Client Alert
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Treasury and IRS Release Temporary Regulations under Sections 245A and 954(c)(6)

Introduction

On Friday, June 14, 2019, the Treasury Department ("Treasury") and the Internal Revenue Service (the "IRS") released temporary regulations under sections 245A and 954(c)(6) (the "Temporary Regulations"). Section 245A, which was added to the Code by the Tax Cuts and Jobs Act ("TCJA"), provides a 100% dividends-received deduction ("DRD") to domestic corporations for the foreign-source portion of dividends received from a specified 10% owned foreign corporation ("SFC") after December 31, 2017. Section 954(c)(6) provides a "look-through" exception to subpart F income for dividends received by a controlled foreign corporation ("CFC") from a related CFC to the extent the dividends are not attributable to subpart F income or effectively connected income (the "CFC Look-Through Rule"). Prior to the Temporary Regulations, taxpayers had questioned the interaction of section 245A and section 954(c)(6) (along with many other issues).

Typically, the Administrative Procedure Act ("APA") requires regulations to be prospective only, with a delayed effective date 30 days after the regulations are issued, unless the agency includes a "good cause" statement explaining why notice and public comment would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). When an agency includes an adequate "good cause" statement, rules may be immediately effective. Treasury cited several reasons why it believes it has good cause for the Temporary Regulations to be immediately effective, including that (i) if the rules were merely proposed, they "would provide taxpayers with the opportunity to engage in the transactions to which these rules relate with confidence that they achieve the intended tax avoidance results" that Treasury seeks to prevent, (ii) a prospective effective date could result in increased compliance costs for taxpayers who have already filed their 2018 tax returns and would need to file amended returns (and potentially pay additional taxes and interest) to adopt the approach taken in the Temporary Regulations on their 2018 returns, (iii) good cause is supported when regulations are temporary in effect, and these Temporary Regulations qualify because they have a fixed expiration date (three years after issuance) and Treasury will consider comments submitted on the regulations before finalizing the Temporary Regulations, and (iv) the Temporary Regulations are part of Treasury's implementation of the TCJA, which made "sweeping" and "complex" changes to the US international tax regime. Many practitioners and taxpayers have questioned the adequacy of Treasury's "good cause" statement, because it is not consistent with the reasons other agencies have cited--and courts have upheld--as supporting "good cause" for immediately effective rules.
Although the Temporary Regulations are “effective” on the date that they are published in the Federal Register, which is June 18, 2019, they “apply” to distributions that occur after December 31, 2017. As a practical matter, this means that the rules are retroactive and immediately binding upon taxpayers. Treasury cited its rulemaking authority under section 7805(b)(2) for this retroactive applicability date, which authorizes Treasury to issue regulations that apply retroactively to the date a statute was enacted as long as those regulations are issued within 18 months of enactment. For regulations under the TCJA, June 22, 2019 was the deadline for Treasury and the IRS to take advantage of this authority.

According to the preamble to the Temporary Regulations (the “Preamble”), Congress intended to “form a comprehensive and closely integrated set of tax rules,” applying the section 965 transition tax, subpart F, the section 951A GILTI regime, and section 245A together to a U.S. shareholder’s earnings from a foreign corporation. As Treasury describes it, under the normal operations of these provisions, earnings and profits (“E&P”) is subject first to the subpart F and GILTI regimes, and then section 245A applies “residually.” However, Treasury is concerned that a “literal” reading of section 245A could lead to taxpayers applying the DRD to E&P of a foreign corporation that is attributable to income that should be subject to subpart F or GILTI, but is not. This scenario could arise for fiscal year taxpayers when there is a period of time between the calculation of the transition tax, the effective date of section 245A on January 1, 2018, and the effective date of the GILTI regime (the “gap period”). Treasury expressed concern that taxpayers were entering into transactions during the gap period “with a view to eliminating current or future taxation” of the foreign corporation's foreign earnings, and that such transactions would “substantially undermine” the anti-base-erosion rules that Congress developed for post-2017 earnings. Treasury was also concerned that changes in CFC ownership, coupled with section 245A, could give rise to abusive and/or unintended results regardless of when they occur.

Finally, it is important to understand what the Temporary Regulations do not do. The Temporary Regulations do not contain general rules related to dividends eligible for the DRD under section 245A. According to the Preamble, Treasury and the IRS expect to release those rules at an unspecified future date.

