not a U.S. asset*—(i) *Property that does not give rise to ECEP.* Property described in paragraphs (d) (1) through (4) of this section shall not be treated as a U.S. asset of a foreign corporation if, on the determination date, income from the use of the property, or gain or loss from the disposition of the property, would be described in paragraph (f)(2) of this section (relating to certain income that does not produce ECEP).

(ii) *Assets acquired to increase U.S. net equity artificially.* U.S. assets shall not include assets acquired or used by a foreign corporation if one of the principal purposes of such acquisition or use is to increase artificially the U.S. assets of a foreign corporation on the determination date. Whether assets are acquired or used for such purpose will depend upon all the facts and circumstances of each case. Factors to be considered in determining whether one of the principal purposes in acquiring or using an asset is to increase artificially the U.S. assets of a foreign corporation include the length of time during which the asset was used in a U.S. trade or business, whether the asset was acquired from, or disposed of to, a related person, and whether the aggregate value of the U.S. assets of the foreign corporation increased temporarily on the determination date. For purposes of this paragraph (d)(5)(ii), to be one of the principal purposes, a purpose must be important, but it is not necessary that it be the primary purpose.

(iii) *Interbranch transactions.* A transaction of any type between separate offices or branches of the same taxpayer does not create a U.S. asset.

(6) *E&P basis of a U.S. asset*—(i) *General rule.* The E&P basis of a U.S. asset for purposes of this section is its adjusted basis for purposes of computing the foreign corporation's earnings and profits. In determining the E&P basis of a U.S. asset, the adjusted basis of the asset (for purposes of computing taxable income) must be increased or decreased to take into account inclusions of income or gain, and deductions or similar charges, that affect the basis of the asset where such items are taken into account in a different manner for purposes of computing earnings and profits than for purposes of computing taxable income. For example, if section 312 (k) requires that depreciation with respect to a U.S. asset be determined using the straight line method for purposes of computing earnings and profits, but depreciation with respect to the asset is determined using a different method for purposes of computing taxable income, the E&P basis of the property for purposes of this section must be computed using the straight line method of depreciation.

(ii) *Installment obligations*—(A) *Sales in taxable year beginning on or after January 1, 1987.* For purposes of this section, the E&P basis of an installment obligation described in paragraph (d)(2)(iii) of this section that arises in connection with an installment sale occurring in a taxable year beginning on or after January 1, 1987, shall equal the sum of the total amount of gain from the sale if the obligation were satisfied in full and the adjusted basis of the property sold as of the date of sale, reduced by payments received with respect to the obligation that are not interest or original issue discount. See paragraph (j)(2)(ii) of this section, however, for a special E&P basis rule for an installment obligation arising in connection with a sale of a U.S. asset by a foreign corporation described in section 312(k)(4), where such sale occurs in a taxable year beginning in 1987.

(B) *Sales in taxable year prior to January 1, 1987.* For purposes of this section, the E&P basis of an installment obligation described in paragraph (d)(2)(iii) of this section that arises in connection with an installment sale occurring in a taxable year beginning before January 1, 1987, shall equal zero.

(iii) *Computation of E&P basis in a partnership.* For purposes of this section, a foreign corporation's E&P basis in a partnership interest shall be the foreign corporation's adjusted basis in such interest (as determined under paragraph (d)(3)(vi) of this section), further adjusted to take into account any differences between the foreign corporation's distributive share of items of partnership income, gain, loss, and deduction for purposes of computing the taxable income of the foreign corporation and the foreign corporation's distributive share of items of partnership income, gain, loss, and deductions for purposes of computing the earnings and profits of the foreign corporation.

(iv) *Computation of E&P basis of a loss property.* The E&P basis of a loss property (as defined in paragraph (d)(2)(ix) of this section) shall equal the E&P basis, immediately before the loss, of the U.S. asset with respect to which the loss was sustained, reduced (but not below zero) by—

(A) The amount of any deduction claimed under section 165 by the foreign corporation with respect to the loss for earnings and profits purposes; and

(B) Any compensation received with respect to the loss.

(v) *Computation of E&P basis of financial instruments.* [Reserved]

(vi) *Example.* The application of paragraph (d)(6)(ii) of this section is illustrated by the following example.

Example. Sale in taxable year beginning on or after January 1, 1987. Foreign corporation A, a calendar year taxpayer, sells a U.S. asset on the installment method in 1993. Under the terms of the sale, A is to receive $100, payable in ten annual installments of $10 beginning in 1994, plus an arm's-length rate of interest on the unpaid balance of the sales price. A's adjusted basis in the property sold is $70. The obligation received in connection with the installment sale is treated as a U.S. asset with an E&P basis of $100 ($30 (the amount of gain from the sale if the obligation were satisfied in full) + $70 (the adjusted basis of the property sold)). If A receives a payment of $10 (not including interest) in 1994 with respect to the obligation, the obligation is treated as a U.S. asset with an E&P basis of $90 ($100 − $10) as of the close of 1994.

(e) *U.S. liabilities.* The term *U.S. liabilities* means the amount of liabilities determined under paragraph (e)(1) of this section decreased by the amount of liabilities determined under paragraph (e)(3) of this section, and increased by the amount of liabilities determined under paragraph (e)(2) of this section.

(1) *Liabilities based on §1.882–5.* The amount of liabilities determined under this paragraph (e)(1) is the amount of U.S.-connected liabilities of a foreign corporation under §1.882–5 if the U.S.-connected liabilities were computed using the assets and liabilities of the foreign corporation as of the determination date (rather than the average of such assets and liabilities for the taxable year) and without regard to paragraph (e)(3) of this section.

(2) *Additional liabilities*—(i) *Insurance reserves.* The amount of liabilities determined under this paragraph (e)(2)(i) is the amount (as of the determination date) of the total insurance liabilities on United States business (within the meaning of section 842(b)(2)(B)) of a foreign corporation described in section 842(a) (relating to foreign corporations carrying on an insurance business in the United States) to the extent that such liabilities are not otherwise treated as U.S. liabilities by reason of paragraph (e)(1) of this section.

(ii) *Liabilities described in §1.882–5(a)(1)(ii).* The amount of liabilities determined under this paragraph (e)(2)(ii) is the amount (as of the determination date) of liabilities described in §1.882–5(a)(1)(ii) (relating to liabilities giving rise to interest expense that is directly allocated to income from a U.S. asset).

(3) *Election to reduce liabilities*—(i) *General rule.* The amount of liabilities determined under this paragraph (e)(3) is the amount by which a foreign corporation elects to reduce its liabilities under paragraph (e)(1) of this section.

(ii) *Limitation.* For any taxable year, a foreign corporation may elect to reduce the amount of its liabilities determined under paragraph (e)(1) of this section by an amount that does not exceed the lesser of the amount of U.S. liabilities as of the determination date, or the amount of U.S. liability reduction needed to reduce a dividend equivalent amount as of the determination date to zero.

(iii) *Effect of election on interest deduction and branch-level interest tax.* A foreign corporation that elects to reduce its liabilities under this paragraph (e)(3) must, for purposes of computing the amount of its interest apportioned to ECI under §1.882–5, reduce its U.S.-connected liabilities for the taxable year of the election by the amount of the reduction in liabilities under this paragraph (e)(3). The reduction of its U.S.-connected liabilities will also require a corresponding decrease in the amount of its interest apportioned to ECI under §1.882–5 for purposes of §1.884–4(a) and for all other Code sections for which the amount of interest apportioned under §1.882–5 is relevant.

(iv) *Method of election.* A foreign corporation that elects the benefits of this paragraph (e)(3) for a taxable year shall attach a statement to its return for the taxable year that it has elected to reduce its liabilities for the taxable year under this paragraph (e)(3) and that it has reduced the amount of its U.S.-connected liabilities as provided in paragraph (e)(3)(iii) of this section and shall indicate the amount of such reductions on such attachment. The cumulative amount of all U.S. liability reductions is shown on Schedule I (Form 1120–F) in addition to the separate elections attached to the timely filed return. An election under this paragraph (e)(3) must be made before the due date (including extensions) for the foreign corporation's income tax return for the taxable year.

(v) *Effect of election on complete termination.* If a foreign corporation completely terminates its U.S. trade or business (within the meaning of § 1.884–2T (a)(2)), notwithstanding § 1.884–2T(a), the foreign corporation will be subject to tax on a dividend equivalent amount that equals the lesser of—

(A) The foreign corporation's accumulated ECEP that is attributable to an election to reduce liabilities; or

(B) The amount by which the corporation elected to reduce liabilities at the end of the taxable year preceding the year of complete termination.

For purposes of the preceding sentence, accumulated ECEP is attributable to an election to reduce liabilities to the extent that the ECEP was accumulated because of such an election rather than because of an increase in U.S. assets. For example, if a foreign corporation did not have positive ECEP in any year for which an election was made, it would not be required to include an amount as a dividend equivalent amount under this paragraph (e)(3)(v) because any accumulated ECEP that it may have is not attributable to an election to reduce liabilities.

(4) *Artificial decrease in U.S. liabilities.* If a foreign corporation repays or otherwise decreases its U.S. liabilities and one of the principal purposes of such decrease is to decrease artificially its U.S. liabilities on the determination date, then such decrease shall not be taken into account for purposes of computing the foreign corporation's U.S. net equity. Whether the U.S. liabilities of a foreign corporation are artificially decreased will depend on all the facts and circumstances of each case. Factors to be considered in determining whether one of the principal purposes for the repayment or decrease of the liabilities is to decrease artificially the U.S. liabilities of a foreign corporation shall include whether the aggregate liabilities are temporarily decreased on or before the determination date by, for example, the repayment of liabilities, or U.S. liabilities are temporarily decreased on or before the determination date by the acquisition with contributed funds of passive-type assets that are not U.S. assets. For purposes of this paragraph (e)(4), to be one of the principal purposes, a purpose must be important, but it is not necessary that it be the primary purpose.

(5) *Examples.* The application of this paragraph (e) is illustrated by the following examples.

Example 1. General rule for computation of U.S. liabilities. As of the close of 1997, foreign corporation A, a calendar year taxpayer computes its U.S.-connected liabilities under § 1.882–5(c) using its actual ratio of liabilities to assets. For purposes of computing its U.S.- connected liabilities under § 1.882–5(c), A must determine the average total value of its assets that are U.S. assets. Assume that the average value of such assets is $100, while the amount of such assets as of the close of 1997 is $125. For purposes of § 1.882–5(c)(2), A must determine the ratio of the average of its worldwide liabilities for the year to the average total value of worldwide assets for the taxable year. Assume that A's average liabilities-to-assets ratio under § 1.882–5(c)(2) is 55 percent, while its liabilities-to-assets ratio at the close of 1997 is only 50 percent. Thus, assuming no further adjustments under paragraph (e)(3) of this section, A's U.S.-connected liabilities for purposes of § 1.882–5 are $55 ($100 × 55%). However, A's U.S. liabilities are $62.50 for purposes of this section, the value of its assets determined under § 1.882–5(b)(2) as of the close of December ($125) multiplied by the liabilities-to-assets ratio of (50%) as of such date.

Example 2. Election made to reduce liabilities. (i) As of the close of 2007, foreign corporation A, a real estate company, owns U.S. assets with an E&P basis of $1000. A has $800 of liabilities under paragraph (e)(1) of this section. A has accumulated ECEP of $500 and in 2008, A has $60 of ECEP that it intends to retain for future expansion of its U.S. trade or business. A elects under paragraph (e)(3) of this section to reduce its liabilities by $60 from $800 to $740. As a result of the election, assuming A's U.S. assets and U.S. liabilities would otherwise have remained constant, A's U.S. net equity as of the close of 2007 will increase by the amount of the decrease in liabilities ($60) from $200 to $260 and its ECEP will be reduced to zero. Under paragraph (e)(3)(iii) of this section, A's interest expense for the taxable year is reduced by the amount of interest attributable to $60 of liabilities and A's excess interest is reduced by the same amount. A's taxable income and ECEP are increased by the amount of the reduction in interest expense attributable to the liabilities, and A may make an election under paragraph (e)(3) of this section to further reduce its liabilities, thus increasing its

U.S. net equity and reducing the amount of additional ECEP created for the election.

(ii) In 2009, assuming A again has $60 of ECEP, A may again make the election under paragraph (e)(3) to reduce its liabilities. However, assuming A's U.S. assets and liabilities under paragraph (e)(1) of this section remain constant, A will need to make an election to reduce its liabilities by $120 to reduce to zero its ECEP in 2009 and to continue to retain for expansion (without the payment of the branch profits tax) the $60 of ECEP earned in 2008. Without an election to reduce liabilities, A's dividend equivalent amount for 2009 would be $120 ($60 of ECEP plus the $60 reduction in U.S. net equity from $260 to $200). If A makes the election to reduce liabilities by $120 (from $800 to $680), A's U.S. net equity will increase by $60 (from $260 at the end of the previous year to $320), the amount necessary to reduce its ECEP to $0. However, the reduction of liabilities will itself create additional ECEP subject to section 884 because of the reduction in interest expense attributable to the $120 of liabilities. A can make the election to reduce liabilities by $120 without exceeding the limitation on the election provided in paragraph (e)(3)(ii) of this section because the $120 reduction does not exceed the amount needed to treat the 2009 and 2008 ECEP as reinvested in the net equity of the trade or business within the United States.

(iii) If A terminates its U.S. trade or business in 2009 in accordance with the rules in §1.884–2T(a), A would not be subject to the branch profits tax on the $60 of ECEP earned in that year. Under paragraph (e)(3)(v) of this section, however, it would be subject to the branch profits tax on the portion of the $60 of ECEP that it earned in 2008 that became accumulated ECEP because of an election to reduce liabilities.

(f) *Effectively connected earnings and profits*—(1) *In general.* Except as provided in paragraph (f)(2) of this section and as modified by §1.884–2T (relating to the incorporation or complete termination of a U.S. trade or business or the reorganization or liquidation of a foreign corporation or its domestic subsidiary), the term "effectively connected earnings and profits" ("ECEP") means the earnings and profits (or deficits therein) determined under section 312 and this paragraph (f) that are attributable to ECI (within the meaning of paragraph (d)(1)(iii) of this section). Because the term "ECI" includes income treated as effectively connected, income that is ECI under section 842(b) (relating to minimum net investment income of an insurance business) or 864(c)(7) (relating to gain from property formerly held for use in a U.S. trade or business) gives rise to ECEP. ECEP also includes earnings and profits attributable to ECI of a foreign corporation earned through a partnership, and through a trust or estate. For purposes of section 884, gain on the sale of a U.S. real property interest by a foreign corporation that has made an election to be treated as a domestic corporation under section 897(i) will also give rise to ECEP. ECEP is not reduced by distributions made by the foreign corporation during any taxable year or by the amount of branch profits tax or tax on excess interest (as defined in §1.884–4(a)(2)) paid by the foreign corporation. Earnings and profits are treated as attributable to ECI even if the earnings and profits are taken into account under section 312 in an earlier or later taxable year than the taxable year in which the ECI is taken into account.

(2) *Income that does not produce ECEP.* The term "ECEP" does not include any earnings and profits attributable to—

(i) Income excluded from gross income under section 883(a)(1) or 883(a)(2) (relating to certain income derived from the operation of ships or aircraft);

(ii) Income that is ECI by reason of section 921(d) or 926(b) (relating to certain income of a FSC and certain dividends paid by a FSC to a foreign corporation or nonresident alien) that is not otherwise ECI;

(iii) Gain on the disposition of a U.S. real property interest described in section 897(c)(1)(A)(ii) (relating to certain interests in a domestic corporation);

(iv) Income that is ECI by reason of section 953(c)(3)(C) (relating to certain income of a captive insurance company that a corporation elects to treat as ECI) that is not otherwise ECI;

(v) Income that is exempt from tax under section 892 (relating to certain income of foreign governments); and

(vi) Income that is ECI by reason of section 882(e) (relating to certain interest income of banks organized under the laws of a possession of the United States) that is not otherwise ECI.

(3) *Allocation of deductions attributable to income that does not produce ECEP.* In determining the amount of a foreign corporation's ECEP for the taxable year, deductions and other adjustments shall be allocated and apportioned

under the principles of §1.861–8 between ECI that gives rise to ECEP and income described in paragraph (f)(2) of this section (relating to income that is ECI but does not give rise to ECEP).

(4) *Examples.* The principles of paragraph (f) of this section are illustrated by the following examples.

Example 1. Tax-exempt income. Foreign corporation A owns a tax-exempt municipal bond that is a U.S. asset as of the close of its 1989 taxable year. The municipal bond gives rise in 1989 to ECI (even though the income is excluded from gross income under section 103(a) and is not gross income of a foreign corporation by reason of section 882(b)), and therefore gives rise to ECEP in 1989.

Example 2. Income exempt under a treaty. Foreign corporation A derives ECI that constitutes business profits that are not attributable to a permanent establishment maintained by A in the United States. The ECI is exempt from taxation under section 882(a) by reason of an income tax treaty and section 894(a). The income nevertheless gives rise to ECEP under this paragraph (f). However, a dividend equivalent amount attributable to such ECEP may be exempt from the branch profits tax by reason of paragraph (g) of this section (relating to the application of the branch profits tax to corporations that are residents of countries with which the United States has an income tax treaty).

(g) *Corporations resident in countries with which the United States has an income tax treaty*—(1) *General rule.* Except as provided in paragraph (g)(2) of this section, a foreign corporation that is a resident of a country with which the United States has an income tax treaty in effect for a taxable year in which it has a dividend equivalent amount and that meets the requirements, if any, of the limitation on benefits provisions of such treaty with respect to the dividend equivalent amount shall not be subject to the branch profits tax on such amount (or will qualify for a reduction in the amount of tax with respect to such amount) only if—

(i) The foreign corporation is a qualified resident of such country for the taxable year, within the meaning of §1.884–5(a); or

(ii) The limitation on benefits provision, or an amendment to that provision, entered into force after December 31, 1986.

If, after application of §1.884–5(e)(4)(iv), a foreign corporation is a qualified resident under §1.884–5(e) (relating to the active trade or business test) only with respect to one of its trades or businesses in the United States, i.e., the trade or business that is an integral part of its business conducted in its country of residence, and not with respect to another, the rules of this paragraph shall apply only to that portion of its dividend equivalent amount attributable to the trade or business for which the foreign corporation is a qualified resident.

(2) *Special rules for foreign corporations that are qualified residents on the basis of their ownership*—(i) *General rule.* A foreign corporation that, in any taxable year, is a qualified resident of a country with which the United States has an income tax treaty in effect solely by reason of meeting the requirements of §1.884–5 (b) and (c) (relating, respectively, to stock ownership and base erosion) shall be exempt from the branch profits tax or subject to a reduced rate of branch profits tax under paragraph (g)(1) of this section with respect to the portion of its dividend equivalent amount for the taxable year attributable to accumulated ECEP only if the foreign corporation is a qualified resident of such country within the meaning of §1.884–5(a) for the taxable years includable, in whole or in part, in a consecutive 36-month period that includes the taxable year of the dividend equivalent amount. A foreign corporation that fails the 36-month test described in the preceding sentence shall be exempt from the branch profits tax or subject to the branch profits tax at a reduced rate under paragraph (g)(1) of this section with respect to accumulated ECEP (determined on a last-in-first-out basis) accumulated only during prior years in which the foreign corporation was a qualified resident of such country within the meaning of §1.884–5(a).

(ii) *Rules of application.* A foreign corporation that has not satisfied the 36-month test as of the close of the taxable year of the dividend equivalent amount but satisfies the test with respect to such dividend equivalent amount by meeting the 36-month test by the close of the second taxable year succeeding the taxable year of the dividend equivalent amount shall be subject to the branch profits tax for the year of the dividend equivalent amount without regard to paragraph (g)(1) of this section on the portion of the dividend equivalent amount attributable to accumulated ECEP derived in a taxable year in which the foreign corporation was not a qualified resident within the meaning of § 1.884–5(a). Upon meeting the 36-month test, the foreign corporation shall be entitled to claim by amended return a refund of the tax paid with respect to the dividend equivalent amount in excess of the branch profits tax calculated by taking into account paragraph (g)(2)(i) of this section, provided the foreign corporation establishes in the amended return for the taxable year that it has met the requirements of such paragraph. For purposes of section 6611 (dealing with interest on overpayments), any overpayment of branch profits tax by reason of this paragraph (g)(2)(ii) shall be deemed not to have been made before the filing date for the taxable year in which the foreign corporation establishes that it has met the 36-month test.

(iii) *Example.* The application of this paragraph (g)(2) is illustrated by the following example.

Example. (i) Foreign corporation A, a calendar year taxpayer, is a resident of the United Kingdom. A has a dividend equivalent amount for its taxable year 1991 of $300, of which $100 is attributable to 1991 ECEP and $200 to accumulated ECEP. A is a qualified resident for its taxable year 1991 because for that year it meets the requirements of § 1.884–5 (b) and (c), relating, respectively, to stock ownership and base erosion. For 1991 A does not meet the requirements of § 1.884–5 (d), (e), or (f) for qualified residence. A is not a qualified resident of the United Kingdom for any taxable year prior to 1990 but is a qualified resident for its taxable years 1990 and 1992.

