

Qualified Dividends from Foreign Corporations

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William R. Skinner, Esq.¹
Fenwick & West LLP
wrskinner@fenwick.com

Introduction

This article revisits § 1(h)(11)(C), which treats dividends paid by certain qualified foreign corporations as qualified dividend income taxed at long-term capital gains rates. While most international tax planning focuses on foreign operations of US C corporations, many of the same tax planning principles apply to standalone foreign corporations owned by U.S. individuals, directly or through U.S. pass-through entities such as partnerships, S corporations and trusts. From the perspective of such corporations, section 1(h)(11)(C) is a critical piece of international tax planning in that it determines, in large part, whether investment returns will be taxed as long-term capital gains and ordinary income. For proper planning, section 1(h)(11)(C) must be considered in tandem with the U.S. anti-deferral rules—subpart F and the passive foreign investment company (“*PFIC*”) rules. As will be seen below, the interaction between these rules can be complex and thwart tax planning objectives. At the same time, the possibility of using § 1(h)(11)(C) to obtain long-term capital gains on low-taxed foreign income can yield significant benefits if these rules are properly managed.

Qualified Dividend Income from QFCs

The US retains a classical two-tier system of corporate taxation for an individual shareholder in a C corporation, domestic or foreign. Dividends from domestic C corporations are generally taxed at the long-term capital gains rate. As a result, the tax effect of earning \$100 through a domestic C corporation is two levels of tax: federal corporate tax at 35%, plus shareholder-level taxation at 20%, for an overall federal tax burden of 48%.²

The Code applies the same two-tier system for a US shareholder of a foreign corporation: (1) corporate level tax at the foreign tax rate and (2) a shareholder-level tax on distribution or realization of capital gains. As part of the original enactment of the qualified dividend income rules, Congress included § 1(h)(11)(C) to treat dividends only from certain qualified foreign corporations (“*QFCs*”) as eligible for long-term capital gains treatment. Thus, unlike the return

¹ William R. Skinner, Esq., is a partner in the law firm of Fenwick & West LLP who practices in the areas of U.S. international and corporate taxation, working regularly in areas such as subpart F, transfer pricing, the foreign tax credit and international restructurings. He is based in Silicon Valley and may be reached at 650-335-7669 or wrskinner@fenwick.com.

² This rate excludes the 3.8% Medicare tax on net investment income, which is not discussed in this article. This rate also ignores the possibility that the shareholder’s gain will be partially or wholly exempt from tax under the § 1202 for gains from qualified small business stock.

from a domestic C corporation, which is subject to federal income taxation at a uniform blended rate of 48%, the all-in tax rates on US shareholder's investment in a foreign corporation may vary from as low as 20% to 60% or more.³ The two levers to affect that tax rate are planning to reduce foreign corporate-level tax and ensuring that the shareholder level tax is imposed at the long-term capital gains rate. Understanding and properly applying § 1(h)(11)(C), as well as the subpart F and PFIC anti-deferral rules, is central to both aspects of this tax planning.

Definition of a Qualified Foreign Corporation

A qualified foreign corporation (“*QFC*”) is a foreign corporation that meets one of the following three tests: (1) the corporation is organized in a U.S. possession; (2) the QFC is eligible for benefits of a “comprehensive” U.S. tax treaty that contains an exchange of information provision; or (3) the stock of the QFC with respect to which the dividend is paid is regularly tradable on an established financial market in the United States.⁴ A foreign corporation cannot be a QFC if it is, or was during the preceding taxable year, a passive foreign investment company (PFIC) within the meaning of § 1297.⁵

The treatment of publicly traded and U.S. listed foreign corporations and possessions corporations as QFCs is fairly straightforward. However, the Treaty test may apply to a range of privately-held foreign corporations, including both operating companies and Treaty-based holding companies. As a starting point, the IRS maintains a list of tax treaties that are considered to be “comprehensive.” With the current or pending adoption of modern Limitation on Benefits (LOB) provisions throughout the US tax treaty network, essentially all income tax treaties currently in force qualify as comprehensive.⁶

The key question is what it means for a foreign corporation to be “eligible for benefits” of the treaty within the meaning of § 1(h)(11). For example, unless the QFC is being used to earn U.S. source income, it will not have any occasion to invoke the U.S. tax treaty and establish its eligibility for benefits at the corporate level. Thus, eligibility for the benefits of the tax treaty for purposes of § 1(h)(11) is a purely hypothetical inquiry.⁷

IRS rulings and the legislative history of § 1(h)(11) answer some of the questions about this hypothetical treaty analysis. In PLR 200752029, the IRS employed a three-part framework for analyzing the Treaty test of § 1(h)(11)(C). There, the taxpayer requested a ruling as to the application of § 1(h)(11) to an open-end, limited purpose investment trust. The investment trust

³ A 60% combined tax rate would apply if the foreign corporation were subject to foreign corporate-level tax of 35%, and paid out non-qualified dividend income taxed at a rate of 39.6%.