Extraordinary Dispositions

The Temporary Regulations contain an anti-abuse rule for certain extraordinary dispositions of certain assets occurring during the gap period (the “Extraordinary Disposition Rule”). Absent the Extraordinary Disposition Rule, certain transactions occurring during the gap period would produce (i) income that is not subject to the GILTI provisions under section 951A, (ii) E&P that would benefit from the DRD in section 245A, allowing for tax-free repatriation of such E&P, and (iii) basis in property that would generate amortization that could, among other things, reduce tested income for GILTI purposes. Under the Extraordinary Disposition Rule, 50% of the E&P generated from extraordinary dispositions (the “Extraordinary Disposition Amount”) is excluded from the qualification for the
section 245A DRD. An extraordinary disposition account must be maintained to track the Extraordinary Disposition Amount and distributions of same.

**Transactions that are Extraordinary Dispositions.** An extraordinary disposition (an "Extraordinary Disposition") is a transaction involving a SFC in which the SFC:

1. transfers “specified property”, which is all property except for property that, if sold, would generate gain that is not tested income for GILTI purposes;
2. to a related person;
3. outside of the ordinary course of business; and
4. during the period that begins on January 1, 2018 and ends on the last day of the SFC's taxable year starting before January 1, 2018 (the "Disqualified Period").

**Ordinary Course of Business.** The Temporary Regulations provide a facts and circumstances test for determining whether a transaction is outside the ordinary course of business. The Temporary Regulations also provide a per se rule that deems a transaction to be outside the ordinary course of business if either (i) the taxpayer had a principal purpose of increasing the SFC's E&P during the gap period, or (ii) the transaction involves a transfer of intangible property, as defined in section 367(d)(4). The Preamble explains that Treasury believes that taxpayers do not transfer intangible property in the ordinary course of business and that taxpayers had a strong incentive to transfer intangible property during the gap period. The Preamble also compares transactions involving intangible property to transactions involving raw materials used in manufacturing. This comparison suggests that there are few transactions, other than transactions that give rise to trade payables for inventory, which qualify as within the ordinary course of business.

**Coordination with GILTI.** The Extraordinary Disposition Amount approximates the 50% deduction under section 250 for GILTI tested income. As a result, with one very notable and important exception, gain from Extraordinary Dispositions is effectively taxed at the same rate as tested income that would be taxed under section 951A. Yet, tested income taxed under section 951A can carry with it foreign tax credits under section 960 that reduce the U.S. tax burden on this income. On the other hand, the Extraordinary Disposition Amount, when distributed to the U.S. shareholders, does not carry with it foreign tax credits that taxpayers can use to reduce the U.S. tax burden on this income (because Congress repealed section 902 in the TCJA).

Moreover, the final regulations under section 951A that Treasury and the IRS also released on June 14 retained the rules in the proposed regulations under section 951A that basis from a related party transaction that occurred during the gap period cannot be taken into account in determining depreciation or amortization deductions that reduce GILTI tested income. The final regulations
under section 951A further provide that such deductions are not allocable to subpart F income or effectively connected income. Taxpayers that have engaged in an Extraordinary Disposition will thus be subject to double tax on 50% of the earnings from the disposition: a 21% tax on the Extraordinary Disposition Amount upon distribution to the U.S. shareholder, and a disallowance of the amortization deductions against GILTI tested income, subpart F income or effectively connected income of the related acquiring party.

As discussed below, the ordering rules for the Extraordinary Disposition Amount may mitigate the immediate impact of the section 245A disallowance for some taxpayers, but the Temporary Regulations will still have the effect of limiting repatriation.

Extraordinary Reductions

While the Extraordinary Disposition Rule can only apply to U.S. shareholders with a fiscal year CFC that engaged in an Extraordinary Disposition, the rules relating to certain reductions of a controlling U.S. shareholder's ownership in a CFC (the "Extraordinary Reduction Rule") can apply to all U.S. shareholders in any post-TCJA taxable year.

The Extraordinary Reduction Rule targets reductions of a controlling U.S. shareholder's ownership (i.e., more than 50% ownership) in a CFC that could result in a reduction of subpart F or GILTI inclusions. Treasury is expressly concerned with the application of section 951(a)(2)(B) to the sale of shares in a CFC to another related or unrelated U.S. shareholder (which can reduce the buyer's pro rata share of subpart F and GILTI for prior distributions to the seller, including amounts treated as distributions under section 1248) and the application of section 958(b)(4) (as revised by the TCJA) to the sale of shares in a CFC to a related or unrelated foreign person (which could cause the CFC to remain a CFC even though at the end of the tax year there may not be a U.S. shareholder that is required to include any amounts under subpart F or GILTI).