(ii) Because A is a qualified resident for the 3-year period (1990, 1991, and 1992) that includes the taxable year of the dividend equivalent amount (1991), A satisfies the 36-month test of this paragraph (g)(2) and no branch profits tax is imposed on the total $300 dividend equivalent amount. However, since A was not a qualified resident for any taxable year prior to 1990 and therefore cannot establish that it has satisfied the 36-month test until the taxable year following the year of the dividend equivalent amount, A must pay the branch profits tax for its taxable year 1991 with respect to the portion of the dividend equivalent amount attributable to accumulated ECEP relating to years prior to 1990 without regard to paragraph (g)(1) of this section. A may file for a refund of the branch profits tax paid with respect to its 1991 taxable year at any time after it establishes that it is a qualified resident for its 1992 taxable year.

(3) *Exemptions for foreign corporations resident in certain countries with income tax treaties in effect on January 1, 1987.* The branch profits tax shall not be imposed on the portion of the dividend equivalent amount with respect to which a foreign corporation satisfies the requirements of paragraphs (g) (1) and (2) of this section for a country listed below, so long as the income tax treaty between the United States and that country, as in effect on January 1, 1987, remains in effect, except to the extent the treaty is modified on or after January 1, 1987, to expressly provide for the imposition of the branch profits tax:

Aruba	Jamaica
Austria	Japan
Belgium	Korea
People's Republic of China	Luxembourg
Cyprus	Malta
Denmark	Morocco
Egypt	Netherlands
Finland	Netherlands Antilles
Germany	Norway
Greece	Pakistan
Hungary	Philippines
Iceland	Sweden
Ireland	Switzerland
Italy	United Kingdom

(4) *Modifications with respect to other income tax treaties*—(i) *Limitation on rate of tax*—(A) *General rule.* If, under paragraphs (g) (1) and (2) of this section, a corporation qualifies for a reduction in the amount of the branch profits tax and paragraph (g)(3) of this section does not apply, the rate of tax shall be the rate of tax on branch profits specified in the treaty between the United States and the corporation's country of residence or, if no rate of tax on branch profits is specified, the rate of tax that would apply under such treaty to dividends paid to the foreign corporation by a wholly-owned domestic corporation.

(B) *Certain treaties in effect on January 1, 1987.* The branch profits tax shall generally be imposed at the following rates on the portion of the dividend equivalent amount with respect to which a foreign corporation satisfies the requirements of paragraphs (g) (1) and (2) of this section for a country listed below, for as long as the relevant provisions of those income tax treaties remain in effect and are not modified or superseded by subsequent agreement:

Australia (15%)	Romania (10%)
Barbados (5%)	South Africa (30%)
Canada (10%)	Trinidad & Tobago (10%)
France (5%)	U.S.S.R. (30%)
New Zealand (5%)	
Poland (5%)	

However, for special rates imposed on corporations resident in France and Trinidad & Tobago that have certain amounts of dividend and interest income, see the dividend articles of the income tax treaties with those countries.

(ii) *Limitations other than rate of tax.* If, under paragraphs (g) (1) and (2) of this section, a foreign corporation qualifies for a reduction in the amount of branch profits tax and paragraph (g) (3) of this section does not apply, then—

(A) The foreign corporation shall be entitled to the benefit of any limitations on imposition of a tax on branch profits (in addition to any limitations on the rate of tax) contained in the treaty; and

(B) No branch profits tax shall be imposed with respect to a dividend equivalent amount out of ECEP or accumulated ECEP of the foreign corporation unless the ECEP or accumulated ECEP is attributable to a permanent establishment in the United States or, if not otherwise prohibited under the treaty, to gain from the disposition of a U.S. real property interest described in section 897(c)(1)(A)(i), except to the extent the treaty specifically permits the imposition of the branch profits tax on such earnings and profits.

No article in such treaty shall be construed to provide any limitations on imposition of the branch profits tax other than as provided in this paragraph (g)(4).

(iii) *Computation of the dividend equivalent amount if a foreign corporation has both ECEP attributable to a permanent establishment and not attributable to a permanent establishment.* To determine the dividend equivalent amount of a foreign corporation out of ECEP that is attributable to a permanent establishment, the foreign corporation may only take into account its U.S. assets, U.S. liabilities, U.S. net equity and ECEP attributable to its permanent establishment. Thus, a foreign corporation may not reduce the amount of its ECEP attributable to its permanent establishment by reinvesting all or a portion of that amount in U.S. assets not attributable to the permanent establishment.

(iv) *Limitations under the Canadian treaty.* The limitations on the imposition of the branch profits tax under the Canadian treaty include, but are not limited to, those described in paragraphs (g)(4)(iv) (A) and (B).

(A) *Effect of deficits in earnings and profits.* In the case of a foreign corporation that is a qualified resident of Canada, the dividend equivalent amount for any taxable year shall not exceed the foreign corporation's accumulated ECEP as of the beginning of the taxable year plus the corporation's ECEP for the taxable year. Thus, for example, if a foreign corporation that is a qualified resident of Canada has a deficit in accumulated ECEP of $200 as of the beginning of the taxable year and ECEP of $100 for the taxable year, it will have no dividend equivalent amount for the taxable year because it would have a cumulative deficit in ECEP of $100 as of the close of the taxable year. For purposes of this paragraph (g)(4)(iii)(A), any net deficit in accumulated earnings and profits attributable to taxable years beginning before January 1, 1987, shall be includible in determining accumulated ECEP.

(B) *One-time exemption of Canadian $500,000—(1) General rule.* In the case of a foreign corporation that is a qualified resident of Canada, the branch profits tax shall be imposed only with respect to that portion of the dividend equivalent amount for the taxable year that, when translated into Canadian dollars and added to the dividend equivalent amounts for preceding taxable years translated into Canadian dollars, exceeds Canadian $500,000. The value of the dividend equivalent amount in Canadian currency shall be determined by translating the ECEP for each taxable year that is includible in the dividend equivalent amount (as determined in U.S. dollars under the currency translation method used in determining the foreign corporation's taxable income for U.S. tax purposes) by the weighted average exchange rate for the taxable year (determined under the rules of section 989(b)(3)) during which the earnings and profits were derived.

(*2*) *Reduction in amount of exemption in the case of related corporations.* The amount of a foreign corporation's exemption under this paragraph (g)(4)(iii)(B) shall be reduced by the amount of any exemption that reduced the dividend equivalent amount of an associated foreign corporation with respect to the same or a similar business. For purposes of this paragraph (g)(4)(iii)(B), a foreign corporation is an associated foreign corporation if it is related to the foreign corporation for purposes of sectional 267(b) or it and the foreign corporation are stapled entities (within the meaning of section 269B(c)(2)) or are effectively stapled entities. A business is the same as or similar to another business if it involves the sale, lease, or manufacture of the same or a similar type of property or the provision of the same or a similar type of services. A U.S. real property interest described in section 897(c)(1)(A)(i) shall be treated as a business and all such U.S. real property interests shall be treated as businesses that are the same or similar.

(*3*) *Coordination with second-tier withholding tax.* The value of the dividend equivalent amount that is exempt from the branch profits tax by reason of paragraph (g)(4)(iii)(B)(*1*) of this section shall not be subject to tax under section 871(a) or 881, or to withholding under section 1441 or 1442, when distributed by the foreign corporation.

(5) *Benefits under treaties other than income tax treaties.* A treaty that is not an income tax treaty does not exempt a foreign corporation from the branch profits tax or reduce the amount of the tax.

(h) *Stapled entities.* Any foreign corporation that is treated as a domestic corporation by reason of section 269B (relating to stapled entities) shall continue to be treated as a foreign corporation for purposes of section 884 and the regulations thereunder, notwithstanding section 269B or the regulations thereunder. Dividends paid by such foreign corporation shall be treated as paid by a domestic corporation and shall be subject to the tax imposed by section 871(a) or 881(a), and to withholding under section 1441 or 1442, as applicable, to the extent paid out of earnings and profits that are not subject to tax under section 884(a). Dividends paid by such foreign corporation out of earnings and profits subject to tax under section 884(a) shall be exempt from the tax imposed by sections 871(a) and 881(a) and shall not be subject to withholding under section 1441 or 1442. Whether dividends are paid out of earnings and profits that are subject to tax under section 884(a) shall be determined under section 884(e)(3)(A) and the regulations thereunder. The limitation on the application of treaty benefits in section 884(e)(3)(B) (relating to qualified residents) shall apply to a foreign corporation described in this paragraph (h).

(i) *Effective date*—(1) *General rule.* This section is effective for taxable years beginning on or after October 13, 1992. With respect to a taxable year beginning before October 13, 1992 and after December 31, 1986, a foreign corporation may elect to apply this section in lieu of §1.884–1T of the temporary regulations (as contained in the CFR edition revised as of April 1, 1992), but only if the foreign corporation also makes an election under §1.884–4 (e) to apply §1.884.4 in lieu of §1.884–4T (as contained in the CFR edition revised as of April 1, 1992) for that taxable year, and the statute of limitations for assessment of a deficiency has not expired for that taxable year. Once an election has been made, an election under this section shall apply to all subsequent taxable years. However, paragraph (f)(2)(vi) of this section (relating to certain interest income of Possessions banks) shall not apply for taxable years beginning before January 1, 1990.

(2) *Election to reduce liabilities.* A foreign corporation may make an election to reduce its liabilities under paragraph (e)(3) of this section with respect to a taxable year for which an election under paragraph (i)(1) of this section is

in effect by filing an amended return for the taxable year and recomputing its interest deduction and any other item affected by the election on an amended Form 1120F to take into account the reduction in liabilities for such year.

(3) *Separate election for installment obligations.* A foreign corporation may make a separate election to apply paragraphs (d)(2)(iii) and (d)(6)(ii) of this section (relating to installment obligations treated as U.S. assets) to any prior taxable year without making an election under paragraph (i)(1) of this section, provided the statute of limitations for assessment of a deficiency has not expired for that taxable year and each succeeding taxable year. Once an election under this paragraph (i)(3) has been made, it shall apply to all subsequent taxable years.

(4) *Special rules for certain U.S. assets and liabilities.* Paragraphs (c)(2) (i) and (ii), (d)(3), (d)(4), (d)(5)(iii), (d)(6)(iii), (d)(6)(vi), (e)(2), and (e)(3)(ii), of this section are effective for taxable years beginning on or after June 6, 1996.

(j) *Transition rules*—(1) *General rule.* Except as provided in paragraph (j)(2) of this section, in order to compute its dividend equivalent amount in the first taxable year to which this section applies (whether or not such year begins before October 13, 1992, a foreign corporation must recompute its U.S. net equity as of close of the preceding taxable year using the rules of this section and use such recomputed amount, rather than the amount computed under §1.884–1T (as contained in the CFR edition revised as of April 1, 1992), to determine the amount of any increase or decrease in the U.S. net equity as of the close of that taxable year.

(2) *Installment obligations*—(i) *Interest election.* In recomputing its U.S. net equity as of the close of the preceding taxable year, a foreign corporation that holds an installment obligation treated as a U.S. asset under §1.884–1T(d)(7) (as contained in the CFR edition revised as of April 1, 1992) as of such date may apply the rules of paragraph (d)(2)(iii) of this section without regard to the rule in that paragraph that requires interest or original issue discount on the obligation to be treated as ECI in order for such obligation to be treated as a U.S. asset.

(ii) *1987 sales by certain foreign corporations.* The E&P basis of an installment obligation arising in connection with a sale of property by a foreign corporation described in section 312(k)(4), where such sale occurs in a taxable year beginning in 1987, shall equal the E&P basis of the property sold as of the determination date reduced by payments received with respect to the obligation that do not represent gain for earnings and profits purposes, interest or original issue discount.

[T.D. 8432, 57 FR 41651, Sept. 11, 1992; 57 FR 49117, Oct. 29, 1992; 57 FR 60126, Dec. 18, 1992; 58 FR 17166, Apr. 1, 1993, as amended by T.D. 8657, 61 FR 9338, Mar. 8, 1996; 61 FR 14247, Apr. 1, 1996; T.D. 9281, 71 FR 47451, Aug. 17, 2006; T.D. 9465, 74 FR 49320, Sept. 28, 2009; 74 FR 57252, Nov. 5, 2009]

§ 1.884–2 Special rules for termination or incorporation of a U.S. trade or business or liquidation or reorganization of a foreign corporation or its domestic subsidiary.

(a) through (a)(2)(i) [Reserved]. For further information, see §1.884–2T(a) through (a)(2)(ii).

(a)(2)(ii) *Waiver of period of limitations.* The waiver referred to in §1.884–2T(a)(2)(i)(D) shall be executed on Form 8848, or substitute form, and shall extend the period for assessment of the branch profits tax for the year of complete termination to a date not earlier than the close of the sixth taxable year following that taxable year. This form shall include such information as is required by the form and accompanying instructions. The waiver must be signed by the person authorized to sign the income tax returns for the foreign corporation (including an agent authorized to do so under a general or specific power of attorney). The waiver must be filed on or before the date (including extensions) prescribed for filing the foreign corporation's income tax return for the year of complete termination. With respect to a complete termination occurring in a taxable year ending prior to June 6, 1996 a foreign corporation may also satisfy the requirements of this paragraph (a)(2)(ii) by applying §1.884–2T(a)(2)(ii) of the temporary regulations (as contained in the CFR edition revised as of April 1, 1995). A properly executed Form 8848, substitute form, or other form of waiver authorized by this paragraph (a)(2)(ii) shall be deemed to be consented to and signed by a Service Center Director or the Assistant Commissioner (International) for purposes of §301.6501(c)–1(d) of this chapter.

(a)(3) through (a)(4) [Reserved]. For further information, see §1.884–2T(a)(3) through (a)(4).

(a)(5) *Special rule if a foreign corporation terminates an interest in a trust.* A foreign corporation whose beneficial interest in a trust terminates (by disposition or otherwise) in any taxable year shall be subject to the branch profits tax on ECEP attributable to amounts (including distributions of accumulated income or gain) treated as ECI to such beneficiary in such taxable year notwithstanding any other provision of §1.884–2T(a).

(b) through (c)(2)(ii) [Reserved]. For further information, see §1.884–2T (b) through (c)(2)(ii).

(c)(2)(iii) *Waiver of period of limitations and transferee agreement.* In the case of a transferee that is a domestic corporation, the provisions of §1.884–2T(c)(2)(i) shall not apply unless, as part of the section 381(a) transaction, the transferee executes a Form 2045 (Transferee Agreement) and a waiver of period of limitations as described in this paragraph (c)(2)(iii), and files both documents with its timely filed (including extensions) income tax return for the taxable year in which the section 381(a) transaction occurs. The waiver shall be executed on Form 8848, or substitute form, and shall extend the period for assessment of any additional branch profits tax for the taxable year in which the section 381(a) transaction occurs to a date not earlier than the close of the sixth taxable year following the taxable year in which such transaction occurs. This form shall include such information as is required by the form and accompanying instructions. The waiver must be signed by the person authorized to sign Form 2045. With respect to a complete termination occurring in a taxable year ending prior to June 6, 1996 a foreign corporation may also satisfy the requirements of this paragraph (c)(2)(iii) by applying §1.884–2T(c)(2)(iii) of the temporary regulations (as contained in the CFR edition revised as of April 1, 1995). A properly executed Form 8848, substitute form, or other form of waiver authorized by this paragraph (c)(2)(iii) shall be deemed to be consented to and signed by a Service Center Director or the Assistant Commissioner (International) for purposes of §301.6501(c)–1(d) of this chapter.

(c)(3) through (c)(6)(i)(A) [Reserved]. For further guidance, see §1.884–2T(c)(3) through (c)(6)(i)(A).

(B) Shareholders of the transferee (or of the transferee's parent in the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E)) who in the aggregate owned more than 25 percent of the value of the stock of the transferor at any time within the 12-month period preceding the close of the year in which the section 381(a) transaction occurs sell, exchange or otherwise dispose of their stock or securities in the transferee at any time during a period of three years from the close of the taxable year in which the section 381(a) transaction occurs.

(C) In the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E), the transferee's parent sells, exchanges, or otherwise disposes of its stock or securities in the transferee at any time during a period of three years from the close of the taxable year in which the section 381(a) transaction occurs.

(D) A corporation related to any such shareholder or the shareholder itself if it is a corporation (subsequent to an event described in paragraph (c)(6)(i)(A) or (B) of this section) or the transferee's parent (subsequent to an event described in paragraph (c)(6)(i)(C) of this section), uses, directly or indirectly, the proceeds or property received in such sale, exchange or disposition, or property attributable thereto, in the conduct of a trade or business in the United States at any time during a period of three years from the date of sale in the case of a disposition of stock in the transferor, or from the close of the taxable year in which the section 381(a) transaction occurs in the case of a disposition of the stock or securities in the transferee (or the transferee's parent in the case of a triangular reorganization described in section 368(a)(1)(C) or a reorganization described in sections 368(a)(1)(A) and (a)(2)(D) or (E)). Where this paragraph (c)(6)(i) applies, the transferor's branch profits tax liability for the taxable year in which the section 381(a) transaction occurs shall be determined under §1.884–1, taking into account all the adjustments in U.S. net equity that result from the transfer of U.S. assets and liabilities to the transferee pursuant to the section 381(a) transaction, without regard to any provisions in this paragraph (c). If an event described in paragraph (c)(6)(i)(A), (B), or (C) of this section occurs after the close of the taxable year in which the section 381(a) transaction occurs, and if additional branch profits tax is required to be paid by reason of the application of this paragraph (c)(6)(i), then interest must be paid on that amount at the underpayment rates determined under section 6621(a)(2), with respect to the period between the date that was prescribed for filing the transferor's income tax return for the year in which the section 381(a) transaction occurs and the date on which the additional tax for that year is paid. Any such additional tax liability together with interest thereon shall be the liability of the transferee within the meaning of section 6901 pursuant to section 6901 and the regulations thereunder.

(c)(6)(ii) through (f) [Reserved]. For further guidance, see §1.884–2T(c)(6)(ii) through (f).

(g) *Effective dates.* Paragraphs (a)(2)(ii) and (c)(2)(iii) of this section are effective for taxable years beginning after December 31, 1986. Paragraph (a)(5) of this section is effective for taxable years beginning on or after June 6, 1996. Paragraphs (c)(6)(i)(B), (C), and (D), are applicable for tax years beginning after December 31, 1986, except that such paragraphs are applicable to transactions occurring on or after January 23, 2006, in the case of reorganizations described in sections 368(a)(1)(A) and 368(a)(2)(D) or (E).

[T.D. 8657, 61 FR 9341, Mar. 8, 1996, as amended by T.D. 9243, 71 FR 4292, Jan. 26, 2006]

§ 1.884–2T Special rules for termination or incorporation of a U.S. trade or business or liquidation or reorganization of a foreign corporation or its domestic subsidiary (temporary).

(a) *Complete termination of a U.S. trade or business*—(1) *General rule.* A foreign corporation shall not be subject to the branch profits tax for the taxable year in which it completely terminates all of its U.S. trade or business within the meaning of paragraph (a)(2) of this section. A foreign corporation's non-previously taxed accumulated effectively connected earnings and profits as of the close of the taxable year of complete termination shall be extinguished for purposes of section 884 and the regulations thereunder, but not for other purposes (for example, sections 312, 316 and 381).

(2) *Operating rules*—(i) *Definition of complete termination.* A foreign corporation shall have completely terminated all of its U.S. trade or business for any taxable year (''the year of complete termination'') only if—

(A) As of the close of that taxable year, the foreign corporation either has no U.S. assets, or its shareholders have adopted an irrevocable resolution in that taxable year to completely liquidate and dissolve the corporation and, before the close of the immediately succeeding taxable year (also a ''year of complete termination'' for purposes of applying this paragraph (a)(2)), all of its U.S. assets are either distributed, used to pay off liabilities, or cease to be U.S. assets;

(B) Neither the foreign corporation nor a related corporation uses, directly or indirectly, any of the U.S. assets of the terminated U.S. trade or business, or property attributable thereto or to effectively connected earnings and profits earned by the foreign corporation in the year of complete termination, in the conduct of a trade or business in the United States at any time during a period of three years from the close of the year of complete termination;

(C) The foreign corporation has no income that is, or is treated as, effectively connected with the conduct of a trade or business in the United States (other than solely by reason of section 864 (c)(6) or (c)(7)) during the period of three years from the close of the year of complete termination; and

(D) The foreign corporation attaches to its income tax return for each year of complete termination a waiver of the period of limitations, as described in paragraph (a)(2)(ii) of this section.

If a foreign corporation fails to completely terminate all of its U.S. trade or business because of the failure to meet any of the requirements of this paragraph (a)(2), then its branch profits tax liability for the taxable year and all subsequent taxable years shall be determined under the provisions of §1.884–1, without regard to any provisions in this paragraph (a), taking into account any reduction in U.S. net equity that results from a U.S. trade or business of the foreign corporation ceasing to have U.S. assets. Any additional branch profits tax liability that may result, together with interest thereon (charged at the underpayment rates determined under section 6621(a)(2) with respect to the period between the date that was prescribed for filing the foreign corporation's income tax return for the taxable year with respect to which the branch profits tax liability arises and the date on which the additional tax for that year is paid), and applicable penalties, if any, shall be the liability of the foreign corporation (or of any person who is a transferee of the foreign corporation within the meaning of section 6901).

(ii) *Waiver of period of limitations.* [Reserved]. See §1.884–2(a)(2)(ii) for rules relating to this paragraph.

