November 10, 2026

Kevin Salinger
Acting Assistant Secretary, Tax Policy
United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Comments on Proposed Regulations Regarding Sections 904(b)(5) and 250(b)(3) (REG-117273-25)

Dear Mr. Salinger:

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

ACT appreciates the opportunity to submit comments on the proposed regulations (the "Proposed Regulations")[1] issued by the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") to implement sections 904(b)(5) and 250(b)(3), as added or amended by Public Law 119-21, also known as the One Big Beautiful Bill Act (the "OBBBA").

These comments reflect the practical experience of ACT member companies applying the U.S. foreign tax credit ("FTC") and section 250 rules and are intended to assist Treasury in identifying targeted revisions to the Proposed Regulations that would implement the OBBBA consistent with congressional intent while avoiding unintended limitations on FTCs and disincentives for investment and innovation in the United States.

ACT appreciates Treasury's continued commitment to improving tax administration, reducing unnecessary regulatory burdens, and issuing practical guidance that promotes certainty, administrability, and voluntary compliance.

I. Introduction: OBBBA Amendments and the Proposed Regulations

The OBBBA added section 904(b)(5) to limit the deductions allocated and apportioned to foreign source section 951A category income (the net CFC tested income ("NCTI") category) for purposes of applying the FTC limitation under section 904(a). Section 904(b)(5)(A) allocates and apportions the section 250(a)(1)(B) deduction and deductions for certain taxes to NCTI; section 904(b)(5)(B) excludes from this allocation interest expense and research or experimental ("R&E") expenditures; and section 904(b)(5)(C) requires other deductions to reduce NCTI only if directly allocable to that income. Deductions that otherwise would have been allocated or

[1] Allocation and Apportionment of Deductions to Foreign Source Section 951A Category Income and Deduction Eligible Income, REG-117273-25, 91 Fed. Reg. 57,832 (Sept. 11, 2026).

apportioned to NCTI but are excluded under section 904(b)(5)(B) or (C) are instead allocated to [2] income.[3]

Separately, the OBBBA amended section 250(b)(3)(A)(ii) to exclude interest expense and R&E expenditures from the deductions properly allocable to deduction eligible income ("DEI"), and thus from the computation of foreign-derived DEI ("FDDEI").[4] Both amendments apply to taxable years beginning after December 31, 2025.[5]

The Proposed Regulations helpfully clarify that certain categories of expenses (*e.g.*, stewardship and general and administrative expenses) are not directly allocable to NCTI. In this regard, we believe the Proposed Regulations are consistent with the plain language of the statutory term "directly" and faithfully interpret the apparent congressional intent of section 904(b)(5), i.e., to minimize the extent to which "ordinary" shareholder-level expenses (which are generally not deductible in determining a CFC's income under foreign law) will reduce a taxpayer's foreign tax credit limitation attributable to its NCTI inclusions. Requiring such expenses to be allocated to NCTI would often result in effective double taxation of a taxpayer's NCTI inclusions by reducing the foreign tax credit limitation to an amount that is less than the amount subject to tax under foreign law.[6]

The Proposed Regulations treat certain deductions, including net operating loss ("NOL") deductions, as directly allocable to NCTI when allocated or assigned to that category,[7] and provide that deductions excluded under section 904(b)(5) are reallocated to U.S. source income for all purposes of section 904, including the determination of losses under sections 904(f)(5)(D)

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3 Pub. L. No. 119-21, § 70311(a), 139 Stat. 72, 202–03 (2025); section 904(b)(5)(A)–(C).

4 Pub. L. No. 119-21, § 70322(b)(1), 139 Stat. 72, 205 (2025); section 250(b)(3)(A)(ii).

5 Pub. L. No. 119-21, §§ 70311(c), 70322(b)(2), 139 Stat. 72, 203, 205 (2025).

6 We recognize that OBBBA does not have formal legislative history. However, in discerning congressional intent for section 904(b)(5), we believe it is appropriate to consider the legislative history to the Tax Cuts and Jobs Act ("TCJA"), which specifically noted that a taxpayer's inclusions under the predecessor Global Intangible Low-Taxed Income ("GILTI") regime would generally not be subject to incremental U.S. tax if the income was taxed under foreign law at a rate equal to or greater than 13.125% (*i.e.*, the amount equal to the 10.5% rate applicable to GILTI after taking into account the then applicable section 250 deduction, divided by the 80% foreign tax credit "cap" then applicable under section 960(d)). See H.R. Rep. No. 115-466, at 626–27 (2017). The requirement to allocate shareholder expenses to GILTI often frustrated this congressional intent and appears to have been an important consideration underlying section 904(b)(5).