Under the Extraordinary Reduction Rule, a controlling U.S. shareholder's DRD with respect to a dividend from a CFC could be limited if, at any point in the same taxable year as the dividend, (i) the U.S. shareholder transfers more than 10 percent (by value) of its ownership in the CFC or (ii) the U.S. shareholder's ownership percentage at the end of the taxable year in the CFC is less than 90 percent (by value) of the shareholder's highest ownership percentage during the taxable year or the shareholder's ownership percentage the day before any transactions that occurred in the prior taxable year pursuant to a plan to reduce the U.S. shareholder's percentage ownership (by value) (either (i) or (ii) being an "Extraordinary Reduction"). The Temporary Regulations provide exceptions for transfers made in section 368(a)(1)(E) or (F) reorganizations and changes in ownership that do not exceed 5 percentage points (by value).

If there is an Extraordinary Reduction, the controlling U.S. shareholder's DRD is reduced by an amount (the "Extraordinary Reduction Amount") equal to the lesser of the dividend or the U.S. shareholder's pre-reduction pro rata share of
the CFC's subpart F income and tested income (to the extent not included in income by the U.S. shareholder or by another U.S. corporation or tax resident individual).

The Temporary Regulations also provide a "close of the tax year" election to avoid the application of the Extraordinary Reduction Rules (and thus the excess taxation (which Treasury freely admits) that can result from the reduction or elimination of the DRD). To be eligible for the election, each controlling U.S. shareholder and each U.S. tax resident that directly or indirectly owns stock in the CFC at the end of the day that the Extraordinary Reduction occurs must enter into a written, binding agreement to close the CFC's taxable year. If this election is made, the CFC's tax year ends on the date of the Extraordinary Reduction for all purposes of the Code (including for purposes of determining the subpart F and GILTI inclusions of the CFC's U.S. shareholders prior to the Extraordinary Reduction), and there is no reduction in a controlling U.S. shareholder's DRD with respect to dividends of untaxed E&P from the subject CFC (after accounting for any subpart F or GILTI inclusions).

If the "close of the tax year" election is made and the taxable year of the CFC does not close for foreign law purposes, foreign taxes accrued during the foreign tax year are allocated between the pre-close and post-close U.S. taxable periods. This rule is necessary to minimize foreign tax credit leakage when an election is made to close the tax year for U.S. tax purposes only.

Section 954(c)(6) Limitations for Lower-Tier Transactions

The Temporary Regulations also contain rules that limit the availability of the CFC Look-Through Rule. To prevent avoidance of the Extraordinary Disposition Rule and the Extraordinary Reduction Rule discussed above, the regulations prevent the CFC Look-Through Rule from applying in cases where the rule would, absent the limitation on the CFC Look-Through Rule, effectively eliminate subpart F income or GILTI.

**Extraordinary Disposition.** The regulatory framework effectively treats Extraordinary Dispositions occurring at the level of a lower-tier CFC as having taken place at the level of the first-tier CFC. Specifically, the Temporary Regulations provide that the CFC Look-Through Rule is only available to the extent that the amount of the dividend from a lower-tier CFC to an upper-tier CFC exceeds the "disqualified amount."

The "disqualified amount" is equal to 50% of a specified ratio. The numerator of the ratio is the U.S. shareholder's portion of the dividend that would have been an Extraordinary Disposition had the U.S. shareholder received its pro rata share of the dividend directly (i.e., the "tiered extraordinary disposition amount"). The denominator of the ratio is the aggregate percentage of stock of the upper-tier CFC owned by U.S. tax residents that have subpart F inclusions with respect to that CFC.

**Extraordinary Reduction.** In the case of an Extraordinary Reduction, the Temporary Regulations also limit the availability of the CFC Look-Through Rule
for dividends paid by a lower-tier CFC to an upper-tier CFC when the dividend is paid in the same taxable year in which there is an Extraordinary Reduction with respect to the lower-tier CFC. Effectively, the CFC Look-Through Rule is turned off to the extent of the subpart F income and GILTI that would have been recognized had the Extraordinary Reduction not occurred.