(iii) *Property subject to reinvestment prohibition rule.* For purposes of paragraph (a)(2)(i)(B) of this section—

(A) The term *U.S. assets of the terminated U.S. trade or business* shall mean all the money and other property that qualified as U.S. assets of the foreign corporation as of the close of the taxable year immediately preceding the year of complete termination; and

(B) Property attributable to U.S. assets or to effectively connected earnings and profits earned by the foreign corporation in the year of complete termination shall mean money or other property into which any part or all of such assets or effectively connected earnings and profits are converted at any time before the expiration of the three-year period specified in paragraph (a)(2)(i)(B) of this section by way of sale, exchange, or other disposition, as well as any money or other property attributable to the sale by a shareholder of the foreign corporation of its interest in the foreign corporation (or a successor corporation) at any time after a date which is 12 months before the close of the year of complete termination (24 months in the case of a foreign corporation that makes an election under paragraph (b) of this section).

(iv) *Related corporation.* For purposes of paragraph (a)(2)(i)(B) of this section, a corporation shall be related to a foreign corporation if either corporation is a 10-percent shareholder of the other corporation or, where the foreign corporation completely liquidates, if either corporation would have been a 10-percent shareholder of the other corporation had the foreign corporation remained in existence. For this purpose, the term *10-percent shareholder* means any person described in section 871(h)(3)(B) as well as any person who owns 10 percent or more of the total value of the stock of the corporation, and stock ownership shall be determined on the basis of the attribution rules described in section 871(h)(3)(C).

(v) *Direct or indirect use of U.S. assets.* The use of any part or all of the property referred to in paragraph (a)(2)(i)(B) of this section shall include the loan thereof to a related corporation or the use thereof as security (as a pledge, mortgage, or otherwise) for any indebtedness of a related corporation.

(3) *Complete termination in the case of a section 338 election.* A foreign corporation whose stock is acquired by another corporation that makes (or is deemed to make) an election under section 338 with respect to the stock of the foreign corporation shall be treated as having completely liquidated as of the close of the acquisition date (as defined in section 338(h)(2)) and to have completely terminated all of its U.S.

trade or business with respect to the taxable year ending on such acquisition date provided the foreign corporation that exists prior to the section 338 transaction complies with the requirements of paragraph (a)(2)(i) (B) and (D) of this section. For purposes of the preceding sentence, any of the money or other property paid as consideration for the acquisition of the stock in the foreign corporation (and for any debt claim against the foreign corporation) shall be treated as property attributable to the U.S. assets of the terminated U.S. trade or business and to the effectively connected earnings and profits of the foreign corporation earned in the year of complete termination.

(4) *Complete termination in the case of a foreign corporation with income under section 864(c)(6) or 864(c)(7).* No branch profits tax shall be imposed on effectively connected earnings and profits attributable to income that is treated as effectively connected with the conduct of a trade or business in the United States solely by reason of section 864(c)(6) or 864(c)(7) if—

(i) No income of the foreign corporation for the taxable year is, or is treated as, effectively connected with the conduct of a trade or business in the United States, without regard to section 864(c)(6) or 864(c)(7),

(ii) The foreign corporation has no U.S. assets as of the close of the taxable year, and

(iii) Such effectively connected earnings and profits would not have been subject to branch profits tax pursuant to the complete termination provisions of paragraph (a)(1) of this section if income or gain subject to section 864(c)(6) had not been deferred or if property subject to section 864(c)(7) had been sold immediately prior to the date the property ceased to have been used in the conduct of a trade or business in the United States.

(5) *Special rule if a foreign corporation terminates an interest in a trust.* [Reserved]. See §1.884–2(a)(5) for rules relating to this paragraph.

(6) *Coordination with second-level withholding tax.* Effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits of a foreign corporation that are exempt from branch profits tax by reason of the provisions of paragraph (a)(1) of this section shall not be subject to tax under section 871(a), 881(a), 1441 or 1442 when paid as a dividend by such foreign corporation (or a successor-in-interest).

(b) *Election to remain engaged in a U.S. trade or business*—(1) *General rule.* A foreign corporation that would be considered to have completely terminated all of its U.S. trade or business for the taxable year under the provisions of paragraph (a)(2)(i) of this section, but for the provisions of paragraph (a)(2)(i)(B) of this section that prohibit reinvestment within a three-year period, may make an election under this paragraph (b) for the taxable year in which it completely terminates all its U.S. trade or business (as determined without regard to paragraph (a)(2)(i)(B) of this section) and, if it so chooses, for the following taxable year (but not for any succeeding taxable year). The election under this paragraph (b) is an election by the foreign corporation to designate an amount of marketable securities as U.S. assets for purposes of §1.884–1. The marketable securities identified pursuant to the election under paragraph (b)(3) of this section shall be treated as being U.S. assets in an amount equal, in the aggregate, to the lesser of the adjusted basis of the U.S. assets that ceased to be U.S. assets during the taxable year in which the election is made (determined on the date or dates the U.S. assets ceased to be U.S. assets) or the adjusted basis of the marketable securities as of the end of the taxable year. The securities must be held from the date that they are identified until the end of the taxable year for which the election is made, or if disposed of during the taxable year, must be replaced on the date of disposition with other marketable securities that are acquired on or before that date and that have a fair market value as of the date of substitution not less than their adjusted basis.

(2) *Marketable security.* For purposes of this paragraph (b), the term *marketable security* means a security (including stock) that is part of an issue any portion of which is regularly traded on an established securities market (within the meaning of §1.884–5(d)(2) and (4))

and a deposit described in section 871(i)(3) (A) or (B).

(3) *Identification requirements.* In order to qualify for this election—

(i) The marketable securities must be identified on the books and records of the U.S. trade or business within 30 days of the date an equivalent amount of U.S. assets ceases to be U.S. assets; and

(ii) On the date a marketable security is identified, its adjusted basis must not exceed its fair market value.

(4) *Treatment of income from deemed U.S. assets.* The income or gain from the marketable securities (or replacement securities) subject to an election under this paragraph (b) that arises in a taxable year for which an election is made shall be treated as ECI (other than for purposes of section 864(c)(7)), and losses from the disposition of such marketable securities shall be allocated entirely to income that is ECI. In addition, all such securities shall be treated as if they had been sold for their fair market value on the earlier of the last business day of a taxable year for which an election is in effect or the day immediately prior to the date of substitution by the foreign corporation of a U.S. asset for the marketable security, and any gain (but not loss) and accrued interest on the securities shall also be treated as ECI. The adjusted basis of such property shall be increased by the amount of any gain recognized by reason of this paragraph (b).

(5) *Method of election.* A foreign corporation may make an election under this paragraph (b) by attaching to its income tax return for the taxable year a statement—

(i) Identifying the marketable securities treated as U.S. assets under this paragraph (b);

(ii) Setting forth the E&P bases of such securities; and

(iii) Agreeing to treat any income, gain or loss as provided in paragraph (b)(4) of this section.

Such statement must be filed on or before the due date (including extensions) of the foreign corporation's income tax return for the taxable year. A foreign corporation shall not be permitted to make an election under this paragraph (b) more than once.

(6) *Effective date.* This paragraph (b) is effective for taxable years beginning on or after October 13, 1992. However, if a foreign corporation has made a valid election under §1.884–1(i) to apply that section with respect to a taxable year beginning before October 13, 1992 and after December 31 1986, this paragraph (b) shall be effective beginning with such taxable year.

(c) *Liquidation, reorganization, etc. of a foreign corporation.* The following rules apply to the transfer by a foreign corporation engaged (or deemed engaged) in the conduct of a U.S. trade or business (the ''transferor'') of its U.S. assets to another corporation (the ''transferee'') in a complete liquidation or reorganization described in section 381(a) (a ''section 381(a) transaction'') if the transferor is engaged (or deemed engaged) in the conduct of a U.S. trade or business immediately prior to the section 381(a) transaction. For purposes of this paragraph (c), a section 381(a) transaction is considered to occur in the taxable year that ends on the date of distribution or transfer (as defined in §1.381(b)–1(b)) pursuant to the section 381(a) transaction.

(1) *Inapplicability of paragraph (a)(1) of this section to section 381(a) transactions.* Paragraph (a)(1) of this section (relating to the complete termination of a U.S. trade or business of a foreign corporation) does not apply to exempt the transferor from branch profits tax liability for the taxable year in which the section 381(a) transaction occurs or in any succeeding taxable year.

(2) *Transferor's dividend equivalent amount for the taxable year in which a section 381(a) transaction occurs.* The dividend equivalent amount for the taxable year, including a short taxable year, in which a section 381(a) transaction occurs shall be determined under the provisions of §1.884–1, as modified under the provisions of this paragraph (c)(2).

(i) *U.S. net equity.* The transferor's U.S. net equity as of the close of the taxable year shall be determined without regard to any transfer in that taxable year of U.S. assets to or from the transferee pursuant to a section 381(a) transaction, and without regard to any U.S. liabilities assumed or acquired by the transferee from the transferor in that taxable year pursuant to a section 381(a) transaction. The transferor's adjusted basis (for earnings and profits purposes) in U.S. assets transferred to the transferee pursuant to a section 381(a) transaction shall be the adjusted basis of those assets (for earnings and profits purposes) immediately prior to the section 381(a) transaction, adjusted as provided under section 362(b), treating the transferor, for that purpose, as though it were the transferee and treating the gain taken into account for earnings and profits purposes as gain recognized.

(ii) *Effectively connected earnings and profits.* The transferor's effectively connected earnings and profits for the taxable year in which the section 381(a) transaction occurs and its non-previously taxed accumulated effectively connected earnings and profits shall be determined without regard to the carryover to the transferee of the transferor's earnings and profits under section 381 (a) and (c)(2) and paragraph (c)(4) of this section. Effectively connected earnings and profits for the taxable year in which a section 381(a) transaction occurs shall be adjusted by the amount of any gain recognized to the transferor in that year pursuant to the section 381(a) transaction (to the extent taken into account for earnings and profits purposes).

(iii) *Waiver of period of limitations and transferee agreement.* [Reserved]. See §1.884–2(c)(2)(iii) for rules relating to this paragraph.

(3) *Transferor's dividend equivalent amount for any taxable year succeeding the taxable year in which the section 381(a) transaction occurs.* Any decrease in U.S. net equity in any taxable year succeeding the taxable year in which the section 381(a) transaction occurs shall increase the transferor's dividend equivalent amount for those years without regard to the limitation in §1.884–1(b)(3)(ii), to the extent such decrease in U.S. net equity does not exceed the balance of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits carried over to the transferee pursuant to section 381 (a) and (c)(2), as determined under paragraph (c)(4) of this section.

(4) *Earnings and profits of the transferor carried over to the transferee pursuant to the section 381(a) transaction*—(i) *Amount.* The amount of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits of the transferor that carry over to the transferee under section 381 (a) and (c)(2) shall be the effectively connected earnings and profits and the non-previously taxed accumulated effectively connected earnings and profits of the transferor immediately before the close of the taxable year in which the section 381(a) transaction occurs. For this purpose, the provisions in §1.381(c)(2)–1 shall generally apply with proper adjustments to reflect the fact that effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits are not affected by distributions to shareholders but, rather, by dividend equivalent amounts. Therefore, the amounts of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits that carry over to the transferee pursuant to those provisions are reduced by the transferor's dividend equivalent amount for the taxable year in which the section 381(a) transaction occurs. Such amounts are also reduced to the extent of any dividend equivalent amount determined for any succeeding taxable year solely as a result of the provisions of paragraph (c)(3) of this section. For purposes of this paragraph (c)(4)(i), if the transferor accumulates non-previously taxed effectively connected earnings and profits, or incurs a deficit in effectively connected earnings and profits, attributable to a period that is after the close of the taxable year in which the section 381(a) transaction occurs and before the liquidation of the transferor, then such effectively connected earnings and profits, or deficits therein, shall be deemed to have been accumulated or incurred on or before the close of the taxable year in which the section 381(a) transaction occurs.

(ii) *Retention of character.* All of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits that carry over to the transferee shall constitute non-previously taxed accumulated effectively connected earnings and profits of the transferee. In the case of a domestic transferee, such non-previously taxed accumulated effectively connected earnings and profits shall also constitute accumulated earnings and profits of the transferee for purposes of section 316(a)(2).

(iii) *Treatment of distributions by a domestic transferee out of non-previously taxed accumulated effectively connected earnings and profits.* In the event the transferee is a domestic corporation, distributions out of the transferee's non-previously taxed accumulated effectively connected earnings and profits that are received by a foreign distributee shall qualify for benefits under an applicable income tax treaty only (A) if the distributee qualifies for the benefits under such treaty and (B) to the extent that the transferor foreign corporation would have qualified under the principles of §1.884–1(g) (1) and (2)(i) for an exemption or reduction in rate with respect to the branch profits tax if the non-previously taxed accumulated effectively connected earnings and profits had been reflected in a dividend equivalent amount for the taxable year in which the section 381(a) transaction occurs. (The tax rate on dividends specified in the treaty between the distributee's country of residence and the United States shall apply to any dividends received by a distributee who qualifies for a treaty benefit under the preceding sentence.) In addition, distributions out of such non-previously taxed accumulated effectively connected earnings and profits shall retain their character in the hands of any domestic distributee up a chain of corporate shareholders for purposes of applying this paragraph (c)(4)(iii) to distributions made by any such person to a foreign distributee. If a domestic transferee has non-previously taxed accumulated effectively connected earnings and profits carried over from the transferor as well as accumulated earnings and profits, then each category of earnings and profits shall be accounted for in two separate pools, and any distribution of earnings and profits shall be treated as a distribution out of each pool in proportion to the respective amount of undistributed earnings and profits in each pool. Section 871(i) (relating, in part, to dividends paid by a domestic corporation meeting the 80-percent foreign business requirements of section 861(c)(1)) shall not apply to any dividends paid by a domestic transferee out of its non-previously taxed accumulated effectively connected earnings and profits.

(5) *Determination of U.S. net equity of a transferee that is a foreign corporation.* In the event the transferee is a foreign corporation, then for purposes of determining the transferee's increase or decrease in U.S. net equity under §1.884–1 for its taxable year during which the section 381(a) transaction occurs, its U.S. net equity as of the close of its immediately preceding taxable year shall be increased by the amount of U.S. net equity acquired by the transferee from the transferor pursuant to the section 381(a) transaction, taking into account the adjustments to the basis (for earnings and profits purposes) of U.S. assets under the principles of section 362(b).

(6) *Special rules in the case of the disposition of stock or securities in a domestic transferee or in the transferor*—(i) *General rule.* This paragraph (c)(6)(i) shall apply where the transferee is a domestic corporation, subdivision (A), (B), or (C) of this paragraph applies and subdivision (D) of this paragraph applies.

(A) Shareholders of the transferor sell, exchange or otherwise dispose of stock in the transferor at any time during a 12-month period before the date of distribution or transfer (as defined in §1.381(b)–1(b)) and the aggregate amount of such stock sold, exchanged or otherwise disposed of exceeds 25 percent of the value of the stock of the transferor, determined on a date that is 12 months before the date of distribution or transfer.

(B), (C), and (D) [Reserved]. For further guidance, see §1.884–2(c)(6)(i)(B), (C), and (D).

Where this paragraph (c)(6)(i) applies, the transferor's branch profits tax liability for the taxable year in which the section 381(a) transaction occurs shall be determined under §1.884–1, taking into account all the adjustments in U.S. net equity that result from the transfer of U.S. assets and liabilities to the transferee pursuant to the section 381(a) transaction, without regard to any provisions in this paragraph (c). If an event described in paragraph (c)(6)(i) (A), (B), or (C) of this section occurs after the close of the taxable year in which the section 381(a) transaction occurs, and if additional branch profits tax is required to be paid by reason of the application of this paragraph (c)(6)(i), then interest must be paid on that amount at the underpayment rates determined under section 6621(a)(2), with respect to the period between the date that was prescribed for filing the transferor's income tax return for the year in which the section 381(a) transaction occurs and the date on which the additional tax for that year is paid. Any such additional tax liability together with interest thereon shall be the liability of the transferee within the meaning of section 6901 pursuant to section 6901 and the regulations thereunder.

(ii) *Operating rule.* For purposes of paragraph (c)(6)(i) of this section paragraphs (a)(2) (iii)(B), (iv) and (v) of this section shall apply for purposes of making the determinations under paragraph (c)(6)(i)(D) of this section.

(d) *Incorporation under section 351*—(1) *In general.* The following rules apply to the transfer by a foreign corporation engaged (or deemed engaged) in the conduct of a U.S. trade or business (the "transferor") of part or all of its U.S. assets to a U.S. corporation (the "transferee") in exchange for stock or securities in the transferee in a transaction that qualifies under section 351(a) (a "section 351 transaction"), provided that immediately after the transaction, the transferor is in control (as defined in section 368(c)) of the transferee, without regard to other transferors.

(2) *Inapplicability of paragraph (a)(1) of this section to section 351 transactions.* Paragraph (a)(1) of this section does not apply to exempt the transferor from branch profits tax liability for the taxable year in which a section 351 transaction described in paragraph (d)(1) of this section occurs and shall not apply for any subsequent taxable year of the transferor in which it, or a successor-in-interest, owns stock or securities of a transferee as of the close of the transferor's taxable year.

(3) *Transferor's dividend equivalent amount for the taxable year in which a section 351 transaction occurs.* The dividend equivalent amount of the transferor for the taxable year in which a section 351 transaction described in paragraph (d)(1) of this section occurs shall be determined under the provisions of §1.884–1, as modified by the provisions of this paragraph (d)(3) provided that the transferee elects under paragraph (d)(4) of this section to be allocated a proportionate amount of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits and the foreign corporation files a statement as provided in paragraph (d)(5)(i) of this section and complies with the agreement included in such statement with respect to a subsequent disposition of the transferee's stock.

(i) *U.S. net equity.* The transferor's U.S. net equity as of the close of the taxable year shall be determined without regard to any transfer in that taxable year of U.S. assets to or from the transferee pursuant to a section 351 transaction, and without regard to any U.S. liabilities assumed or acquired by the transferee from the transferor in that taxable year pursuant to a section 351 transaction. The transferor's adjusted basis for earnings and profits purposes in U.S. assets transferred to the transferee pursuant to a section 351 transaction shall be the adjusted basis of those assets for earnings and profits purposes immediately prior to the section 351 transaction, increased by the amount of any gain recognized by the transferor on the transfer of such assets in the section 351 transaction to the extent taken into account for earnings and profits purposes.

(ii) *Effectively connected earnings and profits.* Subject to the limitation in paragraph (d)(3)(iii) of this section, the calculation of the transferor's dividend equivalent amount shall take into account the transferor's effectively connected earnings and profits for the taxable year in which a section 351 transaction occurs (including any amount of gain recognized to the transferor pursuant to the section 351 transaction to the extent the gain is taken into account for earnings and profits purposes) and, for purposes of applying the limitation of §1.884–1(b)(3)(ii), its non-previously taxed accumulated effectively connected earnings and profits, determined without regard to the allocation to the transferee of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits pursuant to the election under paragraph (d)(4)(i) of this section.

(iii) *Limitation on dividend equivalent amount.* The dividend equivalent amount determined under this paragraph (d)(3) shall not exceed the sum of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits determined after taking into account the allocation to the transferee of the transferor's earnings pursuant to an election under paragraph (d)(4)(i) of this section.

(4) *Election to increase earnings and profits*—(i) *General rule.* The election referred to in paragraph (d)(3) of this section is an election by the transferee to increase its earnings and profits by the amount determined under paragraph (d)(4)(ii) of this section. An election under this paragraph (d)(4)(i) shall be effective only if the transferee attaches a statement to its timely filed (including extensions) income tax return for the taxable year in which the section 351 transaction occurs, in which—

(A) It agrees to be subject to the rules of paragraph (c)(4) (ii) and (iii) of this section with respect to the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to the transferee pursuant to the election under this paragraph (d)(4)(i) in the same manner as if such earnings and profits had been carried over to the transferee pursuant to section 381 (a) and (c)(2), and

(B) It identifies the amount of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits that are allocated from the transferor.

An election with respect to a taxable year ending on or before December 1, 1988, may be made by filing an amended Form 1120F on or before January 3, 1988, to which the statement described in this paragraph (d)(4)(i) shall be attached.

(ii) *Amount of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to the transferee.* The amount referred to in paragraph (d)(4)(i) of this section is equal to the same proportion of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits (determined immediately prior to the section 351 transaction and without regard to this paragraph (d)(4) or any dividend equivalent amount for the taxable year) that the adjusted bases for purposes of computing earnings and profits in all the U.S. assets transferred to the transferee by the transferor pursuant to the section 351 transaction bear to the adjusted bases for purposes of computing earnings and profits in all the U.S. assets of the transferor, determined immediately prior to the section 351 transaction.

(iii) *Effect of election on transferor.* For purposes of computing the transferor's dividend equivalent amount for the taxable year succeeding the taxable year in which a section 351 transaction occurs, the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits as of the close of the taxable year in which the section 351 transaction occurs shall be reduced by the amount of its effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to the transferee pursuant to the election under paragraph (d)(4)(i) of this section (and by its dividend equivalent amount for the taxable year in which the section 351 transaction occurs).