7 Prop. Treas. Reg. § 1.904(b)-4(b)(2)(i), (ii)(B), 91 Fed. Reg. 57,832, at 57,840 (Sept. 11, 2026).

(separate limitation losses) and 904(g)(2)(B) (overall domestic losses).[8] These proposed rules may have significant tax consequences for taxpayers that maintain or expand substantial U.S. operations, including investments in manufacturing facilities, infrastructure, research activities, and employment. Financing costs, depreciation, and other domestic expenditures may contribute to U.S. source losses, particularly during periods of substantial domestic investment.

Under the Proposed Regulations, deductions reallocated to U.S. source income under section 904(b)(5) may create or increase U.S. source losses that reduce foreign source taxable income in the NCTI and other separate categories under the existing domestic loss rules, potentially limiting the availability of FTCs. In addition, the Proposed Regulations' treatment of certain NOL deductions as directly allocable to NCTI may cause NOL carryovers attributable to expenses of a type excluded from NCTI under section 904(b)(5) (*e.g.*, interest expense) nevertheless to reduce the NCTI FTC limitation. These potential reductions are particularly consequential because excess credits in the section 951A category cannot be carried forward under section 904(c). Domestic losses that offset foreign source taxable income may give rise to overall domestic losses ("ODLs") that may be recaptured in subsequent years by recharacterizing a portion of positive U.S. source taxable income as foreign source taxable income, potentially increasing the corresponding FTC limitation. However, such recapture may not fully reverse the adverse FTC consequences. Excess credits in separate categories other than the NCTI category generally may be carried forward, but domestic losses created or increased by the reallocation of deductions under the Proposed Regulations, particularly if recurring, may continue to constrain the applicable FTC limitations, delaying credit utilization and increasing the risk that FTC carryforwards ultimately expire unused.

In addition, the proposed section 250 rules define R&E expenditures excluded from the deductions allocated to DEI and FDDEI by reference to the Code provisions governing the timing of deductions (sections 174, 174A, and 59(e)(2)(B)).[9] ACT is concerned that recent IRS guidance with respect to section 174 has resulted in uncertainty and a potentially inappropriate narrowing of the types of expenditures that could qualify as "research or experimental expenditures" within the meaning of section 250(b)(3).[10]

To address the issues identified above, ACT recommends the following targeted revisions to implement the statutory changes consistent with congressional intent, preserve the intended benefits of the new expense allocation and apportionment rules, and avoid unintended disincentives for U.S. investment and innovation.

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8 Prop. Treas. Reg. § 1.904(b)-4(c), 91 Fed. Reg. 57,832, at 57,840 (Sept. 11, 2026).

9 Prop. Treas. Reg. § 1.250(b)-1(d)(2)(ii), 91 Fed. Reg. 57,832, at 57,839 (Sept. 11, 2026).

10 As discussed further below, ACT has previously expressed concerns regarding Notice 2023-63 and Notice 2024-12 and the potential uncertainty that has resulted from that guidance.



II. Recommended Revisions to the Proposed Regulations

1. Domestic Losses: General Rules and Special Section 904(b)(5) Reallocations

The general domestic loss rules under section 904 were not amended by the OBBBA. Under section 904(f)(5)(D), a U.S. source loss generally reduces positive foreign source taxable income proportionately among the applicable FTC separate categories.[11] To the extent a domestic loss offsets foreign source taxable income in a taxable year for which the taxpayer claims FTCs, it generally gives rise to an ODL under section 904(g), with separate category ODL accounts and potential recapture in subsequent taxable years.[12] Although section 904(b)(5) limits the deductions that reduce NCTI to those expressly specified or directly allocable to that income, these general domestic loss rules can reduce the NCTI FTC limitation even when the underlying domestic loss arises from domestic investments or expenditures with no direct relationship to the taxpayer's NCTI.

The interaction of these existing rules with deductions that are specifically reallocated under section 904(b)(5) raises further concerns. The second sentence of section 904(b)(5) directs deductions otherwise allocable or apportionable to NCTI but excluded under section 904(b)(5)(B) or (C), to U.S. source income. Prop. Treas. Reg. § 1.904(b)-4(c) provides that this reallocation applies "for all purposes of section 904," including determining U.S. source losses under section 904(f)(5)(D) and domestic losses under section 904(g)(2)(B). Consequently, deductions reallocated to U.S. source income solely by reason of the special rule under section 904(b)(5) may create or increase a domestic loss that reduces foreign source taxable income in the NCTI category and other separate categories under section 904(f)(5)(D).[13]

ACT believes that the Proposed Regulations' treatment of these losses should be reconsidered in light of the express scope of section 904(b)(5). The introductory "solely for purposes" limitation evidences a congressional intent to confine the application of section 904(b)(5) to the foreign tax credit computation with respect to NCTI.[14] In ACT's view, this language should appropriately

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[11] *See* section 904(f)(5)(D); Treas. Reg. § 1.904(g)-3(e).

