

Domestic Partnerships and S Corporations Filing Under Proposed GILTI Regulations

Notice 2019-46

SECTION 1. OVERVIEW

This notice announces that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue regulations that will permit a domestic partnership or S corporation to apply the rules in proposed §1.951A-5 for taxable years ending before June 22, 2019. This notice also addresses the applicability of penalties in the case of a domestic partnership or S corporation that acted consistently with proposed §1.951A-5 on or before June 21, 2019, but files a tax return consistent with the final regulations under §1.951A-1(e). In order to apply the rules in proposed §1.951A-5 or for penalties not to apply as discussed in this notice, a domestic partnership or S corporation must satisfy certain notification and reporting requirements described in section 5 of this notice.

The regulations described in this notice will be effective for taxable years ending before June 22, 2019. Prior to the issuance of the regulations described in this notice, domestic partnerships and S corporations may rely on this notice, provided they satisfy the requirements described herein.

SECTION 2. BACKGROUND

.01 Partnership and Partner Returns

Section 6031(a) of the Internal Revenue Code (Code) requires every partnership to file a return for each taxable year stating specifically the items of its gross income and the deductions allowable by subtitle A of the Code and such other information for the purposes of carrying out the provisions of subtitle A as the Secretary may by forms and regulations prescribe, including information about the partners in the partnership.

Section 1.6031(a)-1(a)(2) requires that the partnership return contain the information required by the prescribed form and the accompanying instructions. For a partnership, the return required by section 6031(a) is Form 1065, *U.S. Return of Partnership Income*, which includes Schedules K-1 (Form 1065). Schedule K-1 (Form 1065) provides the name of the partner and the partner's distributive share of taxable income and other information related to the partner regarding the partnership.

Section 6031(b) requires that a partnership required to file a return under section 6031(a) furnish to each partner a copy of the Schedule K-1 (Form 1065) that includes such information as may be required to be shown by regulations. In general, section 6031(b) also prohibits partnerships from amending the information required to be furnished to its partners after the due date of the return, unless the partnership has made an election under section 6221(b) for the taxable year. A partnership subject to this prohibition under section 6031(b) that has not timely filed a request to extend the time to file its Form 1065 may not be eligible for the relief provided by this notice unless the partnership fulfills the requirements of Rev. Proc. 2019-32, 2019-33 I.R.B. 659,

which allows a Form 1065 to be filed by an extended deadline. A partnership seeking relief under Rev. Proc. 2019-32 must furnish Schedules K-1 consistent with the superseding Form 1065.

Section 6222(a) generally requires a partner in a partnership to treat a partnership-related item, as defined in section 6241(2)(B) and the corresponding regulations, consistently on the partner's return with the treatment of such item by the partnership on its return.

Section 6222(c) provides that the consistency requirement of section 6222(a) does not apply to a partnership-related item if the partner files with the Secretary a statement identifying the inconsistency. The statement required by section 6222(c) is Form 8082, *Notice of Inconsistent Treatment or Administrative Adjustment Request (AAR)*, which may be filed on an original, amended, or superseding return.

Sections 6072(b) and 6031(b) provide that the deadline for filing Form 1065 and furnishing Schedules K-1 (Form 1065) to partners is generally the fifteenth day of the third month after the end of the partnership's taxable year. For a calendar-year partnership, this deadline generally is March 15.

Section 6081(a) permits the Secretary of the Treasury Department to grant a reasonable extension of time, generally no more than six months, for filing any return, statement, or other required document. Generally, to receive an extension of time to file a return, §1.6081-2(b) provides that a partnership must submit an application before the date prescribed for filing Form 1065 (taking into account certain extensions). For a calendar-year partnership that requests a six-month extension, the extended deadline

for its 2018 taxable year is September 16, 2019.

.02 S Corporation and Shareholder Returns

Section 6037(a) requires every S corporation to file a return for each taxable year stating specifically the items of its gross income and the deductions allowable by subtitle A of the Code, the names and addresses of all persons owning stock in the corporation at any time during the taxable year, the number of shares of stock owned by each shareholder at all times during the taxable year, the amount of money and other property distributed by the corporation during the taxable year to each shareholder, the date of each distribution, each shareholder's pro rata share of each item of the corporation for the taxable year, and such other information for the purpose of carrying out the provisions of subchapter S of chapter 1 of the Code, as the Secretary may by forms and regulations prescribe. Section 1.6037-1(a) provides in part that the return shall set forth the items of gross income and the deductions allowable in computing taxable income as required by the return form or in the instructions issued with respect thereto. For an S corporation, the return required by section 6037(a) is Form 1120S, *U.S. Income Tax Return for an S Corporation*, which includes Schedule K-1 (Form 1120S). Schedule K-1 (Form 1120S) provides the name of the shareholder and the shareholder's pro rata share of taxable income and other information related to the shareholder regarding the S corporation.

Section 6037(b) requires that an S corporation required to file a return under section 6037(a) furnish a copy of the Schedule K-1 (Form 1120S) to each shareholder that includes such information as may be required to be shown by regulations.

Section 6037(c)(1) generally requires a shareholder of an S corporation to treat a subchapter S item, as defined in section 6037(c)(4), consistently on the shareholder's return with the treatment of such item by the S corporation on its return.

Section 6037(c)(2) provides that the consistency requirement of section 6037(c)(1) does not apply to a subchapter S item if the shareholder files with the Secretary a statement identifying the inconsistency. The statement required by section 6037(c)(2) is Form 8082, which may be filed on an original, amended, or superseding return.