(5) *Dispositions of stock or securities of the transferee by the transferor*—(i) *General rule*. The statement referred to in paragraph (d)(3) of this section is a statement executed by the transferor stating the transferor's agreement that, upon the disposition of part or all of the stock or securities it owns in the transferee (or a successor-in-interest), it shall treat as a dividend equivalent amount for the taxable year in which the disposition occurs an amount equal to the lesser of (A) the amount realized upon such disposition or (B) the total amount of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits that was allocated from the transferor to that transferee pursuant to an election under paragraph (d)(4)(i) of this section, which amount shall be reduced to the extent previously taken into account by the transferor as dividends or dividend equivalent amounts for tax or branch profits, tax purposes. The extent and manner in which such dividend equivalent amount may be subject to the branch profits tax in the taxable year of disposition shall be determined under the provisions of section 884 and the regulations thereunder, including the provisions of paragraph (a) of this section (relating to complete terminations), as limited under paragraph (d)(2) of this section. Except as otherwise provided in paragraph (d)(5)(ii) of this section, the term *disposition* means any transfer that would constitute a disposition by the transferor for any purpose of the Internal Revenue Code and the regulations thereunder. This paragraph (d)(5)(i) shall apply regardless of whether the stock or securities of the transferee are U.S. assets in the hands of the transferor at the time of sale, exchange or disposition.

(ii) *Exception for certain tax-free dispositions*. For purposes of paragraph (d)(5)(i) of this section, a disposition does not include a transfer of stock or securities of the transferee by the transferor in a transaction that qualifies as a transfer pursuant to a complete liquidation described in section 332(b) or a transfer pursuant to a reorganization described in section 368(a)(1)(F). Any other transfer that qualifies for non-recognition of gain or loss shall be treated as a disposition for purposes of paragraph (d)(5)(i) of this section, unless the Commissioner has, by published guidance or by prior ruling issued to the taxpayer upon its request, determined such transfer not to be a disposition for purposes of paragraph (d)(5)(i) of this section.

(iii) *Distributions governed by section 355*. In the case of a distribution or exchange of stock or securities of a transferee to which section 355 applies (or so much of section 356 as relates to section 355) and that is not in pursuance of a plan meeting the requirements of a reorganization as defined in section 368(a)(1)(D), § 1.312–10(b) (relating to the allocation of earnings and profits in certain corporate separations) shall not apply to reduce the transferor's effectively connected earnings and profits or non-previously taxed accumulated effectively connected earnings and profits.

(iv) *Filing of statement*. The statement referred to in paragraph (d)(5)(i) of this section shall be attached to a timely filed (including extensions) income tax return of the transferor for the taxable year in which the section 351 transaction occurs. An election with respect to a taxable year ending on or before December 1, 1988, may be made by filing an amended Form 1120F on or before January 3, 1988, to which the statement described in this paragraph (d)(5)(iv) shall be attached.

(6) *Example*. The provisions of this paragraph (d) are illustrated by the following example.

Example. Foreign corporation X has a calendar taxable year. X's only assets are U.S. assets and X computes its interest deduction using the actual ratio of liabilities to assets under § 1.882–5(b)(2)(ii). X's U.S. net equity as of the close of its 1988 taxable year is $2,000, resulting from the following amounts of U.S. assets and liabilities:

U.S. assets		U.S. liabilities	
U.S. building A	$l,000	Mortgage A	800
U.S. building B	2,500	Mortgage B	1,500
Other U.S. assets	800		
Total	4,300		2,300

Assume that X's adjusted basis in its assets is equal to X's adjusted basis in its assets for earnings and profits purposes. On September 30, 1989, X transfers building A, which has a fair market value of $1,800, to a newly created U.S. corporation Y under section 351 in exchange for 100% of the stock of Y with a fair market value of $800, other property with a fair market value of $200, and the assumption of Mortgage A. Assume that under sections 11 and 351(b), tax of $30 is imposed with respect to the $200 of other property received by X. X's non-previously taxed accumulated effectively connected earnings and profits as of the close of its 1988 taxable year are $200 and its effectively connected earnings and profits for its 1989 taxable year are $330, including $170 of gain recognized to X on the transfer as adjusted for earnings and profits purposes (*i.e.*, $200 of gain recognized minus $30 of tax paid with respect to the gain). Y takes a $1,200 basis in the building transferred from X, equal to the basis in the hands of X ($1,000) increased by the amount of gain recognized to X in the section 351 transaction ($200). Y makes an election in the manner described in paragraph (d)(4)(i) of this section to increase its earnings and profits by the amount described in paragraph (d)(4)(ii) of this section and X files a statement as provided in paragraph (d)(5)(i) of this section. The branch profits tax consequences to X and Y in the taxable year in which the section 351 transaction occurs and in subsequent taxable years are as follows:

(i) *X's dividend equivalent amount for 1989*. The determination of X's dividend equivalent amount for 1989 is a three-step process: determining X's U.S. net equity as of the close of its 1989 taxable year under paragraph (d)(3)(i) of this section; determining the amount of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits for its 1989 taxable year under paragraph (d)(3)(ii) of this section; and applying the limitation in paragraph (d)(3)(iii) of this section.

Step one: Pursuant to paragraph (d)(3)(i) of this section, X's U.S. net equity as of the close of its 1989 taxable year is calculated without regard to the section 351 transaction except that X's basis in its U.S. assets is increased by the $170 amount of gain it has recognized for earnings and profits purposes in connection with the section 351 transaction. Thus, X's U.S. net equity as of the close of its 1989 taxable year is $1,870, consisting of the following U.S. assets and liabilities, taking into account the fact that X's other U.S. assets have decreased to $500:

U.S. assets		U.S. liabilities	
Building A	$1,170	Mortgage A	800
Building B	2,500	Mortgage B	1,500
Other U.S. assets	500		
Total	4,170		2,300

Thus, X's U.S. net equity as of the close of its 1989 taxable year has decreased by $130 relative to its U.S. net equity as of the close of its 1988 taxable year.

Step two: Pursuant to paragraph (d)(3)(ii) of this section, X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits for the taxable year are determined without taking into account the allocation to Y of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits pursuant to the election under paragraph (d)(4)(i) of this section. Thus, X's effectively connected earnings and profits for its 1989 taxable year are $330 and X's non-previously taxed accumulated effectively connected earnings and profits are $200. Thus, but for the limitation in paragraph (d)(3)(iii) of this section, X's dividend equivalent amount for the taxable year would be $460, equal to X's effectively connected earnings and profits for the taxable year ($330), increased by the decrease in X's U.S. net equity ($130).

Step three: Pursuant to paragraph (d)(3)(iii) of this section, X's dividend equivalent amount for its 1989 taxable year may not exceed the sum of the transferor's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits, determined as of the close of its 1989 taxable year, after taking into account the allocation of the transferor's earnings and profits pursuant to the election under paragraph (d)(4)(i) of this section. Based upon subdivision (ii) of this example, X's dividend equivalent amount for 1989 cannot exceed $423, which is equal to the total amount of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits, determined as of the close of its 1989 taxable year without regard to the allocation of earnings and profits to Y pursuant to Y's election under paragraph (d)(4)(i) of this section ($530), reduced by the amount of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to Y pursuant to Y's election under paragraph (d)(4)(i) of this section ($107). Thus, X's dividend equivalent amount for its 1989 taxable year is limited to $423.

(ii) *Amount of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits transferred to Y*. Pursuant to Y's election under paragraph (d)(4)(i) of this section, Y increases its earnings and profits by the amount prescribed in paragraph (d)(4)(ii) of this section. This amount is equal to the sum of X's effectively connected earnings and profits and non previously taxed accumulated effectively connected earnings and profits determined immediately before the section 351 transaction, without regard to X's dividend equivalent amount for the year, allocated in the same proportion that X's basis in the U.S. assets transferred to Y bears to the bases of all of X's U.S. assets, which bases are determined immediately prior to the section 351(a) transaction. The amount of X's effectively connected earnings and profits immediately before the section 351 transaction is assumed to be $260. The total amount of effectively connected earnings and profits ($260) and non-previously taxed accumulated effectively connected earnings and profits ($200) determined immediately before the section 351 transaction is, therefore, $460. The portion of $460 that is allocated to Y pursuant to Y's election under paragraph (d)(4)(i) of this section is $107, calculated as $46? multiplied by a fraction, the numerator of which is the basis of the U.S. assets transferred to Y pursuant to the section 351 transaction ($1,000), and the denominator of which is the basis of X's U.S. assets determined immediately before the section 351 transaction ($4,300). Pursuant to paragraph (d)(4)(i) of this section, the amount of $107 of X's effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to Y pursuant to paragraph (d)(4)(i) of this section constitutes non-previously taxed accumulated effectively connected earnings and profits of Y.

(iii) *X's non-previously taxed accumulated effectively connected earnings and profits for 1990.* Pursuant to paragraph (d)(4)(iii) of this section, X's non-previously taxed accumulated effectively connected earnings and profits as of the close of its 1989 taxable year for purposes of computing its dividend equivalent amount for its taxable year 1990 are zero, *i.e.*, $530 of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits reduced by $107 of effectively connected earnings and profits and non-previously taxed accumulated effectively connected earnings and profits allocated to Y, and further reduced by X's $423 dividend equivalent amount for its 1989 taxable year.

(iv) *X's U.S. net equity for purposes of determining the dividend equivalent amount for succeeding taxable years.* For 1990, X must determine its U.S. net equity as of December 31, 1989, in order to determine whether there has been an increase or decrease in its U.S. net equity as of December 31, 1990. For this purpose, X's U.S. net equity as of December 31, 1989 is determined under the provisions of §1.884–1 without regard to the special rules in paragraph (d)(3)(i) of this section. Thus, X.'s U.S. net equity as of December 31, 1989 is $1,500, consisting of the following. U.S. assets and liabilities:

U.S. assets		U.S. liabilities	
Building B	$2,500	Mortgage B	1,500
Other U.S. assets	500		
Total	$3,000		1,500

(e) *Certain transactions with respect to a domestic subsidiary.* In the case of a section 381(a) transaction in which a domestic subsidiary of a foreign corporation transfers assets to that foreign corporation or to another foreign corporation with respect to which the first foreign corporation owns stock (directly or indirectly) meeting the requirements of section 1504(a)(2), the transferee's non-previously taxed accumulated effectively connected earnings and profits for the taxable year in which the section 381(a) transaction occurs shall be increased by all of the domestic subsidiary's current earnings and profits and earnings and profits accumulated after December 31, 1986, that carry over to the transferee under sections 381(a) and (c)(1) (including non-previously taxed accumulated effectively connected earnings and profits, if any, transferred to the domestic subsidiary under paragraphs (c)(4) and (d)(4) of this section and treated as earnings and profits under paragraphs (c)(4)(ii) and (d)(4)(ii) of this section). For purposes of determining the transferee's dividend equivalent amount for the taxable year in which the section 381(a) transaction occurs, the transferee's U.S. net equity as of the close of its taxable year immediately preceding the taxable year during which the section 381(a) transaction occurs shall be increased by the greater of

(1) The amount by which the transferee's U.S. net equity computed immediately prior to the transfer would have increased due to the transfer of the subsidiary's assets and liabilities if U.S. net equity were computed immediately prior to the transfer and immediately after the transfer (taking into account in the earnings and profits basis of the assets transferred any gain recognized on the transfer to the extent reflected in earnings and profits), or

(2) The total amount of U.S net equity transferred (directly or indirectly) by the foreign parent to the domestic subsidiary in one or more prior section 351 or 381(a) transactions.

(f) *Effective date*. This section is effective for taxable years beginning after December 31, 1986.

[T.D. 8223, 53 FR 34059, Sept. 2, 1988, as amended by T.D. 8432, 57 FR 41659, Sept. 11, 1992; 57 FR 49117, Oct. 29, 1993; 57 FR 60126, Dec. 18, 1992; T.D. 8657, 61 FR 9341, Mar. 8, 1996; T.D. 9243, 71 FR 4293, Jan. 26, 2006]

§ 1.884–3T Coordination of branch profits tax with second-tier withholding (temporary). [Reserved]

§ 1.884–4 Branch-level interest tax.

(a) *General rule*—(1) *Tax on branch interest*. In the case of a foreign corporation that, during the taxable year, is engaged in trade or business in the United States or has gross income that is ECI (as defined in § 1.884–1(d)(1)(iii)), any interest paid by such trade or business (hereinafter ''branch interest,'' as defined in paragraph (b) of this section) shall, for purposes of subtitle A (Income Taxes), be treated as if it were paid by a domestic corporation (other than a corporation described in section 861(c)(1), relating to a domestic corporation that meets the 80 percent foreign business requirement). Thus, for example, whether such interest is treated as income from sources within the United States by the person who receives the interest shall be determined in the same manner as if such interest were paid by a domestic corporation (other than a corporation described in section 861(c)(1)). Such interest shall be subject to tax under section 871(a) or 881, and to withholding under section 1441 or 1442, in the same manner as interest paid by a domestic corporation (other than a corporation described in section 861(c)(1)) if received by a foreign person and not effectively connected with the conduct by the foreign person of a trade or business in the United States, unless the interest, if paid by a domestic corporation, would be exempt under section 871(h) or 881(c) (relating to exemption for certain portfolio interest received by a foreign person), section 871(i) or 881(d) (relating, in part, to exemption for certain bank deposit interest received by a foreign person), or another provision of the Code. Such interest shall also be treated as interest paid by a domestic corporation (other than a corporation described in section 861(c)(1)) for purposes of sections 864(c), 871(b) and 882(a) (relating to income that is effectively connected with the conduct of a trade or business within the United States) and section 904 (relating to the limitation on the foreign tax credit). For purposes of this section, a foreign corporation also shall be treated as engaged in trade or business in the United States if, at any time during the taxable year, it owns an asset taken into account under § 1.882–5(a)(1)(ii) or (b)(1) for purposes of determining the amount of the foreign corporation's interest expense allocated or apportioned to ECI. See paragraph (b)(8) of this section for the effect of income tax treaties on branch interest.

(2) *Tax on excess interest*—(i) Definition of excess interest. For purposes of this section, the term ''excess interest'' means—

(A) The amount of interest allocated or apportioned to ECI of the foreign corporation under § 1.882–5 for the taxable year, after application of § 1.884–1(e)(3); minus

(B) The foreign corporation's branch interest (as defined in paragraph (b) of this section) for the taxable year, but not including interest accruing in a taxable year beginning before January 1, 1987; minus

(C) The amount of interest determined under paragraph (c)(2) of this section (relating to interest paid by a partnership).

(ii) *Imposition of tax*. A foreign corporation shall be liable for tax on excess interest under section 881(a) in the same manner as if such excess interest were interest paid to the foreign corporation by a wholly-owned domestic corporation (other than a corporation described in section 861(c)(1)) on the last day of the foreign corporation's taxable year. Excess interest shall be exempt from tax under section 881(a) only as provided in paragraph (a)(2)(iii) of this section (relating to treatment of certain excess interest of banks as interest on deposits) or paragraph (c)(3) of this section (relating to income tax treaties).

(iii) *Treatment of a portion of the excess interest of banks as interest on deposits.* A portion of the excess interest of a foreign corporation that is a bank (as defined in section 585(a)(2)(B) without regard to the second sentence thereof) provided that a substantial part of its business in the United States, as well as all other countries in which it operates, consists of receiving deposits and making loans and discounts, shall be treated as interest on deposits (as described in section 871(i)(3)), and shall be exempt from the tax imposed by section 881(a) as provided in such section. The portion of the excess interest of the foreign corporation that is treated as interest on deposits shall equal the product of the foreign corporation's excess interest and the greater of—

(A) The ratio of the amount of interest bearing deposits, within the meaning of section 871(i)(3)(A), of the foreign corporation as of the close of the taxable year to the amount of all interest bearing liabilities of the foreign corporation on such date; or

(B) 85 percent.

(iv) *Reporting and payment of tax on excess interest.* The amount of tax due under section 884(f) and this section with respect to excess interest of a foreign corporation shall be reported on the foreign corporation's income tax return for the taxable year in which the excess interest is treated as paid to the foreign corporation under section 884(f)(1)(B) and paragraph (a)(2) of this section, and shall not be subject to withholding under section 1441 or 1442. The tax shall be due and payable as provided in section 6151 and such other sections of Subtitle F of the Internal Revenue Code as apply, and estimated tax payments shall be due with respect to a foreign corporation's liability for the tax on excess interest as provided in section 6655.

(3) *Original issue discount.* For purposes of this section, the term ''interest'' includes original issue discount, as defined in section 1273(a)(1).

(4) *Examples.* The application of this paragraph (a) is illustrated by the following examples.

Example 1. Taxation of branch interest and excess interest. Foreign corporation A, a calendar year taxpayer that is not a corporation described in paragraph (a)(2)(iii) of this section (relating to banks), has $120 of interest allocated or apportioned to ECI under §1.882–5 for 1997. A's branch interest (as defined in paragraph (b) of this section) for 1997 is as follows: $55 of portfolio interest (as defined in section 871(h)(2)) to B, a nonresident alien; $25 of interest to foreign corporation C, which owns 15 percent of the combined voting power of A's stock, with respect to bonds issued by A; and $20 to D, a domestic corporation. B and C are not engaged in the conduct of a trade or business in the United States. A, B and C are residents of countries with which the United States does not have an income tax treaty. The interest payments made to B and D are not subject to tax under section 871(a) or 881 and are not subject to withholding under section 1441 or 1442. The payment to C, which does not qualify as portfolio interest because C owns at least 10 percent of the combined voting power of A's stock, is subject to withholding of $7.50 ($25 × 30%). In addition, because A's interest allocated or apportioned to ECI under §1.882–5 ($120) exceeds its branch interest ($100), A has excess interest of $20, which is subject to a tax of $6 ($20 × 30%) under section 881. The tax on A's excess interest must be reported on A's income tax return for 1997.

Example 2. Taxation of excess interest of a bank. Foreign corporation A, a calendar year taxpayer, is a corporation described in paragraph (a)(2)(iii) of this section (relating to banks) and is a resident of a country with which the United States does not have an income tax treaty. A has excess interest of $100 for 1997. At the close of 1997, A has $10,000 of interest-bearing liabilities (including liabilities that give rise to branch interest), of which $8,700 are interest-bearing deposits. For purposes of computing the tax on A's excess interest, $87 of the excess interest ($100 excess interest × ($8,700 interest-bearing deposits/$10,000 interest-bearing liabilities)) is treated as interest on deposits. Thus, $87 of A's excess interest is exempt from tax under section 881(a) and the remaining $13 of excess interest is subject to a tax of $3.90 ($13 × 30%) under section 881(a).

(b) *Branch interest*—(1) *Definition of branch interest.* For purposes of this section, the term ''branch interest'' means interest that is—

(i) Paid by a foreign corporation with respect to a liability that is—

(A) A U.S. booked liability within the meaning of §1.882–5(d)(2) (other than a U.S. booked liability of a partner within the meaning of §1.882–5(d)(2)(vii)); or

(B) Described in §1.884–1(e)(2) (relating to insurance liabilities on U.S. business and liabilities giving rise to interest expense that is directly allocated to income from a U.S. asset); or

(ii) In the case of a foreign corporation other than a corporation described in paragraph (a)(2)(iii) of this section, a liability specifically identified (as provided in paragraph (b)(3)(i) of this section) as a liability of a U.S. trade or business of the foreign corporation on or before the earlier of the date on which the first payment of interest is made with respect to the liability or the due date (including extensions) of the foreign corporation's income tax return for the taxable year, provided that—

(A) The amount of such interest does not exceed 85 percent of the amount of interest of the foreign corporation that would be excess interest before taking into account interest treated as branch interest by reason of this paragraph (b)(1)(ii);

(B) The requirements of paragraph (b)(3)(ii) of this section (relating to notification of recipient of interest) are satisfied; and

(C) The liability is not described in paragraph (b)(3)(iii) of this section (relating to liabilities incurred in the ordinary course of a foreign business or secured by foreign assets) or paragraph (b)(1)(i) of this section.

(2) [Reserved]

(3) *Requirements relating to specifically identified liabilities*—(i) *Method of identification.* A liability described in paragraph (b)(1)(ii) of this section is identified as a liability of a U.S. trade or business only if the liability is shown on the records of the U.S. trade or business, or is identified as a liability of the U.S. trade or business on other records of the foreign corporation or on a schedule established for the purpose of identifying the liabilities of the U.S. trade or business. Each such liability must be identified with sufficient specificity so that the amount of branch interest attributable to the liability, and the name and address of the recipient, can be readily identified from such records or schedule. However, with respect to liabilities that give rise to portfolio interest (as defined in sections 871(h) and 881(c)) or that are payable 183 days or less from the date of original issue, and form part of a larger debt issue, such liabilities may be identified by reference to the issue and maturity date, principal amount and interest payable with respect to the entire debt issue. Records or schedules described in this paragraph that identify liabilities that give rise to branch interest must be maintained in the United States by the foreign corporation or an agent of the foreign corporation for the entire period commencing with the due date (including extensions) of the income tax return for the taxable year to which the records or schedules relate and ending with the expiration of the period of limitations for assessment of tax for such taxable year. A foreign corporation that is subject to this section may identify a liability under paragraph (b)(1)(ii) of this section whether or not it is actually engaged in the conduct of a trade or business in the United States.

(ii) *Notification to recipient.* Interest with respect to a liability described in paragraph (b)(1)(ii) of this section shall not be treated as branch interest unless the foreign corporation paying the interest either—

(A) Makes a return, pursuant to section 6049, with respect to the interest payment; or

(B) Sends a notice to the person who receives such interest in a confirmation of the transaction, a statement of account, or a separate notice, within two months of the end of the calendar year in which the interest was paid, stating that the interest paid with respect to the liability is from sources within the United States.