⁴ §§ 1(h)(11)(C)(i) and 1(h)(11)(C)(ii).

⁵ §1(h)(11)(C)(iii).

⁶ The remaining exceptions are the 1973 Treaty with the USSR (currently applicable to certain former republics), Bermuda and the Netherlands Antilles. See Notice 2011-64, § 2.

⁷ See IRS Notice 2011-64, § 3 (“For purposes of determining whether it satisfies these requirements, a foreign corporation is treated as though it were claiming treaty benefits, even if it does not derive income from sources within the United States.”).

was subject to taxation in the Treaty country (Country A) on its worldwide income, less a deduction for dividends paid. The investment trust filed IRS Form 8832 to elect to be classified as a corporation for US tax purposes.⁸ In ruling on § 1(h)(11)(C), the IRS applied the following three-part test:

- (1) Was the investment trust a corporation?
- (2) If the trust was a corporation, was it a tax resident of a Country A within the meaning of the US – Country A tax treaty?
- (3) Was the trust a “qualifying person” under the LOB Article of the Treaty?

In answering these questions, the IRS viewed the first issue as a matter of US tax law, and analyzed whether the trust was a fixed investment trust under Treas. Reg. § 301.7701-4(c) or a business entity. Due to the trustee’s power to reinvest proceeds of the certificate holders, the trust was properly treated as a business entity that had elected corporate status for U.S. tax purposes. This resolved the first question favorably for the taxpayer.

In the PLR, the IRS viewed the second and third questions as involving the application of the treaty in the same manner as if the Trust were claiming treaty benefits for US source income. Although not explicitly stated, the reference to the trust being a “qualifying person” under the Treaty suggests that the IRS was looking for the taxpayer to show that the trust was entitled to all of the benefits of the treaty under the public trading or ownership-base erosion test,⁹ rather than qualifying for hypothetical treaty benefits only with respect to certain items of income under the active business test or derivative benefits test.¹⁰

At the same time, the 2003 Conference Report underlying the enactment of § 1(h)(11) suggests a somewhat broader inquiry. Specifically, the Conference Report states:

The conferees further intend that a company will be eligible for benefits of a comprehensive income tax treaty within the meaning of this provision if it would qualify for the benefits of the treaty with respect to substantially all of its income in the taxable year in which the dividend is paid.

As some commentators have persuasively argued, the reference to qualifying for benefits “substantially all of the income” likely refers to qualifying under the active business test.¹¹ This result also achieves a rational policy result in that a foreign corporation earning predominantly active business income from a business conducted in the treaty country necessarily has a substantial, non-abusive presence in the foreign country. At the same time, there has not been any guidance from the IRS endorsing this analysis.

⁸ The trust represented that it was not a PFIC, apparently due to an insurance business carried on through subsidiaries.

⁹ 2006 US Model Treaty, Articles 22(2)(c)(i) and 22(2)(e).

¹⁰ 2006 US Model Treaty Article 22(3); see also, e.g., 2001 US-UK Income Tax Treaty, Article 23(3).

¹¹ New York State Bar Association Report No. 1113 (June 26, 2006) at pp. 21-25.

A recent ILM 201343019 (Sept. 10, 2013) addressed treaty eligibility for § 1(h)(11) purposes under the “principal purpose test” of the US – Cyprus treaty. There, a US individual owned an interest in the Cyprus Holding Company, which owned an operating company in a third country. The ownership-base erosion test was not satisfied because it required a certain percentage of Cypriot ownership. Article 26(2) of the U.S. - Cyprus Treaty contains a special “principal purpose” test, which allows for benefits “if it is determined that the establishment, acquisition and maintenance of such person and the conduct of its operations did not have as a principal purpose obtaining benefits under the Convention.”¹² In the ILM, the IRS found that the Cypriot company was being maintained in Cyprus for reasons unrelated to obtaining benefits under the Treaty and could not have been treaty shopping in violation of Article 26(2) when it had no US source income. Moreover, the IRS did not seem to view the purpose of establishing a holding company that qualified for § 1(h)(11) as a tainted purpose under the Cyprus treaty.