[12] *See* section 904(g)(2); Treas. Reg. §§ 1.904(g)-1(b)(1), (c)(1), 1.904(g)-2(a).

[13] *See* Prop. Treas. Reg. § 1.904(b)-4(c), 91 Fed. Reg. 57,832, at 57,840 (Sept. 11, 2026). *See also* Prop. Treas. Reg. § 1.904(b)-4(d)(2), Example 2, 91 Fed. Reg. 57,832, at 57,840–57,841 (illustrating that $50 of deductions reallocated to U.S. source income produces a $20 domestic loss that reduces NCTI category income by $15 and general category income by $5 and results in an ODL of $20).

[14] As noted above, when the GILTI regime was enacted as part of the TCJA, the accompanying conference report contemplated that, under its illustrative calculation, no residual U.S. tax would arise on GILTI where the applicable foreign tax rate was at least 13.125 percent, suggesting a minimum-tax-like framework. *See* H.R. Rep. No. 115-466, at 626–27 (2017). In practice, however, the allocation and apportionment of U.S. shareholder-level expenses could result in residual U.S. tax notwithstanding foreign taxes imposed at or above that rate. By excluding certain expenses and limiting deductions allocable to NCTI for FTC limitation purposes,

be read to govern both sentences of the statute, including the direction to allocate excluded deductions to U.S. source income. Consistent with this interpretation, the Joint Committee on Taxation ("JCT") staff's General Explanation of the Tax Provisions of Public Law 119-21 explains that section 904(b)(5) modifies the determination of U.S. source and foreign source income for purposes of applying the section 904 limitation to NCTI category income, but "does not impact" the determination of such income for other purposes of the Code.[15] Notwithstanding this apparent congressional intent, Prop. Treas. Reg. § 1.904(b)-4(c) expressly provides that the resulting U.S. source treatment applies "for all purposes of section 904" (*i.e.*, not limited to the application of section 904(a) with respect to NCTI inclusions). Neither the statutory text—which contains no comparable language—nor the JCT staff's explanation suggest that Congress intended the NCTI-specific expense allocation rule to alter the FTC limitations applicable to other separate categories.[16]

Accordingly, ACT recommends that Treasury permit a taxpayer to elect, solely for purposes of determining domestic losses under section 904(f)(5)(D) and ODL accounts under section 904(g), to disregard any incremental domestic loss attributable solely to the special reallocation under section 904(b)(5). Under the election,[17] that incremental amount would neither reduce foreign source taxable income in any separate category nor create or increase an ODL account giving rise to subsequent recapture. The election would not change the amount or timing of any underlying deduction or the treatment of ordinary domestic losses under generally applicable rules.

If Treasury concludes that the special reallocation provided by section 904(b)(5) must be reflected in ODL computations, ACT alternatively requests that taxpayers be permitted to elect to apply any resulting incremental domestic loss against positive foreign source taxable income

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section 904(b)(5) should be viewed as moving the NCTI regime closer to the minimum-tax framework contemplated by Congress.

[15] Joint Committee on Taxation, General Explanation of the Tax Provisions of Public Law 119-21, JCS-1-26, at 102–103 (May 28, 2026).

[16] The preamble to the Proposed Regulations explains that treating reallocated deductions as U.S. source deductions for all purposes of section 904 ensures that aggregate foreign source taxable income does not exceed worldwide taxable income and allows domestic losses attributable to reallocated deductions to be reflected in ODL accounts for purposes of subsequent recapture. *See* 91 Fed. Reg. 57,832, at 57,837—57,838.

ACT respectfully submits that the overall limitation of foreign income to worldwide taxable income that is provided in section 904(a) is a reflection of the will of Congress– and Congress is free to create exceptions to the operation of this limitation. In our view, section 904(b)(5), read naturally (and consistent with the JCT explanation), reflects a congressional purpose to create an exception to the operation of this general rule in order to limit the application of certain of the foreign tax credit provisions to NCTI inclusions.

[17] ACT supports appropriate limitations on the election to prevent abuse, including a requirement for the election to apply consistently for a period of years and be subject to appropriate documentation and coordination with the existing ODL rules.

in separate categories other than NCTI before reducing NCTI category income. For taxpayers making this election, any corresponding ODL accounts and subsequent recapture should be coordinated with the categories whose income is actually reduced, and multi-year consistency and other appropriate safeguards should apply.

