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February 2, 2026

The Honorable Rebecca Burch
Deputy Assistant Secretary, International Tax Affairs
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Notice 2025-78

Dear Ms. Burch:

The Alliance for Competitive Taxation ("ACT") is a coalition of leading American companies from a wide range of industries that supports a globally competitive corporate tax system.

Attached are ACT's comments in response to Notice 2025-78, which announces the Treasury Department's and IRS's intent to issue regulations under § 250(b)(3)(A)(i)(VII) of the Internal Revenue Code ("Code"), excluding certain gains from foreign-derived deduction eligible income ("FDDEI"). Our comments are limited to a single issue addressed in the Notice: the exclusion of gain from the sale of tangible depreciable property to foreign customers.

We appreciate your consideration of these comments. ACT members welcome the opportunity to discuss these comments further with your staff.

Yours sincerely,

Alliance for Competitive Taxation

cc: Kenneth Kies, Assistant Secretary (Tax Policy)
Kevin Salinger, Deputy Assistant Secretary, Tax Policy
Jim Wang, International Tax Counsel
Peter Blessing, Associate Chief Counsel (International), Internal Revenue Service
Stefan A. Pruessmann, Office of Associate Chief Counsel (International)
Michelle L. Ng, Office of Associate Chief Counsel (International)

ACT Alliance for Competitive Taxation

ALLIANCE FOR COMPETITIVE TAXATION COMMENTS ON NOTICE 2025-78, APPLICATION OF § 250(B)(3)(A)(I)(VII) TO SALES OR OTHER DISPOSITIONS OF PROPERTY

I. INTRODUCTION

Section 70322[1] of Public Law 119-21, commonly referred to as the One, Big, Beautiful Bill Act ("OBBBA")[2], amended § 250(b)(3)(A)(i)[3] to add a new category of income excluded from deduction eligible income ("DEI")[4]. Specifically, § 250(b)(3)(A)(i)(VII)(bb) excludes from DEI "any income or gain from the sale or other disposition of property that is of a type that is subject to depreciation, amortization, or depletion by the seller," except as otherwise provided by the Secretary. Notice 2025-78[5] confirms that this exclusion applies even where the property has been fully depreciated and is subsequently sold to a foreign person for foreign use.

The policy concern underlying this rule presumably is to prevent taxpayers from receiving a deduction for depreciation at the 21% corporate tax rate and later realizing a lower effective tax rate via FDDEI[6] on a subsequent sale of the same asset. However, the exclusion in its current form can produce harsh results by denying FDDEI treatment for economic gain arising where an asset that had previously been depreciated by a company is refurbished or remanufactured and transformed into a product for sale to unrelated foreign buyers.

II. ISSUE

In practice, companies often lease or use high-value assets that are later repurposed, remanufactured, or refurbished for sale to unrelated foreign customers. The proposed interpretation of the OBBBA revisions to § 250(b)(3)(A)(i) would treat all gain from the foreign sale of such property as ineligible for FDDEI— even when the gain reflects new investment, value creation, and foreign-market expansion. This creates a mismatch inconsistent with the treatment of inventory or newly manufactured property, which we believe was not intended by Congress.

Congress delegated the authority to exercise discretion in implementing this rule ("except as otherwise provided by the Secretary"), and ACT recommends Treasury exercise that discretion. We propose two narrowly focused approaches:

1. A **Change-in-Use Exception** for assets that have been materially transformed or remanufactured and moved from business use into sales inventory for disposition to unrelated foreign persons.
2. A **Depreciation Recapture-Based Rule** under which only the portion of gain that reflects previously claimed depreciation is excluded from FDDEI, while gain in excess of that is eligible.

These recommendations are consistent with longstanding tax principles (e.g., § 1245 recapture[7]) and would further the policy objectives of the FDDEI regime, without undermining the apparent concerns that led Congress to adopt the OBBBA revisions.

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[1] Public Law 119-21, 139 Stat. 72, July 4, 2025
[2] Public Law 119–21, July 4, 2025
[3] 26 U.S.C. § 250(b)(3)(A)(i), as amended by Pub. L. No. 119–21, § 70322(a)(1), 139 Stat. 72 (2025)
[4] 26 U.S.C. § 250(b)(3), as amended by Pub. L. No. 119–21, § 70322(a)(1), 139 Stat. 72 (2025)
[5] IRS Notice 2025-78, "Application of Section 250(b)(3)(A)(i)(VII) to Sales or Other Dispositions of Property" (Dec. 4, 2025)
[6] I.R.C. § 250(b)(4), as amended by Pub. L. No. 119–21, § 70322, 139 Stat. 72 (2025)
[7] See I.R.C. § 1245; Treas. Reg. § 1.1245-1(a)(1).