(iii) *Liabilities that do not give rise to branch interest under paragraph (b)(1)(ii) of this section.* A liability is described in this paragraph (b)(3)(iii) (and interest with respect to the liability may not be treated as branch interest of a foreign corporation by reason of paragraph (b)(1)(ii) of this section) if—

(A) The liability is directly incurred in the ordinary course of the profit-making activities of a trade or business of the foreign corporation conducted outside the United States, as, for example, an account or note payable arising from the purchase of inventory or receipt of services by such trade or business; or

(B) The liability is secured (during more than half the days during the portion of the taxable year in which the interest accrues) predominantly by property that is not a U.S. asset (as defined in §1.884–1(d)) unless such liability is secured by substantially all the property of the foreign corporation.

(4) [Reserved]

(5) *Increase in branch interest where U.S. assets constitute 80 percent or more of a foreign corporation's assets*—(i) *General rule*. If a foreign corporation would have excess interest before application of this paragraph (b) (5) and the amount of the foreign corporation's U.S. assets as of the close of the taxable year equals or exceeds 80 percent of all money and the aggregate E&P basis of all property of the foreign corporation on such date, then all interest paid and accrued by the foreign corporation during the taxable year that was not treated as branch interest before application of this paragraph (b)(5) and that is not paid with respect to a liability described in paragraph (b)(3)(iii) of this section (relating to liabilities incurred in the ordinary course of a foreign business or secured by non-U.S. assets) shall be treated as branch interest. However, if application of the preceding sentence would cause the amount of the foreign corporation's branch interest to exceed the amount permitted by paragraph (b)(6)(i) of this section (relating to branch interest in excess of a foreign corporation's interest allocated or apportioned to ECI under §1.882–5) the amount of branch interest arising by reason of this paragraph shall be reduced as provided in paragraphs (b)(6) (ii) and (iii) of this section, as applicable.

(ii) *Example*. The application of this paragraph (b)(5) is illustrated by the following example.

Example. Application of 80 percent test. Foreign corporation A, a calendar year taxpayer, has $90 of interest allocated or apportioned to ECI under §1.882–5 for 1993. Before application of this paragraph (b)(5), A has $40 of branch interest in 1993. A pays $60 of other interest during 1993, none of which is attributable to a liability described in paragraph (b)(3)(iii) of this section (relating to liabilities incurred in the ordinary course of a foreign business and liabilities predominantly secured by foreign assets). As of the close of 1993, A has an amount of U.S. assets that exceeds 80 percent of the money and E&P bases of all A's property. Before application of this paragraph (b)(5), A would have $50 of excess interest (i.e., the $90 interest allocated or apportioned to its ECI under §1.882–5 less $40 of branch interest). Under this paragraph (b)(5), the $60 of additional interest paid by A is also treated as branch interest. However, to the extent that treating the $60 of additional interest as branch interest would create an amount of branch interest that would exceed the amount of branch interest permitted under paragraph (b)(6) of this section (relating to branch interest that exceeds a foreign corporation's interest allocated or apportioned to ECI under §1.882–5) the amount of the additional branch interest is reduced under paragraph (b)(6)(iii) of this section, which generally allows a foreign corporation to specify certain liabilities that do not give rise to branch interest or paragraph (b) (6) (ii) of this section, which generally specifies liabilities that do not give rise to branch interest beginning with the most-recently incurred liability.

(6) *Special rule where branch interest exceeds interest allocated or apportioned to ECI of a foreign corporation*—(i) *General rule*. If the amount of branch interest that is both paid and accrued by a foreign corporation during the taxable year (including interest that the foreign corporation elects under paragraph (c)(1) of this section to treat as paid during the taxable year) exceeds the amount of interest allocated or apportioned to ECI of a foreign corporation under §1.882–5 for the taxable year, then the amount of the foreign corporation's branch interest shall be reduced by the amount of such excess as provided in paragraphs (b)(6)(ii) and (iii) of this section, as applicable. The rules of paragraphs (b)(6)(ii) and (iii) of this section shall also apply where the amount of branch interest with respect to liabilities identified under paragraph (b)(1)(ii) of this section exceeds the maximum amount that may be treated as branch interest under that paragraph. This paragraph (b)(6) shall apply whether or not a reduction in the amount of branch interest occurs as a result of adjustments made during the examination of the foreign corporation's income tax return, such as a reduction in the amount of interest allocated or apportioned to ECI of the foreign corporation under §1.882–5.

(ii) *Reduction of branch interest beginning with most-recently incurred liability*. Except as provided in paragraph (b)(6)(iii) of this section (relating to an election to specify liabilities that do not give rise to branch interest), the amount of the excess in paragraph (b)(6)(i) of this section shall first reduce branch interest attributable to liabilities described in paragraph (b)(1)(ii) of this section (relating to liabilities identified as giving rise to branch interest) and then, if such excess has not been reduced to zero, branch interest attributable to the group of liabilities described in paragraph (b)(1)(i) of this section. The reduction of branch interest attributable to each group of liabilities (i.e., liabilities described in paragraph (b)(1)(ii) of this section and liabilities described in paragraph (b)(1)(i) of this section) shall be made beginning with interest attributable to the latest-incurred liability and continuing, in reverse chronological order, with branch interest attributable to the next-latest incurred liability. The branch interest attributable to a liability must be reduced to zero before a reduction is made with respect to branch interest attributable to the next-latest incurred liability. Where only a portion of the branch interest attributable to a liability is reduced by reason of this paragraph (b)(6)(ii), the reduction shall be made beginning with the last interest payment made with respect to the liability during the taxable year and continuing, in reverse chronological order, with the next-latest payment until the amount of branch interest has been reduced by the amount specified in paragraph (b)(6)(i) of this section. The amount of interest that is not treated as branch interest by reason of this paragraph (b)(6)(ii) shall not be treated as paid by a domestic corporation and thus shall not be subject to tax under section 871(a) or 881(a).

(iii) *Election to specify liabilities that do not give rise to branch interest.* For purposes of reducing the amount of branch interest under paragraph (b)(6)(i) of this section, a foreign corporation may, instead of using the method described in paragraph (b)(6)(ii) of this section, elect for any taxable year to specify which liabilities will not be treated as giving rise to branch interest or will be treated as giving rise only in part to branch interest. Branch interest paid during the taxable year with respect to a liability specified under this paragraph (b)(6)(iii) must be reduced to zero before a reduction is made with respect to branch interest attributable to the next-specified liability. If all interest payments with respect to a specified liability, when added to all interest payments with respect to other liabilities specified under this paragraph (b)(6)(iii), would exceed the amount of the reduction under paragraph (b)(6)(i) of this section, then only a portion of the branch interest attributable to that specified liability shall be reduced under this paragraph (b)(6)(iii), and the reduction shall be made beginning with the last interest payment made with respect to the liability during the taxable year and continuing, in reverse chronological order, with the next-latest payment until the amount of branch interest has been reduced by the amount of the reduction under paragraph (b)(6)(i) of this section. A foreign corporation that elects to have this paragraph (b)(6)(iii) apply shall note on its books and records maintained in the United States that the liability is not to be treated as giving rise to branch interest, or is to be treated as giving rise to branch interest only in part. Such notation must be made after the close of the taxable year in which the foreign corporation pays the interest and prior to the due date (with extensions) of the foreign corporation's income tax return for the taxable year. However, if the excess interest in paragraph (b)(6)(i) of this section occurs as a result of adjustments made during the examination of the foreign corporation's income tax return, the election and notation may be made at the time of examination. The amount of interest that is not treated as branch interest by reason of this paragraph (b)(6)(iii) shall not be treated as paid by a domestic corporation and thus shall not be subject to tax under section 871 (a) or 881 (a).

(iv) *Examples.* The application of this paragraph (b)(6) is illustrated by the following examples.

Example 1. Branch interest exceeds interest apportioned to ECI with no election in effect. Foreign corporation A, a calendar year, accrual method taxpayer, has interest expense apportioned to ECI under §1.882–5 of $230 for 1997. A's branch interest for 1997 is as follows:

(i) $130 paid to B, a domestic corporation, with respect to a note issued on March 10, 1997, and secured by real property located in the United States;

(ii) $60 paid to C, an individual resident of country X who is entitled to a 10 percent rate of withholding on interest payments under the income tax treaty between the United States and X, with respect to a note issued on October 15, 1996, which gives rise to interest subject to tax under section 871(a);

(iii) $80 paid to D, an individual resident of country Y who is entitled to a 15 percent rate of withholding on interest payments under the income tax treaty between the United States and Y, with respect to a note issued on February 15, 1997, which gives rise to interest subject to tax under section 871(a); and

(iv) $70 of portfolio interest (as defined in section 871(h) (2)) paid to E, a nonresident alien, with respect to a bond issued on March 1, 1997.

A's branch interest accrues during 1997 for purposes of calculating the amount of A's interest apportioned to ECI under §1.882–5. A has identified under paragraph (b)(1)(ii) of this section the liabilities described in paragraphs (ii), (iii) and (iv) of this example. A has not made an election under paragraph (b)(6)(iii) of this section to specify liabilities that do not give rise to branch interest. The amount of A's branch interest in 1997 is limited under paragraph (b)(6)(i) of this section to $230, the amount of the interest apportioned to A's ECI for 1997. The amount of A's branch interest must thus be reduced by $110 ($340–$230) under paragraph (b)(6)(ii) of this section. The reduction is first made with respect to interest attributable to liabilities described in paragraph (b)(1)(ii) of this section (i.e., liabilities identified as giving rise to branch interest) and, within the group of liabilities described in paragraph (b)(1)(ii) of this section, is first made with respect to the latest-incurred liability. Thus, the $70 of interest paid to E with respect to the bond issued on March 1, 1997, and $40 of the $80 of interest paid to D with respect to the note issued on February 15, 1997, are not treated as branch interest. The interest paid to D is no longer subject to tax under section 871(a), and D may claim a refund of amounts withheld with respect to the interest payments. There is no change in the tax consequences to E because the interest received by E was portfolio interest and was not subject to tax when it was treated as branch interest.

Example 2. Effect of election to specify liabilities. Assume the same facts as in *Example 1* except that A makes an election under paragraph (b)(6)(iii) of this section to specify which liabilities are not to be treated as giving rise to branch interest. A specifies the liability to D, who would be taxable at a rate of 15 percent on interest paid with respect to the liability, as a liability that does not give rise to branch interest, and D is therefore not subject to tax under section 871 (a) and is entitled to a refund of amounts withheld with respect to the interest payments. A also specifies the liability to C as a liability that gives rise to branch interest only in part. As a result, $30 of the $60 of interest paid to C is not treated as branch interest, and C is entitled to a refund with respect to the $30 of interest that is not treated as branch interest.

(7) *Effect of election under paragraph (c)(1) of this section to treat interest as if paid in year of accrual.* If a foreign corporation accrues an interest expense in a taxable year earlier than the taxable year of payment and elects under paragraph (c)(1) of this section to compute its excess interest as if the interest expense were branch interest paid in the year of accrual, the interest expense shall be treated as branch interest that is paid at the close of such year (and not in the actual year of payment) for all purposes of this section. Such interest shall thus be subject to tax under section 871(a) or 881(a) and withholding under section 1441 or section 1442, as if paid on the last day of the taxable year of accrual. Interest that is treated under paragraph (c)(1) of this section as paid in a later year for purposes of computing excess interest shall be treated as paid only in the actual year of payment for all purposes of this section other than paragraphs (a)(2) and (c)(1) of this section (relating to excess interest).

(8) *Effect of treaties*—(i) *Payor's treaty.* In the case of a foreign corporation's branch interest, relief shall be available under an article of an income tax treaty between the United States and the foreign corporation's country of residence relating to interest paid by the foreign corporation only if, for the taxable year in which the branch interest is paid (or if the branch interest is treated as paid in an earlier taxable year under paragraph (b)(7) of this section, for the earlier taxable year)—

(A) The foreign corporation meets the requirements of the limitation on benefits provision, if any, in the treaty, and either—

(*1*) The corporation is a qualified resident (as defined in §1.884–5(a)) of that foreign country in such year; or

(*2*) The corporation meets the requirements of paragraph (b)(8)(iii) of this section in such year; or

(B) The limitation on benefits provision, or an amendment to that provision, entered into force after December 31, 1986.

(ii) *Recipient's treaty.* A foreign person (other than a foreign corporation) that derives branch interest is entitled to claim benefits under provisions of an income tax treaty between the United States and its country of residence relating to interest derived by the foreign person. A foreign corporation may claim such benefits if it meets, with respect to the branch interest, the requirements of the limitation on benefits provision, if any, in the treaty and—

(A) The foreign corporation meets the requirements of paragraphs (b)(8)(i)(A) or (B) of this section; and

(B) In the case of interest paid in a taxable year beginning after December 31, 1988, with respect to an obligation with a maturity not exceeding one year, each foreign corporation that beneficially owned the obligation prior to maturity was a qualified resident (for the period specified in paragraph (b)(8)(i) of this section) of a foreign country with which the United States has an income tax treaty or met the requirements of the limitation on benefits provision in a treaty with respect to the interest payment and such provision entered into force after December 31, 1986.

(iii) *Presumption that a foreign corporation continues to be a qualified resident.* For purposes of this paragraph (b)(8), a foreign corporation that was a qualified resident for the prior taxable year because it fulfills the requirements of §1.884–5 shall be considered a qualified resident with respect to branch interest that is paid or received during the current taxable year if—

(A) In the case of a foreign corporation that met the stock ownership and base erosion tests in §1.884–5(b) and (c) for the preceding taxable year, the foreign corporation does not know, or have reason to know, that either 50 percent of its stock (by value) is not beneficially owned (or treated as beneficially owned by reason of §1.884–5(b)(2)) by qualifying shareholders at any time during the portion of the taxable year that ends with the date on which the interest is paid, or that the base erosion test is not met during the portion of the taxable year that ends with the date on which the interest is paid;

(B) In the case of a foreign corporation that met the requirements of §1.884–5(d) (relating to publicly-traded corporations) for the preceding taxable year, the foreign corporation is listed on an established securities exchange in the United States or its country of residence at all times during the portion of the taxable year that ends with the date on which the interest is paid and does not fail the requirements of §1.884–5(d)(4)(iii) (relating to certain closely-held corporations) at any time during such period; or

(C) In the case of a foreign corporation that met the requirements of §1.884–5(e) (relating to the active trade or business test) for the preceding taxable year, the foreign corporation continues to operate (other than in a nominal degree), at all times during the portion of the taxable year that ends with the date on which the interest is paid, the same business in the U.S. and its country of residence that caused it to meet such requirements for the preceding taxable year.

(iv) *Treaties other than income tax treaties.* A treaty that is not an income tax treaty does not provide any benefits with respect to branch interest.

(v) *Effect of income tax treaties on interest paid by a partnership.* If a foreign corporation is a partner (directly or indirectly) in a partnership that is engaged in a trade or business in the United States and owns an interest of 10 percent or more (as determined under the attribution rules of section 318) in the capital, profits, or losses of the partnership at any time during the partner's taxable year, the relief that may be claimed under an income tax treaty with respect to the foreign corporation distributive share of interest paid or treated as paid by the partnership shall not exceed the relief that would be available under paragraphs (b)(8) (i) and (ii) of this section if such interest were branch interest of the foreign corporation. See paragraph (c)(2) of this section for the effect on a foreign corporation's excess interest of interest paid by a partnership of which the foreign corporation is a partner.

(vi) *Examples.* The following examples illustrate the application of this paragraph (b)(8).

Example 1. Payor's treaty. The income tax treaty between the United States and country X provides that the United States may not impose a tax on interest paid by a corporation that is a resident of that country (and that is not a domestic corporation) if the recipient of the interest is a nonresident alien or a foreign corporation. Corp A is a qualified resident of country X and meets the limitation on benefits provision in the treaty. A's branch interest is not subject to tax under section 871(a) or 881(a) regardless of whether the recipient is entitled to benefits under an income tax treaty.

Example 2. Recipient's treaty and interest received from a partnership. A, a foreign corporation, and B, a nonresident alien, are partners in a partnership that owns and operates U.S. real estate and each has a distributive share of partnership interest deductions equal to 50 percent of the interest deductions of the partnership. There is no income tax treaty between the United States and the countries of residence of A and B. The partnership pays $1,000 of interest to a bank that is a resident of a foreign country, Y, and that qualifies under an income tax treaty in effect with the United States for a 5 percent rate of tax on U.S. source interest paid to a resident of country Y. However, the bank is not a qualified resident of country Y and the limitation on benefits provision of the treaty has not been amended since December 31, 1986. The partnership is required to withhold at a rate of 30 percent on $500 of the interest paid to the bank (i.e., A's 50 percent distributive share of interest paid by the partnership) because the bank cannot, under paragraph (b)(8)(iv) of this section, claim greater treaty benefits by lending money to the partnership than it could claim, if it lent money to A directly and the $500 were branch interest of A.

(c) *Rules relating to excess interest*—(1) *Election to compute excess interest by treating branch interest that is paid and accrued in different years as if paid in year of accrual*—(i) *General rule.* If branch interest is paid in one or more taxable years before or after the year in which the interest accrues, a foreign corporation may elect to compute its excess interest as if such branch interest were paid on the last day of the taxable year in which it accrues, and not in the taxable year in which it is actually paid. The interest expense will thus reduce the amount of the foreign corporation's excess interest in the year of accrual rather than in the year of actual payment. Except as provided in paragraph (c)(1)(ii) of this section, if an election is made for a taxable year, this paragraph (c)(1)(i) shall apply to all branch interest that is paid or accrued during that year. See paragraph (b)(7) of this section for the effect of an election under this paragraph (c)(1) on branch interest that accrues in a taxable year after the year of payment.

(ii) *Election not to apply in certain cases.* An election under this paragraph (c)(1) shall not apply to an interest expense that accrued in a taxable year beginning before January 1, 1987, and shall not apply to an interest expense that was paid in a taxable year beginning before such date unless the interest was income from sources within the United States. An election under this paragraph (c)(1) shall not apply to branch interest that accrues during the taxable year and is paid in an earlier taxable year if the branch interest reduced excess interest in such earlier year. However, a foreign corporation may amend its income tax return for such earlier taxable year so that the branch interest does not reduce excess interest in such year.

(iii) *Requirements for election.* A foreign corporation that elects to apply this paragraph (c)(1) shall attach to its income tax return (or to an amended income tax return) a statement that it elects to have the provisions of this paragraph (c)(1) apply, or shall provide written notice to the Commissioner during an examination that it elects to apply this paragraph (c)(1). The election shall be effective for the taxable year to which the return relates and for all subsequent taxable years unless the Commissioner consents to revocation of the election.

(iv) *Examples.* The following examples illustrate the application of this paragraph (c)(1).

Example 1. Interest accrued before paid. Foreign corporation A, a calendar year, accrual method taxpayer, has $100 of interest allocated or apportioned to ECI under §1.882–5 for 1997. A has $60 of branch interest in 1997 before application of this paragraph (c)(1). A has an interest expense of $20 that properly accrues for tax purposes in 1997 but is not paid until 1998. When the interest is paid in

1998 it will meet the requirements for branch interest under paragraph (b)(1) of this section. A makes a timely election under this paragraph (c)(1) to treat the accrued interest as if it were paid in 1997. A will be treated as having branch interest of $80 for 1997 and excess interest of $20 in 1997. The $20 of interest treated as branch interest of A in 1997 will not again be treated as branch interest in 1998.

Example 2. Interest paid before accrued. Foreign corporation A, a calendar year, accrual method taxpayer, has $60 of branch interest in 1997. The interest expense does not accrue until 1994 and the amount of interest allocated or apportioned to A's ECI under §1.882–5 is zero for 1997 and $60 for 1998. A makes an election under this paragraph (c)(1) with respect to 1997. As a result of the election, A's $60 of branch interest in 1997 reduces the amount of A's excess interest for 1994 rather than in 1998.

(2) *Interest paid by a partnership*—(i) *General rule.* Except as otherwise provided in paragraphs (c)(2) (i) and (ii) of this section, if a foreign corporation is a partner in a partnership that is engaged in trade or business in the United States, the amount of the foreign corporation's distributive share of interest paid or accrued by the partnership shall reduce (but not below zero) the amount of the foreign corporation's excess interest for the year to the extent such interest is taken into account by the foreign corporation in that year for purposes of calculating the interest allocated or apportioned to the ECI of the foreign corporation under §1.882–5. A foreign corporation's excess interest shall not be reduced by its distributive share of partnership interest that is attributable to a liability described in paragraph (b)(3)(iii) of this section (relating to interest on liabilities incurred in the ordinary course of a foreign business or secured predominantly by assets that are not U.S. assets) or would be described in paragraph (b)(3)(iii) of this section if entered on the partner's books. See paragraph (b)(8)(v) of this section for the effect of income tax treaties on interest paid by a partnership.

(ii) *Special rule for interest that is paid and accrued in different years.* Paragraph (c)(2)(i) of this section shall not apply to any portion of a foreign corporation's distributive share of partnership interest that is paid and accrued in different taxable years unless the foreign corporation has an election in effect under paragraph (c)(1) of this section that is effective with respect to such interest and any tax due under section 871(a) or 881(a) with respect to such interest has been deducted and withheld at source in the earlier of the taxable year of payment or accrual.

(3) *Effect of treaties*—(i) *General rule.* The rate of tax imposed on the excess interest of a foreign corporation that is a resident of a country with which the United States has an income tax treaty shall not exceed the rate provided under such treaty that would apply with respect to interest paid by a domestic corporation to that foreign corporation if the foreign corporation meets, with respect to the excess interest, the requirements of the limitation on benefits provision, if any, in the treaty and either—

(A) The corporation is a qualified resident (as defined in §1.884–5(a)) of that foreign country for the taxable year in which the excess interest is subject to tax; or

(B) The limitation on benefits provision, or an amendment to that provision, entered into force after December 31, 1986.