A number of other technical questions remain unanswered under § 1(h)(11)’s treaty test. For example, one important question is when exactly must be the foreign corporation paying the dividend be a QFC. The legislative history cited above refers to the foreign corporation qualifying for treaty benefits in the “taxable year in which the dividend is paid.” If the foreign corporation did not qualify for benefits in a previous year, but becomes eligible for treaty benefits in the current year, it would, therefore, seem to be able to pay qualified dividend income during the current year out of earnings derived from prior years in which it was not a QFC.¹³ Similarly, if dividends from a non-QFC are paid to a QFC, it would seem that the fact that the underlying earnings may be traced to a non-QFC is irrelevant.

Planning under the Ownership – Base Erosion Test

Perhaps the most straightforward path into § 1(h)(11)(C) is through the ownership-base erosion test. In several major U.S. tax treaties, the ownership test can be established by having at least 50% US ownership of the treaty corporation. For example, Article 24(2)(c) of the US - Luxembourg Treaty of 1996 allows a Luxembourg company to qualify for treaty benefits where the following two conditions are met: (1) at least 50% of the principal class of shares are “ultimately owned” by persons that are qualified residents or US citizens; and (2) deductible payments made to persons other qualified residents or US citizens do not exceed 50% of the company’s gross income. The two conditions, qualifying ownership and absence of base erosion, are incorporated in most US tax treaties through the so-called “ownership-base erosion test.”

This test works well with § 1(h)(11) planning in that, if the proper treaty jurisdiction is chosen, the qualifying US ownership for treaty purposes may be supplied entirely by US owners. So long as the holding company does not engage in prohibited “base erosion,” it would be a qualified person that allows its majority US owners to derive qualified dividend income. For

¹² US – Cyprus Income Tax Treaty of 1984, Article 26(2).

¹³ Where the regulations require earnings to be traced to a particular source to obtain beneficial tax treatment, they have explicitly so provided. *Cf.* Treas. Reg. § 1.954-2(b)(4)(ii)(A)(2) (same country exception requires E&P to be accumulated during period payor and recipient were related parties).

example, it might be possible for the QFC to make deductible payments under a hybrid instrument to US shareholders. Even if deductible for local country tax purposes, such payments generally would not count towards the base erosion threshold if made to qualifying persons. Check-the-box planning involving subsidiaries of the Treaty country holding company might also facilitate foreign tax reduction. In addition to a favorable treaty test, other important features of a potential holding company for this purpose are relaxed CFC rules, participation exemption, and reduced rate of foreign withholding tax on outbound dividends.

Interaction of § 1(h)(11) with the Anti-Deferral Rules

While the above discussion provides an overview of obtaining § 1(h)(11) benefits from the foreign corporation, it only represents half of the necessary analysis. If a foreign corporation is also a controlled foreign corporation (“*CFC*”) and/or passive foreign investment company (“*PFIC*”) with respect to the US owners, the anti-deferral rules can significantly curtail the shareholders’ ability to derive qualified dividend income. As discussed below, PFICs are not eligible for § 1(h)(11)(C) unless covered by the CFC overlap rule. CFCs, on the other hand, continue to be eligible for the benefits of § 1(h)(11), but not with respect to subpart F income or section 956 investments (unless a § 962 election is made). In addition, gain from the sale of CFC stock may be characterized as a dividend under § 1248, which makes the CFC’s eligibility for § 1(h)(11) at the time of exit particularly important.

Interaction with PFIC

Section 1(h)(11)(C)(iii) disallows the benefits of qualified dividend income with respect to any foreign corporation that is, or was during the preceding taxable year, a passive foreign investment company as defined under § 1297. As a potential trap for the unwary, this test differs in some respects from what constitutes an ownership interest in a § 1291 fund that is viewed as carrying a “PFIC taint.”

First, the rule applies irrespective of whether a qualified electing fund (“*QEF*”) election has been made by the shareholder. Under the QEF rules, if a shareholder makes a QEF election for the first year of its holding period of a PFIC (a so-called “*pedigreed QEF*”), the shareholder is no longer treated as a § 1291 fund with respect to the shareholder. If the corporation constitutes a PFIC under the asset test or income test for the year, even if treated as a QEF, dividends will not constitute qualified dividend income even though gain from the sale of shares would be capital gains. Moreover, this disqualification rule also applies if the corporation, as a pedigreed QEF, failed the income test or asset test during the previous year. Thus, even if the shareholder has made a QEF election and purged its PFIC history, it must nonetheless wait at least a year before the foreign corporation is able to pay a qualified dividend.