III. RECOMMENDED MODIFICATION: CHANGE-IN-USE EXCEPTION

ACT recommends an approach under which property that was previously depreciated but is later materially remanufactured or refurbished and held for sale might be treated as no longer subject to the exclusion.

Such a rule would be consistent with Treasury's regulatory authority under § 250(c)[8] and would harmonize the treatment of remanufactured or refurbished property and newly manufactured inventory when both are destined for foreign use.

To preserve administrability and prevent abuse, the exception could require:

- Bona fide remanufacture, refurbishment, or transformation (e.g., material new basis or change in physical condition), which could include a requirement that the amount invested to remanufacture or transform the property must exceed a specified percentage of the original (undepreciated) basis in the property prior to its transformation or refurbishment;[9]
- Sale for foreign use, either to an unrelated foreign person or to a related foreign person that subsequently resells the property to an unrelated foreign customer for foreign use;
- Continued application of the related-party anti-abuse rule under Notice 2025-78, §3.01(6).

Example:
Assume a U.S. company acquires or manufactures equipment for $8,000,000 and leases it to customers in the ordinary course of business. The equipment is fully depreciated over its useful life, reducing the basis to $0. After recovering the asset from service at the end of its lease, the company invests $6,000,000 to materially remanufacture the equipment and converts it into inventory. The company then sells the remanufactured property to an unrelated foreign person for $11,000,000. Under a change-in-use exception, provided that the transformation is material and the property is held for sale in the ordinary course of business, the entire $5,000,000 gain (sale price of $11,000,000 less basis of $6,000,000) could qualify as FDDEI.

As illustrated in **Example 3 of Notice 2025-78**, property held for sale as inventory is treated differently than depreciated property, even if functionally identical at the time of sale. A change-in-use exception would mitigate this discontinuity.

IV. ADDITIONAL MODIFICATION: DEPRECIATION RECAPTURE RULE

ACT also believes that a depreciation recapture rule should apply to taxpayers who do not remanufacture property (after it has been depreciated but before selling it), but who nonetheless sell the the property as inventory for an amount exceeding its original cost basis. Thus, ACT recommends that Treasury adopt a rule treating only the portion of gain equal to depreciation previously claimed as excluded from DEI under § 250(b)(3)(A)(i)(VII)(bb), while allowing FDDEI treatment for gain above that amount.

Example:
Assume a U.S. company acquires or manufactures equipment for $4,000,000 and leases it to customers in the ordinary course of business. Over time, the company depreciates the asset fully, reducing the tax basis to $0. After the lease term ends, the company refurbishes the property and sells it to an unrelated foreign person for $6,000,000. Under ACT's recommendation, the portion of gain attributable to prior depreciation ($4,000,000) would be excluded from FDDEI, while the remaining $2,000,000 would qualify.

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[8] I.R.C. § 250(c), granting the Secretary authority to issue regulations and interpretive guidance under section 250.
9 We note that existing Treasury regulations in the subpart F area provide a definition of "manufacturing" that could be used as the starting point for crafting this exception. See Treas. Reg. § 1.954-3(a)(4).

This recommendation tracks § 1245 recapture principles and reflects the distinction between cost recovery and further economic gain. It can be implemented using records already maintained for tax purposes. We acknowledge that Treasury may be concerned about related-party transactions that shift property within a controlled group in ways that obscure prior use or artificially qualify gain for FDDEI. ACT supports retaining the anti-abuse rule in Notice 2025-78, section 3.01(6), and would not object to a provision clarifying that the recapture-based exception does not apply where the asset was acquired from a related party with a principal purpose of avoiding the exclusion.

V. STATUTORY AND POLICY BASIS FOR EXCEPTIONS

Congress delegated the authority to exercise discretion in applying the FDDEI exclusion for depreciated property ("except as otherwise provided by the Secretary"). This language, together with Treasury's general regulatory authority under § 250(c), provides clear support for promulgating a tailored rule that aligns with likely Congressional intent.

The Notice already reflects an exercise of this regulatory authority in applying the exclusion to tangible property. A similarly narrow and principled carve-out for remanufactured or transformed property would fall well within this authority.

VI. CONCLUSION

ACT appreciates Treasury's efforts to implement the 2025 amendments to § 250. We respectfully recommend that forthcoming proposed regulations:

- Permit FDDEI treatment for property materially remanufactured, transformed, or refurbished and held for sale to unrelated foreign persons (Change-in-Use Exception); and
- Allow FDDEI treatment for the portion of gain on depreciated property that exceeds prior depreciation (Depreciation Recapture Rule).

Both proposals are consistent with the policy goals of the FDDEI regime and can be implemented using existing concepts and safeguards. We support the continued application of the anti-abuse rule under Notice 2025-78, §3.01(6), to preserve the integrity of the FDDEI framework.

ACT representatives would welcome the opportunity to discuss these matters with you at your convenience.