(ii) *Provisions relating to interest paid by a foreign corporation.* Any provision in an income tax treaty that exempts or reduces the rate of tax on interest paid by a foreign corporation does not prevent imposition of the tax on excess interest or reduce the rate of such tax.

(4) *Example.* The application of paragraphs (c)(2) and (3) of this section is illustrated by the following example.

Example. Interest paid by a partnership. Foreign corporation A, a calendar year taxpayer, is not a resident of a foreign country with which the United States has an income tax treaty. A is engaged in the conduct of a trade or business both in the United States and in foreign countries, and owns a 50 percent interest in X, a calendar year partnership engaged in the conduct of a trade or business in the United States. For 1997, all of X's liabilities are of a type described in paragraph (b)(1) of this section (relating to liabilities on U.S. books) and none are described in paragraph (b)(3)(iii) of this section (relating to liabilities that may not give rise to branch interest). A's distributive share of interest paid by X in 1997 is $20. For 1997, A has $150 of interest allocated or apportioned to its ECI under §1.882–5, $120 of which is attributable to branch interest. Thus, the amount of A's excess interest for 1997, before application of paragraph (c)(2)(i) of this section, is $30. Under paragraph (c)(2)(i) of this section, A's $30 of excess interest is reduced by $20, representing A's share of interest paid by X. Thus, the amount of A's excess interest for 1997 is reduced to $10. A is subject to a tax of 30 percent on its $10 of excess interest.

(d) *Stapled entities.* A foreign corporation that is treated as a domestic corporation by reason of section 269B (relating to stapled entities) shall continue to be treated as a foreign corporation for purposes of section 884 (f) and this section, notwithstanding section 269B and the regulations thereunder. Interest paid by such foreign corporation shall be treated as paid by a domestic corporation and shall be subject to the tax imposed by section 871 (a) or 881 (a), and to withholding under section 1441 and 1442, as applicable, to the extent such interest is not subject to tax by reason of section 884(f) and this section.

(e) *Effective dates*—(1) *General rule.* Except as provided in paragraph (e)(2) of this section, this section is effective for taxable years beginning October 13, 1992, and for payments of interest described in section 884(f)(1)(A) made (or treated as made under paragraph (b)(7) of this section) during taxable years of the payor beginning after such date. With respect to taxable years beginning before October 13, 1992, and after December 31, 1986, a foreign corporation may elect to apply this section in lieu of §1.884–4T of the temporary regulations (as contained in the CFR edition revised as of April 1, 1992) as they applied to the foreign corporation after issuance of Notice 89–80, 1989–2 C.B. 394, but only if the foreign corporation has made an election under §1.884–1 (i) to apply §1.884–1 in lieu of §1.884–1T (as contained in the CFR edition revised as of April 1, 1992) for that year, and the statute of limitations for assessment of a deficiency has not expired for that taxable year. Once an election has been made, an election under this section shall apply to all subsequent taxable years.

(2) *Special rule.* Paragraphs (a)(1), (a)(2)(i)(A), (a)(2)(iii), (b)(1), (b)(3), (b)(5)(i), (b)(6)(i), (b)(6)(ii), and (c)(2)(i) of this section are effective for taxable years beginning on or after June 6, 1996.

(f) *Transition rules*—(1) *Election under paragraph (c)(1) of this section.* If a foreign corporation has made an election described in §1.884–4T(b)(7) (as contained in the CFR edition revised as of April 1, 1992) with respect to interest that has accrued and been paid in different taxable years, such election shall be effective for purposes of paragraph (c)(1) of this section as if the corporation had made the election under paragraph (c)(1) of this section of these regulations.

(2) *Waiver of notification requirement for non-banks under Notice 89–80.* If a foreign corporation that is not a bank has made an election under Notice 89–80 to apply the rules in part 2 of section I of the Notice in lieu of the rules in §1.884–4T(b) (as contained in the CFR edition revised as of April 1, 1992) to determine the amount of its interest paid and excess interest in taxable years beginning prior to 1990, the requirement that the foreign corporation satisfy the notification requirements described in paragraph (b)(3)(ii) of this section is waived with respect to interest paid in taxable years ending on or before the date the Notice was issued.

(3) *Waiver of legending requirement for certain debt issued prior to January 3, 1989.* For purposes of sections 871(h), 881(c), and this section, branch interest of a foreign corporation that would be treated as portfolio interest under section 871(h) or 881(c) but for the fact that it fails to meet the requirements of section 163(f)(2)(B)(ii)(II) (relating to the legend requirement), shall nevertheless be treated as portfolio interest provided the interest arises with respect to a liability incurred by the foreign corporation before January 3, 1989, and interest with respect to the liability was treated as branch interest in a taxable year beginning before January 1, 1990.

[T.D. 8432, 57 FR 41660, Sept. 11, 1992; 57 FR 49117, Oct. 29, 1992; 57 FR 60126, Dec. 18, 1992, as amended by T.D. 8657, 61 FR 9341, Mar. 8, 1996]

§ 1.884–5 Qualified resident.

(a) *Definition of qualified resident.* A foreign corporation is a qualified resident of a foreign country with which the United States has an income tax treaty in effect if, for the taxable year, the foreign corporation is a resident of that country (within the meaning of such treaty) and either—

(1) Meets the requirements of paragraphs (b) and (c) of this section (relating to stock ownership and base erosion);

(2) Meets the requirements of paragraph (d) of this section (relating to publicly-traded corporations);

(3) Meets the requirements of paragraph (e) of this section (relating to the conduct of an active trade or business); or

(4) Obtains a ruling as provided in paragraph (f) of this section that it shall be treated as a qualified resident of its country of residence.

(b) *Stock ownership requirement*—(1) *General rule*—(i) *Ownership by qualifying shareholders*. A foreign corporation satisfies the stock ownership requirement of this paragraph (b) for the taxable year if more than 50 percent of its stock (by value) is beneficially owned (or is treated as beneficially owned by reason of paragraph (b)(2) of this section) during at least half of the number of days in the foreign corporation's taxable year by one or more qualifying shareholders. A person shall be treated as a qualifying shareholder only if such person meets the requirements of paragraph (b)(3) of this section and is either—

(A) An individual who is either a resident of the foreign country of which the foreign corporation is a resident or a citizen or resident of the United States;

(B) The government of the country of which the foreign corporation is a resident (or a political subdivision or local authority of such country), or the United States, a State, the District of Columbia, or a political subdivision or local authority of a State;

(C) A corporation that is a resident of the foreign country of which the foreign corporation is a resident and whose stock is primarily and regularly traded on an established securities market (within the meaning of paragraph (d) of this section) in that country or the United States or a domestic corporation whose stock is primarily and regularly traded on an established securities market (within the meaning of paragraph (d) of this section) in the United States;

(D) A not-for profit organization described in paragraph (b)(1)(iv) of this section that is not a pension fund as defined in paragraph (b)(8)(i)(A) of this section and that is organized under the laws of the foreign country of which the foreign corporation is a resident or the United States; or

(E) A beneficiary of certain pension funds (as defined in paragraph (b)(8)(i)(A) of this section) administered in or by the country in which the foreign corporation is a resident to the extent provided in paragraph (b)(8) of this section.

Beneficial owners of an association taxable as a corporation shall be treated as shareholders of such association for purposes of this paragraph (b)(1). If stock of a foreign corporation is owned by a corporation that is treated as a qualifying shareholder under paragraph (b)(1)(i)(C) of this section, such stock shall not also be treated as owned, directly or indirectly, by any qualifying shareholders of such corporation for purposes of this paragraph (b). Notwithstanding the above, a foreign corporation will not be treated as a qualified resident unless it obtains the documentation described in paragraph (b)(3) of this section to show that the requirements of this paragraph (b)(1)(i) have been met and maintains the documentation as provided in paragraph (b)(9) of this section. See also paragraph (b)(1)(iii) of this section, which treats certain publicly-traded classes of stock as owned by qualifying shareholders.

(ii) *Special rules relating to qualifying shareholders*. For purposes of applying paragraph (b)(1)(i) of this section—

(A) Stock owned on any day shall be taken into account only if the beneficial owner is a qualifying shareholder on that day or, in the case of a corporation or not-for-profit organization that is a qualifying shareholder under paragraph (b)(1)(i) (C) or (D) of this section, for a one-year period that includes such day; and

(B) An individual, corporation or not-for-profit organization is a resident of a foreign country if it is a resident of that country for purposes of the income tax treaty between the United States and that country.

(iii) *Publicly-traded class of stock treated as owned by qualifying shareholders.* A class of stock of a foreign corporation shall be treated as owned by qualifying shareholders if—

(A) The class of stock is listed on an established securities market in the United States or in the country of residence of the foreign corporation seeking qualified resident status; and

(B) The class of stock is primarily and regularly traded on such market (within the meaning of paragraphs (d) (3) and (4) of this section, applied as if the class of stock were the sole class of stock relied on to meet the requirements of paragraph (d)(4)(i)(A)).

For purposes of this paragraph (b), stock in such class shall not also be treated as owned by any qualifying shareholders who own such stock, either directly or indirectly.

(iv) *Special rule for not-for-profit organizations.* A not-for-profit organization is described in paragraph (b)(1)(iv) of this section if it meets the following requirements—

(A) It is a corporation, association taxable as a corporation, trust, fund, foundation, league or other entity operated exclusively for religious, charitable, educational, or recreational purposes, and it is not organized for profit;

(B) It is generally exempt from tax in its country of organization by virtue of its not-for-profit status; and

(C) Either—

(*1*) More than 50 percent of its annual support is expended on behalf of persons described in paragraphs (b)(1)(i)(A) through (E) of this section or on qualified residents of the country in which the organization is organized; or

(*2*) More than 50 percent of its annual support is derived from persons described in paragraphs (b)(1)(i) (A) through (E) of this section or from persons who are qualified residents of the country in which the organization is organized.

For purposes of meeting the requirements of paragraph (b)(1)(iv)(C) of this section, a not-for-profit organization may rely on the addresses of record of its individual beneficiaries and supporters to determine if such persons are resident in the country in which the not-for-profit organization is organized, provided that the addresses of record are not nonresidential addresses such as a post office box or in care of a financial intermediary, and the officers, directors or administrators of the organization do not know or have reason to know that the individual beneficiaries or supporters do not reside at that address.

(2) *Rules for determining constructive ownership*—(i) *General rules for attribution.* For purposes of this section, stock owned by a corporation, partnership, trust, estate, or mutual insurance company or similar entity shall be treated as owned proportionately by its shareholders, partners, beneficiaries, grantors or other interest holders as provided in paragraph (b)(2)(ii) through (v) of this section. The proportionate interest rules of this paragraph (b)(2) shall apply successively upward through a chain of ownership, and a person's proportionate interest shall be computed for the relevant days or period that is taken into account in determining whether a foreign corporation is a qualified resident. Except as otherwise provided, stock treated as owned by a person by reason of this paragraph (b)(2) shall, for purposes of applying this paragraph (b)(2), be treated as actually owned by such person.

(ii) *Partnerships.* A partner shall be treated as having an interest in stock of a foreign corporation owned by a partnership in proportion to the least of—

(A) The partner's percentage distributive share of the partnership's dividend income from the stock;

(B) The partner's percentage distributive share of gain from disposition of the stock by the partnership;

(C) The partner's percentage distributive share of the stock (or proceeds from the disposition of the stock) upon liquidation of the partnership.

For purposes of this paragraph (b)(2)(ii), however, all qualifying shareholders that are partners of a partnership shall be treated as one partner. Thus, the percentage distributive shares of dividend income, gain and liquidation rights of all qualifying shareholders that are partners in a partnership are aggregated prior to determining the least of the three percentages.

(iii) *Trusts and estates*—(A) *Beneficiaries.* In general, a person shall be treated as having an interest in stock of a foreign corporation owned by a trust or estate in proportion to the person's actuarial interest in the trust or estate, as provided in section 318(a)(2)(B)(i), except that an income beneficiary's actuarial interest in the trust will be determined as if the trust's only asset were the stock. The interest of a remainder beneficiary in stock will be equal to 100 percent minus the sum of the percentages of any interest in the stock held by income beneficiaries. The ownership of an interest in stock owned by a trust shall not be attributed to any beneficiary whose interest cannot be determined under the preceding sentence, and any such interest, to the extent not attributed by reason of this paragraph (b)(2)(iii)(A), shall not be considered owned by a beneficiary unless all potential beneficiaries with respect to the stock are qualifying shareholders. In addition, a beneficiary's actuarial interest will be treated as zero to extent that a grantor is treated as owning the stock under paragraph (b)(2)(iii)(B) of this section. A substantially separate and independent share of a trust, within the meaning of section 663(c), shall be treated as a separate trust for purposes of this paragraph (b)(2)(iii)(A), provided that payment of income, accumulated income or corpus of a share of one beneficiary (or group of beneficiaries) cannot affect the proportionate share of income, accumulated income or corpus of another beneficiary (or group of beneficiaries).

(B) *Grantor trusts.* A person is treated as the owner of stock of a foreign corporation owned by a trust to the extent that the stock is included in the portion of the trust that is treated as owned by the person under sections 671 to 679 (relating to grantors and others treated as substantial owners).

(iv) *Corporations that issue stock.* A shareholder of a corporation that issues stock shall be treated as owning stock of a foreign corporation that is owned by such corporation on any day in a proportion that equals the value of the stock owned by such shareholder to the value of all stock of such corporation. If there is an agreement, express or implied, that a shareholder of a corporation will not receive distributions from the earnings of stock owned by the corporation, the shareholder will not be treated as owning that stock owned by the corporation.

(v) *Mutual insurance companies and similar entities.* Stock held by a mutual insurance company, mutual savings bank, or similar entity (including an association taxable as a corporation that does not issue stock interests) shall be considered owned proportionately by the policy holders, depositors, or other owners in the same proportion that such persons share in the surplus of such entity upon liquidation or dissolution.

(vi) *Pension funds.* See paragraphs (b)(8) (ii) and (iii) of this section for the attribution of stock owned by a pension fund (as defined in paragraph (b)(8)(i)(A)) to beneficiaries of the fund.

(vii) *Examples.* The rules of paragraph (b)(2)(ii) of this section are illustrated by the following examples.

Example 1. Stock held solely by qualifying shareholders through a partnership. A and B, residents of country X, are qualifying shareholders, within the meaning of paragraphs (b)(1)(i) (A) through (E) of this section, and the sole partners of partnership P. P's only asset is the stock of foreign corporation Z, a country X corporation seeking qualified resident status under this section. A's distributive share of P's income and gain on the disposition of P's assets is 80 percent, but A's distributive share of P's assets (or the proceeds therefrom) on P's liquidation is 20 percent. B's distributive share of P's income and gain is 20 percent and B is entitled to 80 percent of the assets (or proceeds therefrom) on P's liquidation. Under the attribution rules of paragraph (b)(2)(ii) of this section, A and B will be treated as a single partner owning in the aggregate 100 percent of the stock of Z owned by P.

Example 2. Stock held by both qualifying and non-qualifying shareholders through a partnership. Assume the same facts as in *Example 1* except that C, an individual who is not a qualifying shareholder, is also a partner in P and that C's distributive share of P's income is 60 percent. The distributive shares of A and B are the same as in *Example 1* except that A's distributive share of income is 20 percent. Under the attribution rules of paragraph (b)(2)(ii) of this section, A and B will be treated as a single partner owning in the aggregate 40 percent of the stock of Z owned by P (i.e., the least of A and B's aggregate distributive shares of dividend income (40 percent), gain (100 percent), and liquidation rights (100 percent) with respect to the Z stock).

Example 3. Stock held through tiered partnerships. Assume the same facts as in *Example 1*, except that P does not own the stock of Z directly, but rather is a partner in partnership P1, which owns the stock of Z. Assume that P's distributive share of the dividend income, gain and liquidation rights with respect to the Z stock held by P1 is 40 percent. Assume that of the remaining partners of P1 only D is a qualifying shareholder. D's distributive share of P1's dividend income and gain is 15 percent; D's distributive share of P1's assets on liquidation is 25 percent. Under the attribution rules of paragraph (b)(2)(ii) of this section, A and B, treated as a single partner, will own 40 percent of the Z stock owned by P1 (100 percent X 40 percent) and D will be treated as owning 15 percent of the Z stock owned by P1 (the least of D's dividend income (15 percent), gain (15 percent), and liquidation rights (25 percent) with respect to the Z stock). Thus, 55 percent of the Z stock owned by P1 is treated as owned by qualifying shareholders under paragraph (b)(2)(ii) of this section.

(3) *Required documentation*—(i) *Ownership statements, certificates of residency and intermediary ownership statements.* Except as provided in paragraphs (b)(3)(ii), (iii) and (iv) and paragraph (b)(8) of this section, a person shall only be treated as a qualifying shareholder of a foreign corporation if—

(A) For the relevant period, the person completes an ownership statement described in paragraph (b)(4) of this section and, in the case of an individual who is not a U.S. citizen or resident, also obtains a certificate of residency described in paragraph (b)(5) of this section;

(B) In the case of a person owning stock in the foreign corporation indirectly through one or more intermediaries (including mere legal owners or recordholders acting as nominees), each intermediary completes an intermediary ownership statement described in paragraph (b)(6) of this section; and

(C) Such ownership statements and certificates of residency are received by the foreign corporation on or before the earlier of the date it files its income tax return for the taxable year to which the statements relate or the due date (including extensions) for filing such return or, in the case of a foreign corporation claiming treaty benefits under §1.884–4(b)(8) (i) or (ii) (relating to branch interest) on or before the date on which such interest is paid.

(ii) *Substitution of intermediary verification statement for ownership statements and certificates of residency.* If a qualifying shareholder owns stock through an intermediary that is either a domestic corporation, a resident of the United States, or a resident (for treaty purposes) of a country with which the United States has an income tax treaty in effect, the intermediary may provide an intermediary verification statement (as described in paragraph (b)(7) of this section) in place of any relevant ownership statements and certificates of residency from qualifying shareholders, and in place of intermediary ownership statements (or, where applicable, intermediary verification statements) from all intermediaries standing in the chain of ownership between the qualifying shareholders and the intermediary issuing the intermediary verification statement. An intermediary verification statement generally certifies that the verifying intermediary holds the documentation described in the preceding sentence and agrees to make it available to the District Director on request. Such intermediary verification statements, along with an intermediary ownership statement from the verifying intermediary, must be received by the foreign corporation on or before the earlier of the date if files its income tax return for the taxable year to which the statements relate or the due date (including extensions) for filing such return. An indirect owner of a foreign corporation is thus treated as a qualifying shareholder of a foreign corporation if the foreign corporation receives, on or before the time specified above, an intermediary verification statement and an intermediary ownership statement from the verifying intermediary and an intermediary ownership statement from all intermediaries standing in the chain of the verifying intermediary's ownership of its interest in the foreign corporation.

(iii) *Special rule for registered shareholders of widely-held corporations.* An ownership statement and a certificate of residency shall not be required in the case of an individual who is a shareholder of record of a corporation that has at least 250 shareholders if—

(A) The individual owns less than one percent of the stock (by value) (applying the attribution rules of section 318) of the corporation at all times during the taxable year;

(B) The individual's address of record is in the corporation's country of residence and is not a nonresidential address such as a post office box or in care of a financial intermediary or stock transfer agent; and

(C) The officers and directors of the corporation do not know or have reason to know that the individual does not reside at that address.

The rule in this paragraph (b)(3)(iii) may also be applied with respect to individual owners of mutual insurance companies, mutual savings banks or similar entities, provided that the same conditions set forth in this paragraph (b)(3)(iii) are met with respect to such individuals.

(iv) *Special rule for pension funds.* See paragraphs (b)(8) (ii) through (v) of this section for special documentation rules applicable to pension funds (as defined in paragraph (b)(8)(i)(A) of this section).

(v) *Reasonable cause exception.* If a foreign corporation does not obtain the documentation described in this paragraph (b)(3) or (b)(8) of this section in a timely manner but is able to show prior to notification of an examination of the return for the taxable year that the failure was due to reasonable cause and not willful neglect, the foreign corporation may perfect the documentation after the deadlines specified in this paragraph (b)(3) or (b)(8) of this section. It may make such a showing by providing a written statement to the District Director having jurisdiction over the taxpayer's return or the Office of the Assistant Commissioner (International), as applicable, setting forth the reasons for the failure to obtain the documentation in a timely manner and describing the documentation that was received after the deadline had passed. Whether a failure to obtain the documentation in a timely manner was due to reasonable cause shall be determined by the District Director or the Office of the Assistant Commissioner (International), as applicable, under all the facts and circumstances.

(4) *Ownership statements from qualifying shareholders*—(i) *Ownership statements from individuals.* An ownership statement from an individual is a written statement signed by the individual under penalties of perjury stating—

(A) The name, permanent address, and country of residence of the individual and, if the individual was not a resident of the country for the entire taxable year of the foreign corporation seeking qualified resident status, the period during which it was a resident of the foreign corporation's country of residence;

(B) If the individual is a direct beneficial owner of stock in the foreign corporation, the name of the corporation, the number of shares in each class of stock of the corporation that are so owned, and the period of time during the taxable year of the foreign corporation during which the individual owned the stock (or, in the case of an association taxable as a corporation, the amount and nature of the owner's interest in such association);

(C) If the individual directly owns an interest in a corporation, partnership, trust, estate or other intermediary that owns (directly or indirectly) stock in the foreign corporation, the name of the intermediary, the number and class of shares or amount and nature of the interest of the individual in such intermediary (that is relevant for purposes of attributing ownership in paragraph (b)(2) of this section), and the period of time during the taxable year of the foreign corporation during which the individual held such interest; and

(D) To the extent known by the individual, a description of the chain of ownership through which the individual owns stock in the foreign corporation, including the name and address of each intermediary standing between the intermediary described in paragraph (b)(4)(i)(C) of this section and the foreign corporation.