Second, while the statute refers to the corporation being a PFIC as defined in § 1297 (seemingly a corporate-level determination), the IRS has interpreted this test to apply on a shareholder-by-shareholder basis.¹⁴ Depending on the shareholder’s situation, this rule can be favorable or unfavorable. On the one hand, a shareholder in a prior PFIC that is subject to the

¹⁴ Notice 2004-70, § 7.02

once-a-PFIC, always-a-PFIC rule of § 1298(b)(1) cannot receive capital gains distributions from the PFIC until its holding period is purged. On the other hand, the Notice provides that a foreign corporation's status as a PFIC with respect to the shareholder takes into account the CFC overlap rule of § 1297(d). Under this rule, even if the foreign corporation's assets are predominantly passive, the PFIC rules will not, as noted above, override § 1(h)(11) treatment as to a U.S. shareholder in a CFC. This rule can be useful, for example, where a foreign corporation that is both a PFIC and a CFC derives active income not subject to current taxation under subpart F. Even if the entity's assets are largely passive, the CFC overlap rule may allow dividends out of non-previously taxed earnings to remain qualified dividend income.

Interaction with Subpart F

Section 1(h)(11), as noted above, does not preclude a taxpayer from receiving qualified dividend income from a CFC. Under Notice 2004-70, § 4.01, qualified dividend income includes gain from the sale of CFC stock that is re-characterized as a dividend under § 1248.

However, subpart F inclusions under § 951(a)(1), both with respect to subpart F income and earnings invested in U.S. property, are treated as ordinary income by the IRS.¹⁵ This conclusion has been a matter of some discussion.¹⁶ However, the Tax Court in *Rodriguez v. Commissioner*, affirmed by the Fifth Circuit,¹⁷ held that inclusions under § 951(a)(1)(B) would not be treated as qualified dividend income. Whatever the merits of the *Rodriguez* decision, a taxpayer inclined to take a different view would now need to litigate contrary to a decision of the Tax Court with a view towards achieving a more favorable result in a circuit outside the Fifth Circuit.

Depending on the fact pattern, the *Rodriguez* analysis can create significant traps for a US individual with an interest in a CFC that generates subpart F income or makes § 956 investments. With respect to a CFC holding investments that would otherwise generate long-term capital gain, such as certain real estate or a portfolio of equity securities, the treatment of gains as subpart F income under § 954(c) may, in effect, convert the character from capital gains to ordinary income without deferral. Similarly, in the case of an operating CFC that generates subpart F sales or services income that is subject to significant foreign tax, subpart F may cause the amounts to be currently taxed at ordinary rates, but without a foreign tax credit for foreign income taxes imposed that would be available if the operations were conducted through a hybrid entity. In either case, subpart F may sometimes lead to the conclusion that the shareholder would be better off checking the box to treat the foreign corporation as a flow-through entity for U.S. tax purposes to claim direct foreign tax credits under § 901 or the rate preference for capital gains.

¹⁵ Notice 2004-70, § 4.02

¹⁶ See, e.g., Jeffrey Rubinger, *Turning Water into Wine: The Use of Offshore Holding Companies to Convert Low-Taxed Income into 'Qualified Dividend Income'*, 2004 TNT 92-53 (May 12, 2004).

¹⁷ 2013-2 USTC ¶150,420 (5th Cir. 2013), *aff'g* 137 T.C. 174 (2011)

Use of a § 962 Election in Combination with § 1(h)(11)

One little known, but in this context important, provision of Subpart F is § 962. Section 962(a) allows the US individual to elect to be treated as if it were a domestic C corporation, and limit its tax on subpart F income to an amount that would be imposed if the subpart F income had been earned by a domestic corporation and the corporation were eligible to claim an indirect credit under § 960.¹⁸ This election, which is made year-by-year by each individual shareholder with respect to all of its CFCs, can yield significant benefits in two respects. First, the availability of the indirect foreign tax credit under § 960 in the calculation prevents high-taxed subpart F income from being subject to confiscatory rates of tax. Second, in the case of a foreign corporation paying significant foreign tax, section 962 may, in effect, take the teeth out of *Rodriguez* decision by preventing subpart F from converting qualified dividend income into ordinary subpart F income.¹⁹