Specifically, the CFC Look-Through Rule is only available (assuming the dividend would otherwise qualify for the CFC Look-Through Rule) to the extent it exceeds the lower-tier CFC's "tiered extraordinary reduction amount." The "tiered extraordinary reduction amount" is determined by first multiplying the upper-tier CFC's ownership percentage in the lower-tier CFC immediately before the extraordinary reduction by the sum of the lower-tier CFC's subpart F income and tested income for the taxable year. The resulting amount is reduced by four items: (i) the sum of each U.S. tax resident's pro rata share of the lower-tier CFC's subpart F income and tested income that is attributable to shares of the lower-tier CFC owned by the upper-tier CFC immediately before the Extraordinary Reduction; (ii) the sum of prior tiered extraordinary reduction amounts and amounts included in an upper-tier CFC's subpart F income under the hybrid dividend rules of section 245A(e) by reason of dividends from the lower-tier CFC during the taxable year; (iii) the sum of prior extraordinary reduction amounts of each controlling U.S. shareholder with respect to shares of the lower-tier CFC that were owned by the shareholder during the taxable year but that are owned by the upper-tier CFC at the time of the distribution; and (iv) the product of the upper-tier CFC's ownership percentage in the lower-tier CFC before the extraordinary reduction and the amounts of each U.S. tax resident's pro rata share of subpart F income and tested income for the taxable year, attributable to shares of the lower-tier CFC acquired by the U.S. tax resident from the lower-tier CFC during the taxable year.

A transition rule provides that for purposes of computing the tiered extraordinary reduction amount in taxable years of a lower-tier CFC beginning on or after January 1, 2018, and ending before June 14, 2019, the lower-tier CFC's subpart F income for the taxable year is not treated as subpart F income or tested income.

The denial of the CFC Look-Through Rule with respect to dividends received by upper-tier CFCs as a result of the Extraordinary Disposition and Extraordinary Reduction Rules can result in subpart F inclusions to individual shareholders. (In contrast, the denial of the section 245A DRD only applies to corporate U.S. shareholders). Treasury requests comments on potential denial of the CFC Look-Through Rule to dividends received by an upper-tier CFC from a lower-tier CFC when such CFCs are owned by individuals and there may be a reduction in the individuals' ownership of the lower-tier CFC.

As noted above, if a CFC recognizes gain on the sale or exchange of stock of another foreign corporation, any gain recognized is generally treated as a dividend to the selling CFC to the extent of the lower-tier corporation's E&P under section 964(e). Under section 964(e)(4), the dividend to an upper-tier CFC resulting from the sale or exchange of shares in another foreign corporation held
at least one year is treated as subpart F income of the selling CFC. In such cases, U.S. shareholders can apply the DRD against the foreign-source portion of the section 964(e)(4) dividend as if the subpart F income included by the U.S. shareholder were a dividend received by the U.S. shareholder from the selling CFC. Dispositions subject to section 964(e)(4) are subject to the Extraordinary Disposition Rule and Extraordinary Reduction Rule. Dispositions subject to section 964(e)(1) (but not section 964(e)(4)) are eligible for the CFC Look-Through Rule but are subject to the disallowance rules with respect to the CFC Look-Through Rule for Extraordinary Dispositions and Extraordinary Reductions.

Notably, Treasury indicates that it is considering whether, and to what extent, proposed regulations should be issued that provide that dividends received by a CFC are eligible for the DRD. However, Treasury indicates that in no case would any person, including a foreign corporation, be allowed the DRD directly or indirectly for the portion of a dividend paid to a CFC that is not eligible for the CFC Look-Through Rule as a result of the Temporary Regulations.

### Ordering and Coordination Rules

One positive aspect of the Temporary Regulations is the ordering rules. In particular, the regulations generally allow taxpayers to distribute "good" or "untainted" E&P (i.e., previously tax income and non-extraordinary disposition E&P) before "tainted" E&P (i.e., the Extraordinary Disposition Amount).

The Temporary Regulations give priority to section 245A(e), the hybrid dividend rules that create a subpart F inclusion. If a dividend is not subject to section 245A(e), then it is subject to testing under the Temporary Regulations. As between an Extraordinary Disposition and an Extraordinary Reduction, a dividend is first subject to the latter (the Extraordinary Reduction Rule) before being subject to the former (the Extraordinary Disposition Rule).

If the dividend is subject to (i) either the Extraordinary Reduction Rule or the Extraordinary Disposition Rule, and (ii) limitations to the CFC Look-Through Rule for an Extraordinary Disposition or an Extraordinary Reduction, the portion of the dividend that may be subject to an Extraordinary Disposition or an Extraordinary Reduction is treated as if it occurred immediately before the portion of the dividend that may be subject to the limitation to the CFC Look-Through Rule.