(ii) *Ownership statements from governments.* An ownership statement from a government that is a qualifying shareholder is a written statement signed by either—

(A) An official of the governmental authority, agency or office that has supervisory authority with respect to the government's ownership interest who is authorized to sign such a statement on behalf of the authority, agency or office; or

(B) The competent authority of the foreign country (as defined in the income tax treaty between the United States and the foreign country).

Such statement shall provide the title of the official signing the statement and the name and address of the government agency, and shall provide the information described in paragraphs (b)(4)(i) (B) through (D) of this section (substituting ''government'' for ''individual'') with respect to the government's direct or indirect ownership of stock in the foreign corporation seeking qualified resident status.

(iii) *Ownership statements from publicly-traded corporations.* An ownership statement from a corporation that is a qualifying shareholder under paragraph (b)(1)(i)(C) of this section is a written statement signed by a person authorized to sign a tax return on behalf of the corporation under penalties of perjury stating—

(A) The name, permanent address, and principal place of business of the corporation (if different from its permanent address);

(B) The information described in paragraphs (b)(4)(i) (B) through (D) of this section (substituting ''corporation'' for ''individual''); and

(C) That the corporation's stock is primarily and regularly traded on an established securities exchange (within the meaning of paragraph (d) of this section) in the United States or its country of residence.

(iv) *Ownership statements from not-for-profit organizations.* An ownership statement from a not-for-profit organization (other than a pension fund as defined in paragraph (b)(8)(i)(A) of this section) is a written statement signed by a person authorized to sign a tax return on behalf of the organization under penalties of perjury stating—

(A) The name, permanent address, and principal location of the activities of the organization (if different from its permanent address);

(B) The information described in paragraphs (b)(4)(i) (B) through (D) of this section (substituting ''not-for-profit organization'' for ''individual'') with respect to the not-for-profit organization's direct or indirect ownership of stock in the foreign corporation seeking qualified resident status; and

(C) That the not-for-profit organization satisfies the requirements of paragraph (b)(1)(iv) of this section.

(v) *Ownership through a nominee.* For purposes of this paragraph (b)(4) and paragraph (b)(6) of this section, a person who owns either stock in a foreign corporation seeking qualified resident status or an interest in an intermediary described in paragraph (b)(4)(i)(C) of this section through a nominee shall be treated as owning such stock or interest directly and must, therefore, provide the information described in paragraphs (b)(4) (i) through (iv) of this section, as applicable. Such person must also provide the name and address of the nominee.

(5) *Certificate of residency.* A certificate of residency must be signed by the relevant authorities (as described below) of the country of residence of the individual shareholder and must state that the individual is a resident of that country for purposes of its income tax laws or, if the authorities do not customarily make such a determination, that the individual has filed a tax return claiming resident status and subjecting the individual's income to tax on a resident basis for the taxable year or period that ends with or within the taxable year for which the corporation is seeking qualified resident status. In the case of an individual who is not legally required to file a tax return in his or her country of residence or in any other country, a certificate of residency of a parent or guardian residing at such individual's address shall be considered sufficient to meet that individual's obligation under this paragraph (b)(5). The relevant authorities shall be the competent authority of the foreign country of which the foreign corporation is a resident, as defined in the income tax

treaty between the foreign country and the United States, or such other governmental office of the foreign country (or political subdivision thereof) that customarily provides statements of residence. Notwithstanding the foregoing, the Commissioner may consult with the competent authority of a country regarding the procedures set forth in this paragraph (b)(5) and if necessary agree on additional or alternative procedures under which these certificates may be issued.

(6) *Intermediary ownership statement.* An intermediary ownership statement is a written statement signed under penalties of perjury by the intermediary (if the intermediary is an individual) or a person that would be authorized to sign a tax return on behalf of the intermediary (if the intermediary is not an individual) containing the following information:

(i) The name, address, country of residence, and principal place of business (in the case of a corporation or partnership) of the intermediary and, if the intermediary is a trust or estate, the name and permanent address of all trustees or executors (or equivalent under foreign law);

(ii) The information described in paragraphs (b)(4)(i) (B) through (D) (substituting ''intermediary making the ownership statement'' for ''individual'') with respect to the intermediary's direct or indirect ownership in the stock in the foreign corporation seeking qualified resident status;

(iii) If the intermediary is a nominee for a qualifying shareholder or another intermediary, the name and permanent address of the qualifying shareholder, or the name and principal place of business of such other intermediary;

(iv) If the intermediary is not a nominee for a qualifying shareholder or another intermediary, the proportionate interest in the intermediary of each direct shareholder, partner, beneficiary, grantor, or other interest holder (or if the direct holder is a nominee, of its beneficial shareholder, partner, beneficiary, grantor, or other interest holder) from which the intermediary received an ownership statement and the period of time during the taxable year for which the interest in the intermediary was owned by such shareholder, partner, beneficiary, grantor or other interest holder. For purposes of this paragraph (b)(6)(iv), the proportionate interest of a person in an intermediary is the percentage interest (by value) held by such person, determined using the principles for attributing ownership in paragraph (b)(2) of this section. If an intermediary is not required to receive an ownership statement from its individual registered shareholders or other interest holders by reason of paragraph (b)(3)(iii) of this section, then it must provide a list of the names and addresses of such registered shareholders or other interest holders and the aggregate proportionate interest in the intermediary of such registered shareholders or other interest holders.

(7) *Intermediary verification statement.* An intermediary verification statement that may be substituted for certain documentation under paragraph (b)(3)(ii) of this section is a written statement signed under penalties of perjury by the intermediary (if the intermediary is an individual) or by a person that would be authorized to sign a tax return on behalf of the intermediary (if the verifying intermediary is not an individual) containing the following information—

(i) The name, principal place of business, and country of residence of the verifying intermediary;

(ii) A statement that the verifying intermediary has obtained either—

(A) An ownership statement and, if applicable, a certificate of residency from a qualifying shareholder with respect to the foreign corporation seeking qualified resident status, and an intermediary ownership statement from each intermediary standing in the chain of ownership between the verifying intermediary and the qualifying shareholder; or

(B) An intermediary verification statement substituting for the documentation described in paragraph (b)(7)(ii)(A) and an intermediary ownership statement from such intermediary and each intermediary standing in the chain of ownership between such intermediary and the verifying intermediary;

(iii) The proportionate interest (as computed using the documentation described in paragraph (b)(7)(ii) of this section) in the intermediary owned directly or indirectly by qualifying shareholders;

(iv) An agreement to make available to the Commissioner at such time and place as the Commissioner may request the underlying documentation described in paragraph (b)(7)(ii) of this section; and

(v) A specific and valid waiver of any right to bank secrecy or other secrecy under the laws of the country in which the verifying intermediary is located, with respect to any qualifying shareholder ownership statements, certificates of residency, intermediary ownership statements or intermediary verification statements that the verifying intermediary has obtained pursuant to paragraph (b)(7)(ii) of this section.

A foreign corporation may combine, in a single statement, the information in an intermediary ownership statement and the information in an intermediary verification statement.

(8) *Special rules for pension funds*—(i) *Definitions*—(A) *Pension fund.* For purposes of this section, the term ''pension fund'' shall mean a trust, fund, foundation, or other entity that is established exclusively for the benefit of employees or former employees of one or more employers, the principal purpose of which is to provide retirement, disability, and death benefits to beneficiaries of such entity and persons designated by such beneficiaries in consideration for prior services rendered.

(B) *Beneficiary.* For purposes of this section, the term ''beneficiary'' of a pension fund shall mean any person who has made contributions to the pension fund, or on whose behalf contributions have been made, and who is currently receiving retirement, disability, or death benefits from the pension fund or can reasonably be expected to receive such benefits in the future, whether or not the person's right to receive benefits from the fund has vested.

(ii) *Government pension funds.* An individual who is a beneficiary of a pension fund that would be a controlled entity of a foreign sovereign within the principles of §1.892–2T(c)(1) of the regulations (relating to pension funds established for the benefit of employees or former employees of a foreign government) shall be treated as a qualifying shareholder of a foreign corporation in which the pension fund owns a direct or indirect interest without having to meet the documentation requirements under paragraph (b)(3)(i)(A) of this section, if the foreign corporation is resident in the country of the foreign sovereign and the trustees, directors, or other administrators of the pension fund provide, with the pension fund's intermediary ownership statement described in paragraph (b)(6) of this section, a written statement that the fund is a controlled entity described in this paragraphs (b)(8)(ii). See paragraph (b)(4)(ii) of this section regarding an ownership statement from a pension fund that is an integral part of a foreign government.

(iii) *Non-government pension funds.* For purposes of this section, an individual who is a beneficiary of a pension fund not described in paragraph (b)(8)(ii) of this section shall be treated as a qualifying shareholder of a foreign corporation owned directly or indirectly by such pension fund without having to meet the documentation requirements under paragraph (b)(3)(i)(A) of this section, if—

(A) The pension fund is administered in the foreign corporation's country of residence and is subject to supervision or regulation by a governmental authority (or other authority delegated to perform such supervision or regulation by a governmental authority) in such country;

(B) The pension fund is generally exempt from income taxation in its country of administration;

(C) The pension fund has 100 or more beneficiaries;

(D) The beneficiary's address, as it appears on the records of the fund, is in the foreign corporation's country of residence or the United States and is not a nonresidential address, such as a post office box or in care of a financial intermediary, and none of the trustees, directors or other administrators of the pension fund know, or have reason to know, that the beneficiary is not an individual resident of such foreign country or the United States;

(E) In the case of a pension fund that has fewer than 500 beneficiaries, the beneficiary's employer provides (if the beneficiary is currently contributing to the fund) to the trustees, directors or other administrators a written statement that the beneficiary is currently employed in the country in which the fund is administered or is usually employed in such country but is temporarily employed by the company outside of the country; and

(F) The trustees, directors or other administrators of the pension fund provide, with the pension fund's intermediary ownership statement described in paragraph (b)(6) of this section, a written statement signed under penalties of perjury declaring that the pension fund meets the requirements in paragraphs (b)(8)(iii) (A), (B), and (C) of this section and giving the number of beneficiaries who meet the requirements of paragraph (b)(8)(iii)(D) of this section, and, if applicable, paragraph (b)(8)(iii)(E) of this section.

(iv) *Computation of beneficial interests in non-government pension funds.* The number of shares in a foreign corporation that are held indirectly by beneficiaries of a pension fund who are qualifying shareholders may be computed based on the ratio of the number of such beneficiaries to all beneficiaries of the pension fund (rather than on the basis of the rules in paragraph (b)(2) of this section) if—

(A) The pension fund meets the requirements of paragraphs (b)(8)(iii) (A), (B), and (C) of this section;

(B) The trustees, directors or other administrators of the pension fund have no knowledge, and no reason to know, that the ratio of the pension fund's beneficiaries who are residents of either the country in which the pension fund is administered or of the United States to all beneficiaries of the pension fund would differ significantly from the ratio of the sum of the actuarial interests of such residents in the pension fund to the actuarial interests of all beneficiaries in the pension fund (or, if the beneficiaries' actuarial interest in the stock held directly or indirectly by the pension fund differs from the beneficiaries' actuarial interest in the pension fund, the ratio of actuarial interests computed by reference to the beneficiaries' actuarial interest in the stock);

(C) Either—

(*1*) Any overfunding of the pension fund would be payable, pursuant to the governing instrument or the laws of the foreign country in which the pension fund is administered, only to, or for the benefit of, one or more corporations that are qualified residents of the country in which the pension fund is administered, individual beneficiaries of the pension fund or their designated beneficiaries, or social or charitable causes (the reduction of the obligation of the sponsoring company or companies to make future contributions to the pension fund by reason of overfunding shall not itself result in such overfunding being deemed to be payable to or for the benefit of such company or companies); or

(*2*) The foreign country in which the pension fund is administered has laws that are designed to prevent overfunding of a pension fund and the funding of the pension fund is within the guidelines of such laws; or

(*3*) The pension fund is maintained to provide benefits to employees in a particular industry, profession, or group of industries or professions and employees of at least 10 companies (other than companies that are owned or controlled, directly or indirectly, by the same interests) contribute to the pension fund or receive benefits from the pension fund; and

(D) The trustees, directors or other administrators provide, with the pension fund's intermediary ownership statement described in paragraph (b)(6) of this section, a written statement signed under penalties of perjury certifying that the requirements in paragraphs (b)(8)(iv) (A), (B), and either (C)(*1*), (C)(*2*) or (C)(*3*) of this section have been met.

The statement described in paragraph (b)(8)(iv) (D) of this section may be combined, in a single statement, with the information required in paragraph (b)(8)(iv) (F) of this section.

(v) *Time for making determinations.* The determinations required to be made under this paragraph (b)(8) shall be made using information shown on the records of the pension fund for a date on or after the beginning of the foreign corporation's taxable year to which the determination is relevant.

(9) *Availability of documents for inspection*—(i) *Retention of documents by the foreign corporation.* The documentation described in paragraphs (b)(3) and (b)(8) of this section must be retained by the foreign corporation until expiration of the period of limitations for the taxable year to which the documentation relates and must be made available for inspection by the District Director at such time and place as the District Director may request.

(ii) *Retention of documents by an intermediary issuing an intermediary verification statement.* The documentation upon which an intermediary relies to issue an intermediary verification statement under paragraph (b)(7) of this section must be retained by the intermediary for a period of six years from the date of issuance of the intermediary verification statement and must be made available for inspection by the District Director at such time and place as the District Director may request.

(10) *Examples.* The application of this paragraph (b) is illustrated by the following examples.

Example 1. Foreign corporation A is a resident of country L, which has an income tax treaty in effect with the United States. Foreign corporation A has one class of stock issued and outstanding consisting of 1,000 shares, which are beneficially owned by the following alien individuals, directly or by application of paragraph (b)(2) of this section:

Individual	Shares owned, directly or indirectly by application of paragraph (b)(2) of this section	Percentage
T—resident of the U.S	200	20
U—resident of country L	400	40
V—resident of country M	100	10
W—resident of country L	210	21
X—resident of country N	90	9
Total	1,000	100

(i) T owns his 200 shares directly and is a beneficial owner.

(ii) U and V own, respectively, an 80 percent and a 20 percent actuarial interest in foreign trust FT, (which interest does not differ from their respective interests in the stock owned by FT), which beneficially owns 100 percent of the stock of a foreign corporation B with bearer shares, which beneficially owns 500 shares of foreign corporation A. Foreign corporation B is incorporated in a country that does not have an income tax treaty with the United States. The foreign trust has deposited the bearer shares it owns in B with a bank in a foreign country that has an income tax treaty with the United States.

(iii) W beneficially owns all the shares of foreign corporation C, which are registered in the name of individual Z, a nominee, who resides in country L; foreign corporation C beneficially owns a 70 percent interest in foreign corporation D, which beneficially owns 300 shares of A. D's shares are bearer shares that C (not a resident of a country with which the United States has an income tax treaty) has deposited with a bank in a foreign country that has an income tax treaty with the United States.

(iv) X beneficially owns a 30 percent interest in foreign corporation D.

(v) A is a qualified resident of country L if it obtains the applicable documentation described in paragraph (b)(3) of this section either with respect to ownership by individuals U and W or with respect to ownership by individuals T and U, since either combination of qualifying shareholders of foreign corporation A will exceed 50 percent.

Example 2. Assume the same facts as in *Example 1* and assume that foreign corporation A chooses to obtain documentation with respect to individuals T and U.

(i) A must obtain, pursuant to paragraph (b)(3)(i) of this section, an ownership statement (as described in paragraph (b)(4)(i) of this section) signed by T. T is not required to furnish a certificate of residency because T is a U.S. resident.

(ii) U must provide foreign trust FT with an ownership statement and certificate of residency, as described in paragraphs (b)(4) and (b)(5) of this section. The trustees of FT must provide the depository bank holding foreign corporation B's bearer shares with an intermediary ownership statement concerning its beneficial ownership of B's shares and must attach to it the documentation provided by U. The depository bank must provide B with an intermediary ownership statement regarding its holding of B shares on behalf of FT and has the choice of attaching—

(A) The documentation from U and the intermediary ownership statement from FT; or

(B) An intermediary verification statement described in paragraph (b)(7) of this section, in which case foreign corporation B would not be provided with U's individual documentation or FT's intermediary ownership statement, both of which are retained by the depository bank.

(iii) In either case, B must then provide foreign corporation A with an intermediary ownership statement regarding its direct beneficial ownership of shares in A and, as the case may be, either—

(A) U's documentation and the intermediary ownership statements by FT and the depository bank; or

(B) The depository bank's intermediary ownership and verification statements.

(iv) Thus, with respect to U, A must obtain under paragraph (b)(3)(i) of this section the individual documentation regarding U and an intermediary ownership statement from each intermediary standing in the chain of U's indirect beneficial ownership of shares in A, i.e., from FT, the depository bank and B. In the alternative, A must obtain under paragraph (b)(3)(ii) of this section an intermediary verification statement issued by the depository bank and an intermediary ownership statement from the bank and from B, which, in this example, are the only intermediaries standing in the chain of ownership of the verifying intermediary (i.e., the depository bank).

Example 3. Assume the same facts as in *Example 1.* In addition, assume that foreign corporation A chooses to obtain documentation with respect to individuals U and W. With respect to U, A must obtain the same documentation that is described in *Example 2.* With respect to W, A must obtain, under paragraph (b)(3)(i) of this section, individual documentation regarding W and an intermediary ownership statement from each intermediary standing in the chain of W's indirect beneficial ownership of shares in A, i.e., from individual Z, foreign corporation C, the depository bank in the foreign treaty country, and foreign corporation D. In the alternative, A must obtain, under paragraph (b)(3)(ii) of this section, either—

(i) An intermediary verification statement by the depository bank in the foreign treaty country and an intermediary ownership statement from the bank and from D; or

(ii) An intermediary verification statement from Z and an intermediary ownership statement from Z and from each intermediary standing in the chain of ownership of shares in foreign corporation A, i.e., from C, the depository bank in the foreign treaty country and D. C may not issue an intermediary verification statement because it is not a resident of a country with which the United States has an income tax treaty.

(c) *Base erosion.* A foreign corporation satisfies the requirement relating to base erosion for a taxable year if it establishes that less than 50 percent of its income for the taxable year is used (directly or indirectly) to make deductible payments in the current taxable year to persons who are not residents (or, in the case of foreign corporations, qualified residents) of the foreign country of which the foreign corporation is a resident and who are not citizens or residents (or, in the case of domestic corporations, qualified residents) of the United States. Whether a domestic corporation is a qualified resident of the United States shall be determined under the principles of this section. For purposes of this paragraph (c), the term ''deductible payments'' includes payments that would be ordinarily deductible under U.S. income tax principles without regard to other provisions of the Code that may require the capitalization of the expense, or disallow or defer the deduction. Such payments include, for example, interest, rents, royalties and reinsurance premiums. For purposes of this paragraph (c), the income of a foreign corporation means the corporation's gross income for the taxable year (or, if the foreign corporation has no gross income for the taxable year, the average of its gross income for the three previous taxable years) under U.S. tax principles, but not excluding items of income otherwise excluded from gross income under U.S. tax principles.

(d) *Publicly-traded corporations*—(1) *General rule.* A foreign corporation that is a resident of a foreign country shall be treated as a qualified resident of that country for any taxable year in which—

(i) Its stock is primarily and regularly traded (as defined in paragraphs (d) (3) and (4) of this section) on one or more established securities markets (as defined in paragraph (d)(2) of this section) in that country, or in the United States, or both; or

(ii) At least 90 percent of the total combined voting power of all classes of stock of such foreign corporation entitled to vote and at least 90 percent of the total value of the stock of such foreign corporation is owned, directly or by application of paragraph (b)(2) of this section, by a foreign corporation that is a resident of the same foreign country or a domestic corporation and the stock of such parent corporation is primarily and regularly traded on an established securities market in that foreign country or in the United States, or both.

(2) *Established securities market*—(i) *General rule.* For purposes of section 884, the term ''established securities market'' means, for any taxable year—

(A) A foreign securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority of the country in which the market is located, is the principal exchange in that country, and has an annual value of shares traded on the exchange exceeding $1 billion during each of the three calendar years immediately preceding the beginning of the taxable year;

(B) A national securities exchange that is registered under section 6 of the Securities Act of 1934 (15 U.S.C. 78f); and

(C) A domestic over-the-counter market (as defined in paragraph (d)(2)(iv) of this section).

(ii) *Exchanges with multiple tiers.* If a principal exchange in a foreign country has more than one tier or market level on which stock may be separately listed or traded, each such tier shall be treated as a separate exchange.

(iii) *Computation of dollar value of stock traded.* For purposes of paragraph (d)(2)(i)(A) of this section, the value in U.S. dollars of shares traded during a calendar year shall be determined on the basis of the dollar value of such shares traded as reported by the International Federation of Stock Exchanges, located in Paris, or, if not so reported, then by converting into U.S. dollars the aggregate value in local currency of the shares traded using an exchange rate equal to the average of the spot rates on the last day of each month of the calendar year.