The effect of a § 962 election is illustrated through the following a simplified calculations in the case of two CFCs M (high taxed) and CFC N (low-taxed). At the outset, the § 962(a) election results in a significant deferral of tax with respect to the subpart F income inclusion:

	<u>CFC M</u>	<u>CFC N</u>
Pre-Tax Subpart F Income	\$1,000,000	\$1,000,000
Foreign taxes	\$400,000	\$150,000
<u>Net Sub F inclusion</u>	<u>\$600,000</u>	<u>\$850,000</u>
Net Fed Tax on Sub F Income at 39.6%	\$237,600	\$336,600

Impact of Section 962 Election

Hypothetical Dividend with Sec. 960 Gross-up	\$1,000,000	\$1,000,000
Hypothetical Pre-credit corporate tax	\$350,000	\$350,000
Less Hypothetical Section 960 Credit	-\$350,000	-\$150,000
Hypothetical Corp Tax under Sec. 962(a)	\$0	\$200,000
Net Tax on Sub F under Sec. 962(a)	\$0	\$200,000
<i>Taxes Initially Deferred Through Election</i>	<i>\$237,600</i>	<i>\$136,600</i>
<i>As % of Total Pre-Tax Income</i>	<i>23.8%</i>	<i>13.7%</i>

The cost of electing § 962 relief is the limitation of a PTI exclusion on an actual dividend

¹⁸ See §§ 962(a)(1) and 962(a)(2). A parallel provision applies for purposes of limiting an individual shareholder's tax on § 1248 deemed dividend income to the amount of tax that would have applied had the amounts been earned by a domestic corporation. See § 1248(b)(1).

¹⁹ Some have suggested on technical grounds that the § 962(d) amounts may be an income inclusion, rather than a dividend eligible for § 1(h)(11). See Scott A. Harty and Hale E. Sheppard, *Repatriating Subpart F Income: A Fresh Look at Electing to Be Taxed as a Corporation*, 2005 WTD 70-21 (Apr. 13, 2005). However, this view seems to read § 962(d) in an overly broad manner. Section 962(d) only operates to turn off § 959(a)(1), which excludes certain dividends of a CFC's earnings and profits from gross income. But for the § 959(a) exclusion, such distributions would seem to plainly be dividends under § 316 principles.

to the amount of tax paid on the subpart F income inclusion.²⁰ The remaining amounts are not eligible for the § 959(a) exclusion, and thus become fully taxed as a dividend from the foreign corporation. The apparent rationale is that this amount would be the same as the after-tax earnings of the C corporation (after § 960 indirect credit) available for a dividend to the U.S. shareholder.

Including this second-level tax on the actual distribution determines whether electing § 962 yields a permanent cost or benefit, or merely a deferral of U.S. taxes on subpart F income with a permanent increase or neutral effect on the all-in tax rate. This is illustrated in the table below, which continues the numerical analysis from the above examples.

	<u>CFC M</u>	<u>CFC N</u>
Pre-Tax Subpart F Income	\$1,000,000	\$1,000,000
Foreign taxes	\$400,000	\$150,000
<u>Net Sub F inclusion</u>	<u>\$600,000</u>	<u>\$850,000</u>
Net Fed Tax on Sub F Income at 39.6%	\$237,600	\$336,600
Total Section 962(a) Tax in Year of Inclusion	\$0	\$200,000
Second-Level Dividend After PTI	\$600,000	\$650,000
Tax at 20% QDI Rate	\$120,000	\$130,000
<i>Net Permanent Savings / (Cost) v. No Election</i>	<i>\$117,600</i>	<i>\$6,600</i>
Tax at 39.6% OI Rate	\$237,600	\$257,400
<i>Net Savings / (Cost) v. No Election</i>	<i>\$0</i>	<i>-\$120,800</i>

The second level tax under § 962(d) is triggered by an actual distribution of the PTI. Notably, Section 962(d) provides that § 962 PTI is not treated as PTI for purposes of § 959(a)(1), but does not override § 959(a)(2). Thus, it seems that § 962 PTI triggered by a subpart F inclusion remains available to be lent to the U.S. shareholder tax-free without suffering a § 956 inclusion.²¹

Interaction with § 1248

Section 1248 deemed dividends, unlike subpart F inclusions, are eligible for treatment as qualified dividend income.²² Thus, on a sale of a CFC by US individuals, the § 1248 “pickup” remains eligible for a reduced rate of tax. This can be especially significant where the buyer is a

²⁰ See Treas. Reg. § 1.962-1(d), Example 2.