### De Minimis Exceptions

The Extraordinary Disposition Rules described above are subject to a de minimis exception, whereby a disposition of specified property is not considered to be an Extraordinary Disposition if the sum of the net gain recognized by a SFC on all specified property dispositions is the lesser of (i) $50 million or (ii) 5 percent of the gross value of all of the SFC’s property held immediately before the Disqualified Period. Similarly, and with respect to an Extraordinary Reduction, no amounts are considered an extraordinary reduction if the CFC’s subpart F income and tested income for the taxable year does not, in the aggregate,
exceed the lesser of (i) $50 million or (ii) 5 percent of the CFC's total income for the taxable year.

It is expected these rules will be of limited applicability to most taxpayers.

**Anti-Abuse Rule**

Separate from the principal purpose components of the Extraordinary Disposition Rule and Extraordinary Reduction Rule described above, the Temporary Regulations contain an overarching anti-abuse rule, the parameters of which appear to be intentionally undefined. More specifically, the Temporary Regulations provide that "[t]he Commissioner may make appropriate adjustments to any amounts determined under this section if a transaction is engaged in with a principal purpose of avoiding the purposes of this section." Neither the Temporary Regulations nor the Preamble provide guidance regarding what "appropriate adjustments" may include. It is unclear what particular situations are envisioned, and what gaps IRS and Treasury feared may exist in the Temporary Regulations, the individual parts of which themselves contain principal purpose tests. This seems to just be part of a larger trend towards broader and results-based anti-abuse provisions.

**State Tax Considerations**

As with all aspects of the TCJA, the state tax considerations regarding section 245A and the Temporary Regulations initially begin with conformity. In this regard, many states already decouple from the Code and provide deductions for foreign dividends from related corporations. This is largely due to the constitutional requirement that states treat foreign and domestic dividends equally pursuant to Kraft, 505 U.S. 71 (1992). Given section 245A's application to foreign dividends, it is questionable whether states can actually conform to its provisions generally or the exceptions set forth in the Temporary Regulations.

It should also be noted that some nonconforming states have their own definitions of "dividend" and E&P that differ from the Code. As such, there may be disconnects in the calculation of "dividends" for federal and state tax purposes. Further, various states do not follow Treasury regulations. As such, the Temporary Regulations may not apply or exist even in those states that have not decoupled from section 245A. In sum, given the lack of conformity in this area, there may be a state tax cost to repatriating cash from foreign subsidiaries even if there is no federal tax cost to doing so.

**Compliance Matters**

As noted above, in the "good cause" statement in the Preamble, Treasury and IRS indicated that deferring the effectiveness of the Temporary Regulations could increase taxpayer compliance costs because certain taxpayers would be required to amend and refile returns and pay additional taxes owed with interest. However, this is exactly what the Temporary Regulations caused for certain other taxpayers. Specifically, any fiscal year taxpayer that has already filed its tax return for the Disqualified Period and has received (or was deemed to have
received) an Extraordinary Disposition Amount must file amended returns if they intend to follow the Temporary Regulations.

In addition to creating headaches for fiscal year taxpayers that have already filed their 2018 tax returns, the Temporary Regulations impose an additional layer of recordkeeping under section 6038 for all other taxpayers. Specifically, ineligible amounts (e.g., the Extraordinary Disposition Amount), tiered extraordinary disposition amounts, and tiered extraordinary reduction amounts must be reported on the appropriate information reporting form, in this case Form 5471, in accordance with section 6038. These amounts must be tracked, potentially indefinitely, until they become irrelevant (e.g., until an Extraordinary Disposition Amount is distributed or deemed distributed under the ordering rules). A transition rule requires taxpayers to report the required information on the first return filed following the issuance of revised forms, instructions, or other guidance with respect to reporting such information.

While the tracking and compliance required by the Temporary Regulations pales in comparison to the foreign tax credit rules, for example, it will nevertheless require new procedures to ensure proper tracking of E&P and compliance with the rules.

Are the Temporary Regulations Invalid?

The elaborate scheme contained in the Temporary Regulations to reduce or deny the availability of the DRD (or the CFC Look-Through Rule) results in the creation of substantial U.S. federal income tax liabilities for affected taxpayers that do not exist under the plain language of the statute. Further, Treasury and the IRS issued the Temporary Regulations without following the APA’s notice-and-comment rulemaking requirements. Finally, the Temporary Regulations purportedly have retroactive effect, particularly affecting taxpayers that have already repatriated Extraordinary Disposition Amounts. Therefore, it is reasonable to question whether the Temporary Regulations are invalid.