In addition, with respect to ordinary domestic losses arising independently of section 904(b)(5), ACT similarly recommends that Treasury permit taxpayers to elect to allocate such losses against NCTI category income only to the extent that positive foreign source taxable income in other separate categories is insufficient to absorb those losses. This elective approach would further Congress's objective of limiting the impact of deductions[18]unrelated to the underlying CFC inclusions on the NCTI FTC limitation.[19]

2. Treatment of Pre-2026 Net Operating Loss Deductions

Under section 172, an NOL arising in one taxable year may be deducted in a subsequent taxable year.[20] For purposes of section 904, Treas. Reg. § 1.861-8(e)(8)(i) divides an NOL into components based on the remaining losses in each statutory and residual grouping that have not been used to offset income in other groupings in the loss year. When the NOL is deducted in a subsequent taxable year, the deduction is allocated and apportioned by reference to those components.[21] Accordingly, an NOL component assigned to the section 951A category generally reduces NCTI category income when deducted in a subsequent taxable year.

Prop. Treas. Reg. § 1.904(b)-4(b)(2)(ii)(B) treats NOL deductions allocated and apportioned to NCTI under Treas. Reg. § 1.861-8(e)(8) as directly allocable to NCTI for purposes of determining the NCTI FTC limitation.[22] At the same time, Treasury expressly recognizes that, absent coordination, deductions excluded from NCTI under section 904(b)(5) could generate NCTI category separate limitation losses that are carried forward and reduce NCTI in subsequent taxable years, contrary to the intended operation of section 904(b)(5).[23] To address this concern, the Proposed Regulations would amend Treas. Reg. § 1.861-8(e)(8)(i) to require section

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[19] An elective approach is preferable to a mandatory NCTI-last allocation rule because taxpayers with excess limitation in the NCTI category and excess credits in other categories could be disadvantaged by a requirement to allocate domestic losses to the other categories first. As noted above, ACT supports consistency requirements for such an election and other safeguards to prevent abuse.

[20] Section 172.

[21] *See* Treas. Reg. § 1.861-8(e)(8)(i)–(ii); *see also* Treas. Reg. § 1.904(g)-3.

[22] Prop. Treas. Reg. § 1.904(b)-4(b)(2)(ii)(B), 91 Fed. Reg. 57,832, at 57,840 (Sept. 11, 2026).

[23] *See* 91 Fed. Reg. 57,832, at 57,836–37 (Sept. 11, 2026).



904(b)(5) to be taken into account when determining the source and separate category components of NOLs arising in taxable years beginning after December 31, 2025.[24]

The proposed coordination under Prop. Treas. Reg. § 1.861-8(e)(8)(i) thus generally prevents excluded deductions from generating NCTI category NOL components on a prospective basis. Neither the proposed rule nor the preamble, however, appears to address NOLs arising in taxable years beginning before January 1, 2026 ("pre-2026 NOLs"), whose historical section 951A category components may reflect interest expense and other indirect deductions allocated or apportioned to that category under prior law. Such carryovers may therefore reduce NCTI when deducted in taxable years beginning after December 31, 2025, notwithstanding that comparable expenses incurred in those years would be excluded under section 904(b)(5). Accordingly, pre-2026 NOLs may continue to produce the result that Congress sought to prevent in adopting section 904(b)(5). Further, section 904(b)(5) does not expressly treat NOL deductions as directly allocable to NCTI based solely on their historical source and separate category attribution.[25]

ACT recommends that Treasury provide that, to the extent a pre-2026 NOL component assigned to the section 951A category is attributable to interest expense or other deductions that would be excluded from NCTI under section 904(b)(5), that portion of the NOL deduction is not treated as directly allocable to NCTI for purposes of section 904(b)(5)(C). As an administrable alternative, if tracing historical NOL components would be impracticable, Treasury could provide a special allocation rule under which, solely for purposes of determining the NCTI FTC limitation, NOL deductions reduce NCTI category income only to the extent positive foreign source taxable income in other separate categories is insufficient to absorb those deductions. Either approach would further Congress's decision under section 904(b)(5) to protect the NCTI FTC limitation from deductions unrelated to the underlying CFC inclusions and would affect only the allocation of NOL deductions for FTC limitation purposes, not the amount of the deduction allowed under section 172.

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[24] Prop. Treas. Reg. § 1.861-8(e)(8)(i), 91 Fed. Reg. 57,832, at 57,839 (Sept. 11, 2026).