²¹ Other aspects of upstream loans in the context of repatriation are currently under challenge in the pending tax court litigation filed in *Illinois Tool Works et al. v. Commissioner*, Docket No. 10418-14. However, the treatment of a bona fide loan from a corporation to its shareholder as excluded from gross income remains an established legal principle outside of the application of § 956.

²² See Notice 2004-70, § 4.01.

US corporation that requires a § 338(g) election to be made. Such an election will create large amounts of E&P in the CFC being sold, and absent § 1(h)(11), convert capital gain into ordinary dividend income. If the dividend income is qualified dividend income, however, the shareholders may be indifferent as to the § 338(g) election being made with respect to its CFCs.

In a tiered CFC structure, the § 1248 deemed dividend takes into account earnings of lower-tier CFCs.²³ In order to computing a US corporate shareholder's indirect credit under § 902, the § 1248 dividend is deemed made proportionately from each lower-tier CFC's E&P and tax pools as if a direct dividend were paid to the parent.²⁴ However, if the first-tier CFC is a QFC, but the lower-tier CFCs are not QFCs, does § 1(h)(11) apply to the portion of the § 1248 deemed dividend sourced from lower-tier CFCs that are not QFCs? It may be advisable in such cases to check-the-box on any lower-tier non-QFCs into a QFC prior to the sale, so that there is no possible dividend from a non-QFC in the § 1248 transaction.

In addition, section 1248(b) limits an individual's tax on a § 1248 deemed dividend to the amount of tax that would have been incurred on a sale of stock in a domestic C corporation that had earned the CFC's undistributed earnings and claimed a foreign tax credit. While the computations of the § 1248(b) are detailed,²⁵ they will generally yield a benefit if the § 1248 dividend would not otherwise be treated as QDI and if the earnings are subject to appreciable foreign tax (i.e., 10% or more). If the foreign corporation is a QFC, the § 1248(b) limitation will generally be inapplicable because the § 1248 deemed dividend is only subject to shareholder level tax.²⁶

Proposed Legislation and Certain Hybrid Transactions

In 2007, legislation was proposed in Congress to curtail the benefits of § 1(h)(11) in certain circumstances.²⁷ Specifically, the 2007 proposals bills would have created a new category of "non-qualified dividend income" from a foreign corporation, where any of the following requirements were met: (1) the corporation is not treated as a corporation under the laws of the country to which it would be subject if it were a corporation; (2) such corporation is exempt from tax in its home country; (3) such corporation would be a PFIC, determined without regard to the CFC overlap rule of § 1297(d); or (4) such dividend is paid with respect to a hybrid instrument treated as debt under local law. While such bills would seem unlikely to obtain traction in the near future, they nonetheless highlight certain practices that Congress believed

²³ § 1248(c)(2).

²⁴ See Treas. Reg. § 1.1248-1(d).

²⁵ See Treas. Reg. § 1.1248-4.

²⁶ Rev. Rul. 69-124 holds that the § 1248(b) limitation applies to CFC stock held by an individual indirectly through a domestic partnership. By contrast, some have reported that the IRS has taken a different approach to interpretation of § 962 and limited it to CFC stock owned directly by an individual or US estate or trust. See Rubinger & LaPree, *IRS Takes Flawed Approach to Inclusion under Subpart F*, 2009 TNT 94-10 (May 18, 2009).

²⁷ See Neal Bill, HR 1672 (Mar. 23, 2007); Kerry Bill, S. 1008 (Mar. 28, 2007).

might warrant legislative action.

Conclusion

In short, at age 12, section 1(h)(11) remains a fruitful area of tax planning for foreign corporations owned by US individual shareholders directly and through pass-through entities. After an uncertain period as a temporary tax provision, it graduated in 2013 into a permanent feature of the Code, and a well-advised taxpayer will find many opportunities to maximize the benefits of the provision. At the same time, the PFIC and subpart F anti-deferral rules present significant roadblocks. If not properly managed, these anti-deferral provisions may negate the taxpayer's efforts to maximize the benefits of § 1(h)(11) or, in some cases, make the taxpayer worse off than if no tax planning were undertaken at all.