A reviewing court would evaluate the validity of the Temporary Regulations in accordance with the framework laid out in *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under that framework, the first *Chevron* step is to determine whether Congress has directly spoken to the precise question at issue and, if the intent of Congress is clear, that is the end of the matter. If it is determined that Congress has not directly addressed the precise question at issue, the second *Chevron* step is to determine whether the agency’s answer is based on a permissible construction of the statute—i.e., one that is not manifestly contrary to statute or arbitrary and capricious in substance.

Congress has spoken to the precise question at issue and its intent is clear. Congress plainly provided a DRD under section 245A for the foreign-source portion of any dividend received from an SFC. Congress plainly did not provide for a reduction or elimination of that DRD for an Extraordinary Disposition Amount or an Extraordinary Reduction Amount. In short, absent the Temporary Regulations, it is clear that such amounts would qualify for a full DRD under...
section 245A and there is no evidence that Congress intended a different answer. Indeed, when the Senate offered the opportunity to harmonize the effective dates of section 951A and section 245A to address fiscal-year taxpayers, Congress declined.

Further, the authority to harmonize the U.S. international tax system enacted by Congress in the TCJA can hardly be deduced from the narrow grant of authority contained in section 245A(g), which provides only that:

The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including regulations for the treatment of United States shareholders owning stock of a specified 10 percent owned foreign corporation through a partnership.

Section 245A(g) only directs the Secretary to issue necessary or appropriate regulations or other guidance to carry out the provisions of section 245A, not to harmonize the U.S. international tax system on the back of section 245A. As indicated by the Court in Stark v. Wickard, 321 U.S. 288, 309-310 (1944), “When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.” Treasury and the IRS also cite sections 951A(a), 954(c)(6)(A), and 965(o) as authority for the Temporary Regulations but none of these provisions state or imply an ability to reduce or deny the DRD under section 245A. Therefore, a good argument can be made that the Temporary Regulations survive neither the step one analysis nor the step two analysis of Chevron.

In addition to these substantive problems, the adoption of the Temporary Regulations by Treasury and the IRS arguably suffers from certain procedural defects that could, standing alone, also result in invalidity. As noted above, the APA requires that Treasury and the IRS must provide advance notice and the opportunity to comment before finalizing any regulation or they must show good cause why they did not do so. Under the APA, good cause exists only where notice and public procedure are impracticable, unnecessary, or contrary to the public interest. The courts have generally construed the good cause exception very narrowly where, for example, “delay would imminently threaten life or physical property.” Sorenson Comm’ns, Inc. v. FCC, 755 F.3d 702, 706 (D.C. Cir. 2014). While, as described previously, Treasury and the IRS cite several reasons why they believe they have good cause for the Temporary Regulations to be immediately effective, commentators have observed that many of these reasons ring hollow and do not rise to the level of urgency required by the courts to dispense with a notice-and-comment period.

Another procedural problem with the Temporary Regulations is the retroactive application of the Extraordinary Disposition Rule, particularly with respect to taxpayers that generated an Extraordinary Disposition Amount and repatriated such amount all within their 2018 fiscal years (and have perhaps filed their tax returns for such years). These taxpayers may have engaged in typical internal
restructurings with no inkling that Treasury and the IRS would belatedly and retroactively change the rules to impose substantial U.S. federal income tax liabilities on them. The Supreme Court has stated that, “[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result,” and there must be “clear congressional intent authorizing retroactivity” to overcome this presumption. *Landgraf v. USI Film Products*, 511 U.S. 244, 272 (1994).

Section 7805(b)(1) generally prohibits the application of temporary, proposed, or final regulations to any taxable period ending before taxpayers have had sufficient notice of their content. Section 7805(b)(2), which pertains “to regulations issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates,” states only that the timing limitations in section 7805(b)(1) do not apply but does not provide Treasury and the IRS with affirmative authority to make such regulations retroactively effective in contradiction to the rules of the APA. Section 7805(b)(3) provides that any regulation may take effect or apply retroactively to prevent abuse. However, nothing in the Temporary Regulations or the Preamble thereto suggests that Treasury or the IRS view Extraordinary Dispositions (or Extraordinary Reductions) as abusive meriting retroactivity under section 7805(b)(3). Therefore, a good argument can be made that the Temporary Regulations are invalid to the extent they have retroactive effect.