(iv) *Definition of over-the-counter market.* An over-the-counter market is any market reflected by the existence of an interdealer quotation system. An interdealer quotation system is any system of general circulation to brokers and dealers that regularly disseminates quotations of stocks and securities by identified brokers or dealers, other than by quotation sheets that are prepared and distributed by a broker or dealer in the regular course of business and that contain only quotations of such broker or dealer.

(v) *Discretion to determine that an exchange qualifies as an established securities market.* The Commissioner may, in his sole discretion, determine in a published document that a securities exchange that does not meet the requirements of paragraph (d)(2)(i)(A) of this section qualifies as an established securities market. Such a determination will be made only if it is established that—

(A) The exchange, in substance, has the attributes of an established securities market (including adequate trading volume, and comparable listing and financial disclosure requirements);

(B) The rules of the exchange ensure active trading of listed stocks; and

(C) The exchange is a member of the International Federation of Stock Exchanges.

(vi) *Discretion to determine that an exchange does not qualify as an established securities market.* The Commissioner may, in his sole discretion, determine in a published document that a securities exchange that meets the requirements of paragraph (d)(2)(i) of this section does not qualify as an established securities market. Such determination shall be made if, in the view of the Commissioner—

(A) The exchange does not have adequate listing, financial disclosure, or trading requirements (or does not adequately enforce such requirements); or

(B) There is not clear and convincing evidence that the exchange ensures the active trading of listed stocks.

(3) *Primarily traded.* For purposes of this section, stock of a corporation is ''primarily traded'' on one or more established securities markets in the corporation's country of residence or in the United States in any taxable year if, with respect to each class described in paragraph (d)(4)(l)(i)(A) of this section (relating to classes of stock relied on to meet the regularly traded test)—

(i) The number of shares in each class that are traded during the taxable year on all established securities markets in the corporation's country of residence or in the United States during the taxable year exceeds

(ii) The number of shares in each such class that are traded during that year on established securities markets in any other single foreign country.

(4) *Regularly traded*—(i) *General rule.* For purposes of this section, stock of a

corporation is ''regularly traded'' on one or more established securities markets in the foreign corporation's country of residence or in the United States for the taxable year if—

(A) One or more classes of stock of the corporation that, in the aggregate, represent 80 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote and of the total value of the stock of such corporation are listed on such market or markets during the taxable year;

(B) With respect to each class relied on to meet the 80 percent requirement of paragraph (d)(4)(i)(A) of this section—

(*1*) Trades in each such class are effected, other than in *de minimis* quantities, on such market or markets on at least 60 days during the taxable year (or ⅙ of the number of days in a short taxable year); and

(*2*) The aggregate number of shares in each such class that is traded on such market or markets during the taxable year is at least 10 percent of the average number of shares outstanding in that class during the taxable year (or, in the case of a short taxable year, a percentage that equals at least 10 percent of the number of days in the short taxable year divided by 365).

If stock of a foreign corporation fails the 80 percent requirement of paragraph (d)(4)(i)(A) of this section, but a class of such stock meets the trading requirements of paragraph (d)(4)(i)(B) of this section, such class of stock may be taken into account under paragraph (b)(1)(iii) of this section as owned by qualifying shareholders for purposes of meeting the ownership test of paragraph (b)(1) of this section.

(ii) *Classes of stock traded on a domestic established securities market treated as meeting trading requirements.* A class of stock that is traded during the taxable year on an established securities market located in the United States shall be treated as meeting the trading requirements of paragraph (d)(4)(i)(B) of this section if the stock is regularly quoted by brokers or dealers making a market in the stock. A broker or dealer makes a market in a stock only if the broker or dealer holds himself out to buy or sell the stock at the quoted price.

(iii) *Closely-held classes of stock not treated as meeting trading requirement*—(A) *General rule.* A class of stock shall not be treated as meeting the trading requirements of paragraph (d)(4)(i)(B) of this section (or the requirements of paragraph (d)(4)(ii) of this section) for a taxable year if, at any time during the taxable year, one or more persons who are not qualifying shareholders (as defined in paragraph (b)(1) of this section) and who each beneficially own 5 percent or more of the value of the outstanding shares of the class of stock own, in the aggregate, 50 percent or more of the outstanding shares of the class of stock for more than 30 days during the taxable year. For purposes of the preceding sentence, shares shall not be treated as owned by a qualifying shareholder unless such shareholder provides to the foreign corporation, by the time prescribed in paragraph (b)(3) of this section, the documentation described in paragraph (b)(3) of this section necessary to establish that it is a qualifying shareholder. For purposes of this paragraph (d)(4)(iii)(A), shares of stock owned by a pension fund, as defined in paragraph (b)(8)(i)(A) of this section, shall be treated as beneficially owned by the beneficiaries of such fund, as defined in paragraph (b)(8)(i)(B) of this section.

(B) *Treatment of related persons.* Persons related within the meaning of section 267(b) shall be treated as one person for purposes of this paragraph (d)(4)(iii). In determining whether two or more corporations are members of the same controlled group under section 267(b)(3), a person is considered to own stock owned directly by such person, stock owned with the application of section 1563(e)(1), and stock owned with the application of section 267(c). Further, in determining whether a corporation is related to a partnership under section 267(b)(10), a person is considered to own the partnership interest owned directly by such person and the partnership interest owned with the application of section 267(e)(3).

(iv) *Anti-abuse rule.* Trades between persons described in section 267(b) (as modified in paragraph (d)(4)(iii)(B) of this section) and trades conducted in order to meet the requirements of paragraph (d)(4)(i)(B) of this section shall be disregarded. A class of stock shall not be treated as meeting the trading requirements of paragraph (d)(4)(i)(B) of this section if there is a pattern of trades conducted to meet the requirements of that paragraph. For example, trades between two persons that occur several times during the taxable year my be treated as an arrangement or a pattern of trades conducted to meet the trading requirements of paragraph (d)(4)(i)(B) of this section.

(5) *Burden of proof for publicly-traded corporations.* A foreign corporation that relies on this paragraph (d) to establish that it is a qualified resident of a country with which the United States has an income tax treaty shall have the burden of proving all the facts necessary for the corporation to be treated as a qualified resident, except that with respect to paragraphs (d)(4) (iii) and (iv) of this section, a foreign corporation, with either registered or bearer shares, will meet the burden of proof if it has no reason to know and no actual knowledge of facts that would cause the corporation's stock not to be treated as regularly traded under such paragraphs. A foreign corporation that has shareholders of record must also maintain a list of such shareholders and, on request, make available to the District Director such list and any other relevant information known to the foreign corporation.

(e) *Active trade or business*—(1) *General rule.* A foreign corporation that is a resident of a foreign country shall be treated as a qualified resident of that country with respect to any U.S. trade or business if, during the taxable year—

(i) It is engaged in the active conduct of a trade or business (as defined in paragraph (e)(2) of this section) in its country of residence;

(ii) It has a substantial presence (within the meaning of paragraph (e)(3) of this section) in its country of residence; and

(iii) Either—

(A) Such U.S. trade or business is an integral part (as defined in paragraph (e)(4) of this section) of an active trade or business conducted by the foreign corporation in its country of residence; or

(B) In the case of interest received by the foreign corporation for which a treaty exemption or rate reduction is claimed pursuant to §1.884–4(b)(8)(ii), the interest is derived in connection with, or is incidental to, a trade or business described in paragraph (e)(1)(i) of this section.

A foreign corporation may determine whether it is a qualified resident under this paragraph (e) by applying the rules of this paragraph (e) to the entire affiliated group (as defined in section 1504 (a) without regard to section 1504(b) (2) or (3)) of which the foreign corporation is a member rather than to the foreign corporation separately. If a foreign corporation chooses to apply the rules of this paragraph (e) to its entire affiliated group as provided in the preceding sentence, then it must apply such rules consistently to all of its U.S. trades or businesses conducted during the taxable year.

(2) *Active conduct of a trade or business.* A foreign corporation is engaged in the active conduct of a trade or business only if either—

(i) It is engaged in the active conduct of a trade or business within the meaning of section 367(a)(3) and the regulations thereunder; or

(ii) It qualifies as a banking or financing institution under the laws of the foreign country of which it is a resident, it is licensed to do business with residents of its country of residence, and it is engaged in the active conduct of a banking, financing, or similar business within the meaning of §1.864–4(c)(5)(i) in its country of residence.

A foreign corporation that is an insurance company within the meaning of §1.801–3 (a) or (b) is engaged in the active conduct of a trade or business only if it is predominantly engaged in the active conduct of an insurance business within the meaning of section 952(c)(1)(B)(v) and the regulations thereunder.

(3) *Substantial presence test*—(i) *General rule.* Except as provided in paragraph (e)(3)(ii) of this section, a foreign

corporation that is engaged in the active conduct of a trade or business in its country of residence has a substantial presence in that country if, for the taxable year, the average of the following three ratios exceeds 25 percent and each ratio is at least equal to 20 percent—

(A) The ratio of the value of the assets of the foreign corporation used or held for use in the active conduct of a trade or business in its country of residence at the close of the taxable year to the value of all assets of the foreign corporation at the close of the taxable year;

(B) The ratio of gross income from the active conduct of the foreign corporation's trade or business in its country of residence that is derived from sources within such country for the taxable year to the worldwide gross income of the foreign corporation for the taxable year; and

(C) The ratio of the payroll expenses in the foreign corporation's country of residence for the taxable year to the foreign corporation's worldwide payroll expenses for the taxable year.

(ii) *Special rules*—(A) *Asset ratio*. For purposes of paragraph (e)(3)(i)(A) of this section, the value of an asset shall be determined using the method used by the taxpayer in keeping its books for purposes of financial reporting in its country of residence. An asset shall be treated as used or held for use in a foreign corporation's trade or business if it meets the requirements of §1.367(a)–2(d)(5). Stock held by a foreign corporation shall not be treated as an asset of the foreign corporation for purposes of paragraph (e)(3)i)(A) of this section if the foreign corporation owns 10 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote. The rules of §1.954–2T(b)(3) (other than §1.954–2T(b)(3)(x)) shall apply to determine the location of assets used or held for use in a trade or business. Loans originated or acquired in the course of the normal customer loan activities of a banking, financing or similar institution, and securities and derivative financial instruments held by dealers, traders and insurance companies for use in a trade or business shall be treated as located in the country in which an office or other fixed place of business is primarily responsible for the acquisition of the asset and the realization of income, gain or loss with respect to the asset.

(B) *Gross income ratio*—(*1*) *General rule*. For purposes of paragraph (e)(3)(i)(B) of this section, the term ''gross income'' means the gross income of a foreign corporation for purposes of financial reporting in its country of residence. Gross income shall not include, however, dividends, interest, rent, or royalties unless such corporation derives such dividends, interest, rents, or royalties in the active conduct of its trade or business. Gross income shall also not include gain from the disposition of stock if the foreign corporation owns 10 percent or more of the total combined voting power of all classes of stock of such corporation entitled to vote. Except as provided in this paragraph (e)(3)(ii)(B), the principles of sections 861 through 865 shall apply to determine the amount of gross income of a foreign corporation derived within its country of residence.

(*2*) *Banks, dealers and traders*. Dividend income and gain from the sale of securities, or from entering into or disposing of derivative financial instruments by dealers and traders in such securities or derivative financial instruments shall be treated as derived within the country where the assets are located under paragraph (e)(3)(ii)(A) of this section. Other income, including interest and fees, earned in the active conduct of a banking, financing or similar business shall be treated as derived within the country where the payor of such interest or other income resides. For purposes of the preceding sentence, if a branch or similar establishment outside the country in which the payor resides makes a payment of interest or other income, such amounts shall be treated as derived within the country in which the branch or similar establishment is located.

(*3*) *Insurance companies*. The gross income of a foreign insurance company shall include only gross premiums received by the country.

(*4*) *Other corporations*. Gross income from the performance of services, including transportation services, shall be treated as derived within the country of residence of the person for whom the services are performed. Gross income from the sale of property by a foreign corporation shall be treated as derived within the country in which the purchaser resides.

(*5*) *Anti-abuse rule.* The Commissioner may disregard the source of income from a transaction determined under this paragraph (e)(3)(ii)(B) if it is determined that one of the principal purposes of the transaction was to increase the source of income derived within the country of residence of the foreign corporation for purposes of this section.

(C) *Payroll ratio.* For purposes of paragraph (e)(3)(i)(C) of this section, the payroll expenses of a foreign corporation shall include expenses for ''leased employees'' (within the meaning of section 414(n)(2) but without regard to subdivision (B) of that section) and commission expenses paid to employees and agents for services performed for or on behalf of the corporation. Payroll expense for an employee, agent or a ''leased employee'' shall be treated as incurred where the employee, agent or ''leased employee'' performs services on behalf of the corporation.

(iii) *Exception to gross income test for foreign corporations engaged in certain trades or businesses.* In determining whether a foreign corporation engaged primarily in selling tangible property or in manufacturing, producing, growing, or extracting tangible property has a substantial presence in its country of residence for purposes of paragraph (e)(3)(i) of this section, the foreign corporation may apply the ratio provided in this paragraph (e)(3)(iii) instead of the ratio described in paragraph (e)(3)(i)(B) of this section (relating to the ratio of gross income derived from its country of residence). This ratio shall be the ratio of the direct material costs of the foreign corporation with respect to tangible property manufactured, produced, grown, or extracted in the foreign corporation's country of residence to the total direct material costs of the foreign corporation.

(4) *Integral part of an active trade or business in a foreign corporation's country of residence*—(i) *In general.* A U.S. trade or business of a foreign corporation is an integral part of an active trade or business conducted by a foreign corporation in its country of residence if the active trade or business conducted by the foreign corporation in both its country of residence and in the United States comprise, in principal part, complementary and mutually interdependent steps in the United States and its country of residence in the production and sale or lease of goods or in the provision of services. Subject to the presumption and de minimis rule in paragraphs (e)(4) (iii) and (iv) of this section, if a U.S. trade or business of a foreign corporation sells goods that are not, in principal part, manufactured, produced, grown, or extracted by the foreign corporation in its country of residence, such business shall not be treated as an integral part of an active trade or business conducted in the foreign corporation's country of residence unless the foreign corporation takes physical possession of the goods in a warehouse or other storage facility that is located in its country of residence and in which goods of such type are normally stored prior to sale to customers in such country.

(ii) *Presumption for banks.* A U.S. trade or business of a foreign corporation that is described in §1.884–4(a)(2)(iii) shall be presumed to be an integral part of an active banking business conducted by the foreign corporation in its country of residence provided that a substantial part of the business of the foreign corporation in both its country of residence and the United States consists of receiving deposits and making loans and discounts. This paragraph shall be effective for taxable years beginning on or after June 6, 1996.

(iii) *Presumption if business principally conducted in country of residence.* A U.S. trade or business of a foreign corporation shall be treated as an integral part of an active trade or business of a foreign corporation in its country or residence with respect to the sale or lease of property (or the performance of services) if at least 50 percent of the foreign corporation's worldwide gross income from the sale or lease of property of the type sold in the United States (or from the performance of services of the type performed in the United States) is derived from the sale or lease of such property for consumption, use, or disposition in the foreign corporation's country of residence (or from the performance of such services in the foreign corporation's country of residence). In determining whether property or services are of the same type, a foreign corporation shall follow recognized industry or trade usage or the three-digit major groups (or any narrower classification) of the Standard Industrial Classification as prepared by the Statistical Policy Division of the Office of Management and Budget, Executive Office of the President. The determination of whether income is of the same kind must be made in a consistent manner from year to year.

(iv) *De minimis rule.* If a foreign corporation is engaged in more than one U.S. trade or business and if at least 80 percent of the sum of the ECEP from the current year and the preceding two years is attributable to one or more trades or businesses that meet the integral part test of this paragraph (e)(4), all of the U.S. trades or businesses of the foreign corporation shall be treated as an integral part of an active or business conducted by the foreign corporation. If a foreign corporation has more than one U.S. trade or business and does not meet the requirements of the preceding sentence but otherwise meets the requirements of this paragraph (e)(4) with regard to one or more trade or business, see §1.884–1(g)(1) to determine the extent to which treaty benefits apply to such corporation.

(f) *Qualified resident ruling*—(1) *Basis for ruling.* In his or her sole discretion, the Commissioner may rule that a foreign corporation is a qualified resident of its country or residence if the Commissioner determines that individuals who are not residents of the foreign country of which the foreign corporation is a resident do not use the treaty between that country and the United States in a manner inconsistent with the purposes of section 884. The purposes of section 884 include, but are not limited to, the prevention of treaty shopping by an individual with respect to any article of an income tax treaty between the country of residence of the foreign corporation and the United States.

(2) *Factors.* In order to make this determination, the Commissioner may take into account the following factors, including, but not limited to:

(i) The business reasons for establishing and maintaining the foreign corporation in its country of residence;

(ii) The date of incorporation of the foreign corporation in relation to the date that an income tax treaty between the United States and the foreign corporation's country of residence entered into force;

(iii) The continuity of the historical business and ownership of the foreign corporation;

(iv) The extent to which the foreign corporation meets the requirements of one or more of the tests described in paragraphs (b) through (e) of this section;

(v) The extent to which the U.S. trade or business is dependent on capital, assets, or personnel of the foreign trade or business;

(vi) The extent to which the foreign corporation receives special tax benefits in its country of residence;

(vii) Whether the foreign corporation is a member of an affiliated group (as defined in section 1504(a) without regard to section 1504(b) (2) or (3)), that has no members resident outside the country of residence of the foreign corporation; and

(viii) The extent to which the foreign corporation would be entitled to comparable treaty benefits with respect to all articles of an income tax treaty that would apply to that corporation if it had been incorporated in the country or countries of residence of the majority of its shareholders. For purposes of the preceding sentence, shareholders taken into account shall generally be limited to persons described in paragraph (b)(1)(i) of this section but for the fact that they are not residents of the foreign corporation's country of residence.

(3) *Procedural requirements.* A request for a ruling under this paragraph (f) must be submitted on or before the due date (including extensions) of the foreign corporation's income tax return

for the taxable year for which the ruling is requested. A foreign corporation receiving a ruling will be treated as a qualified resident of its country of residence for the taxable year for which the ruling is requested and for the succeeding two taxable years. If there is a material change in any fact that formed the basis of the ruling, such as the ownership or the nature of the trade or business of the foreign corporation, the foreign corporation must notify the Secretary within 90 days of such change and submit a new private letter ruling request. The Commissioner will then rule whether the change affects the foreign corporation's status as a qualified resident, and such ruling will be valid for the taxable year in which the material change occurred and the two succeeding taxable years, subject to the requirement in the preceding sentence to notify the Commissioner of a material change.

(g) *Effective dates.* Except as provided in paragraph (e)(4)(ii) of this section, this section is effective for taxable years beginning on or after October 13, 1992. With respect to a taxable year beginning before October 13, 1992, and after December 31, 1986, a foreign corporation may elect to apply this section in lieu of the temporary regulations under 1.884–5T (as contained in the CFR edition revised as of April 1, 1992), but only if the statute of limitations for assessment of a deficiency has not expired for that taxable year. Once an election has been made, an election shall apply to all subsequent taxable years.

(h) *Transition rule.* If a foreign corporation elects to apply this section in lieu of §1.884–5T (as contained in the CFR edition revised as of April 1, 1992) as provided in paragraph (g) of this section, and the application of paragraph (b) of this section results in additional documentation requirements in order for the foreign corporation to be treated as a qualified resident, the foreign corporation must obtain the documentation required under that paragraph on or before March 11, 1993.

[T.D. 8432, 57 FR 41666, Sept. 11, 1992; 57 FR 49117, Oct. 29, 1992; 57 FR 60126, Dec. 18, 1992, as amended by T.D. 8657, 61 FR 9343, Mar. 8, 1996; 61 FR 14248, Apr. 1, 1996; T.D. 9803, 81 FR 91030, Dec. 16, 2016]

MISCELLANEOUS PROVISIONS

§ 1.891 Statutory provisions; doubling of rates of tax on citizens and corporations of certain foreign countries.

SEC. 891. *Doubling of rates of tax on citizens and corporations of certain foreign countries.* Whenever the President finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory or extraterritorial taxes, the President shall so proclaim and the rates of tax imposed by sections 1, 3, 11, 802, 821, 831, 852, 871, and 881 shall, for the taxable year during which such proclamation is made and for each taxable year thereafter, be doubled in the case of each citizen and corporation of such foreign country; but the tax at such doubled rate shall be considered as imposed by such sections as the case may be. In no case shall this section operate to increase the taxes imposed by such sections (computed without regard to this section) to an amount in excess of 80 percent of the taxable income of the taxpayer (computed without regard to the deductions allowable under section 151 and under part VIII of subchapter B). Whenever the President finds that the laws of any foreign country with respect to which the President has made a proclamation under the preceding provisions of this section have been modified so that discriminatory and extraterritorial taxes applicable to citizens and corporations of the United States have been removed, he shall so proclaim, and the provisions of this section providing for doubled rates of tax shall not apply to any citizen or corporation of such foreign country with respect to any taxable year beginning after such proclamation is made.

(Sec. 891 as amended by sec. 5(6), Life Insurance Company Tax Act 1955 (70 Stat. 49); sec. 3(f)(1), Life Insurance Company Income Tax Act 1959 (73 Stat. 140))

[T.D. 6610, 27 FR 8723, Aug. 31, 1962]

§ 1.892–1T Purpose and scope of regulations (temporary regulations).

(a) *In general.* These regulations provide guidance with respect to the taxation of income derived by foreign governments and international organizations from sources within the United