[25] In addition to the approach in the Proposed Regulations being at odds with Congress's intent in adopting section 904(b)(5), the approach can produce results that are difficult to reconcile with the statutory language itself. For example, assume a taxpayer incurs an NOL in 2025 (*i.e.*, prior to the effective date of section 904(b)(5)) as a result of its stewardship and general and administrative expenses, a portion of which is allocable (under pre-2026 law) to NCTI. The Proposed Regulations provide that the portion of the NOL carryforward that was allocated to the NCTI category is considered a "directly allocable" expense and thus reduces NCTI in the future year when the NOL is utilized. If, however, the taxpayer incurs those same expenses in 2026 or later years, the deductions are specifically identified as not directly allocable. The nature of the expenditures is exactly the same, however, and, in both cases, the taxpayer is claiming a deduction for those expenses in a year when section 904(b)(5) is in effect.



3. Scope of R&E Expenditures Under Section 250

Section 250(b)(3)(A)(ii), as amended by the OBBBA, excludes "research or experimental expenditures" from the deductions that reduce DEI and FDDEI. Prop. Treas. Reg. § 1.250(b)-1(d)(2)(ii), however, identifies those expenditures by reference to statutory provisions specifying the timing of deductions (including amortization deductions) claimed under sections 174, 174A, and 59(e)(2)(B).[26] ACT respectfully requests clarification regarding the intended relationship between these concepts.

R&E activities may be undertaken by a taxpayer for its own account or performed for other parties pursuant to contractual arrangements,[27] which may involve substantively comparable domestic research activities, but which may involve a wide range of potential contractual allocations of financial risk and rights in the resulting research. ACT has previously expressed concerns that limitations developed for the narrow purpose of determining the timing of deductions under the cost-recovery rules should not automatically determine the scope of "research or experimental expenditures" under other provisions of the Code. In its May 23, 2024, comments, ACT emphasized the importance of preserving longstanding definitions in this context for purposes of other Code provisions.[28] Accordingly, ACT requests that Treasury clarify the appropriate scope of "research or experimental expenditures" for purposes of section 250(b)(3)(A)(ii), taking account of the longstanding principles in Treas. Reg. § 1.174-2 and the distinct purpose of section 250. In particular, Treasury should explain whether the Code provision under which an expenditure is deducted, or the contractual allocation of rights and financial risk, necessarily determine its character for section 250 purposes. In ACT's view, guidance in this area should be based on an analysis of Congress's apparent policy goals in enacting the FDDEI regime and in the OBBBA revisions to the statute.[29] Accordingly, as in our prior comment letter, ACT continues to recommend that Treasury and the IRS clarify that the

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[26] Section 250(b)(3)(A)(ii); Prop. Treas. Reg. § 1.250(b)-1(d)(2)(ii), 91 Fed. Reg. 57,832, at 57,839 (Sept. 11, 2026).

[27] See Treas. Reg. § 1.174-2(a)(1), (10) (addressing the nature of research or experimental expenditures and research performed on a taxpayer's behalf by another person); see also section 174A(a)–(b).

[28] Alliance for Competitive Taxation, Comments on Notices 2023-63 and 2024-12, at 3–5 (May 23, 2024) (recommending that the longstanding definition of research or experimental expenditures continue to apply under other Code provisions without automatically incorporating limitations developed for specified research or experimental expenditures under section 174).

[29] While, as noted above, there is no formal legislative history accompanying the enactment of the OBBBA, ACT believes it is reasonable to infer that Congress's goals in adopting the FDDEI regime in TCJA and in the OBBBA amendments to the regime were to encourage the ownership of valuable intellectual property in the United States and to encourage taxpayers to undertake in the United States the research and development activities that lead to the creation or enhancement of such intellectual property.



long-established definition of "research or experimental expenditures" continues to apply in other areas of the Code that incorporate section 174 by reference, without automatically incorporating limitations developed for specified research or experimental expenditures under section 174.

III. Conclusion

ACT appreciates Treasury's efforts to implement sections 904(b)(5) and 250(b)(3) and the opportunity to provide comments on the Proposed Regulations. ACT respectfully requests that Treasury and the IRS consider the targeted revisions described above to (1) provide appropriately safeguarded elective full relief from domestic-loss effects attributable solely to the special reallocation under section 904(b)(5) or elective NCTI-last alternatives, (2) address the allocation of NOL deductions for purposes of determining the NCTI FTC limitation, and (3) clarify the scope of R&E expenditures under section 250 without automatically importing limitations developed for the section 174 capitalization rules. ACT would welcome the opportunity to discuss these recommendations with Treasury and the IRS.

Sincerely,

Alliance for Competitive Taxation

cc: Rebecca Burch, Deputy Assistant Secretary, International Tax Affairs
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