Sections 6072(b) and 6037(b) provide that the deadline for filing Form 1120S and furnishing Schedules K-1 (Form 1120S) to shareholders of an S corporation is generally the fifteenth day of the third month after the end of the S corporation's taxable year. For a calendar-year S corporation, this deadline generally is March 15. As with partnership returns, this deadline generally may be extended upon request for up to six months under section 6081(a). For a calendar-year S corporation that requests a six-month extension, the extended deadline for its 2018 taxable year is September 16, 2019.

.03 Potentially Applicable Penalties

Section 6698(a) imposes a penalty if any partnership that is required to file a return under section 6031 fails to file a timely return, or files a return that fails to show the information required under that section, unless the failure is due to reasonable cause.

Section 6699(a) imposes a penalty if any S corporation required to file a return under section 6037 fails to file a timely return, or files a return that fails to show the

information required under that section, unless the failure is due to reasonable cause.

Section 6722(a) imposes penalties for failing to include all required information or for including incorrect information on a payee statement (as defined in section 6724(d)(2) and the corresponding regulations), such as a Schedule K-1 (Form 1065) or Schedule K-1 (Form 1120S), unless section 6724(a) applies because the failure is due to reasonable cause and was not due to willful neglect.

.04 Global Intangible Low-Taxed Income (Section 951A)

Section 14201(a) of Pub. L. 115-97 (131 Stat. 2054, 2208), commonly referred to as the Tax Cuts and Jobs Act (TCJA), added section 951A, which applies to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders (as defined in section 951(b)) (U.S. shareholders) in which or with which such taxable years of foreign corporations end.

Section 951A(a) requires a U.S. shareholder of any controlled foreign corporation (as defined in section 957) (CFC) for any taxable year to include in gross income the shareholder's global intangible low-taxed income (GILTI) inclusion for such taxable year. In general, a U.S. shareholder's GILTI inclusion amount is determined by reference to the stock of CFCs that the shareholder owns within the meaning of section 958(a). See section 951A(e)(1), cross-referencing section 951(a)(2).

Section 951(b) defines a U.S. shareholder of a foreign corporation as a United States person (U.S. person) that owns (within the meaning of section 958(a)), or is considered as owning by applying the ownership rules of section 958(b), at least 10 percent of the total combined voting power or value of stock of the foreign corporation.

Section 957(c) generally defines a U.S. person by reference to section 7701(a)(30), which defines a U.S. person as a citizen or resident of the United States, a domestic partnership, a domestic corporation, and certain estates and trusts. Section 1373(a) provides, in part, that for purposes of subpart F of part III of subchapter N of the Code (sections 951 through 965), an S corporation is treated as a partnership, and the shareholders of such corporation are treated as partners of such partnership.

On October 10, 2018, the Treasury Department and the IRS published in the **Federal Register** proposed regulations under section 951A (REG-104390-18, 83 FR 51072) (Proposed Regulations). The Proposed Regulations provided a hybrid approach to the treatment of a domestic partnership that is a U.S. shareholder (U.S. shareholder partnership) of a CFC (partnership CFC). Under the hybrid approach, a U.S. shareholder partnership would determine its GILTI inclusion amount, and the partners of the partnership that were not also U.S. shareholders of the partnership CFC would take into account their distributive share of the partnership's GILTI inclusion amount. See proposed §1.951A-5(b). Partners that were themselves U.S. shareholders of a partnership CFC would not take into account their distributive share of the partnership's GILTI inclusion amount, and instead would be treated as proportionately owning the stock of the partnership CFC within the meaning of section 958(a) as if the domestic partnership were a foreign partnership. See proposed §1.951A-5(c).

On June 21, 2019, the Treasury Department and the IRS published in the **Federal Register** final regulations under section 951A (T.D. 9866, 84 FR 29288) (Final Regulations). The Final Regulations did not adopt the hybrid approach with respect to

domestic partnerships in the Proposed Regulations. Under the Final Regulations, a domestic partnership (including a U.S. shareholder partnership) does not have a GILTI inclusion amount, and therefore no partner of the partnership has a distributive share of a GILTI inclusion amount. See §1.951A-1(e)(1). Rather, for purposes of determining the GILTI inclusion amount of any partner of a domestic partnership, each partner is treated as proportionately owning the stock of a CFC owned by the partnership within the meaning of section 958(a) in the same manner as if the domestic partnership were a foreign partnership. See *id.* Because only a U.S. person that is a U.S. shareholder can have a GILTI inclusion amount, a partner that is not a U.S. shareholder of a partnership CFC does not have a GILTI inclusion amount determined by reference to such partnership CFC. In summary, under the Final Regulations, a partner that is not a U.S. shareholder with respect to a partnership CFC has neither a distributive share of a GILTI inclusion amount nor a GILTI inclusion amount that is determined by reference to such partnership CFC.

The Final Regulations apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of U.S. shareholders in which or with which such taxable years of foreign corporations end. See §1.951A-7. Therefore, domestic partnerships and S corporations that file their income tax returns for the 2018 tax year after June 21, 2019, must, absent the relief provided in this notice, file income tax returns consistent with the Final Regulations and furnish Schedules K-1 to their partners and shareholders that are consistent with these income tax returns.

The Treasury Department and the IRS are aware that many domestic

partnerships and S corporations furnished Schedules K-1 to their partners and shareholders on or before the date of publication of the Final Regulations on June 21, 2019. Consistent with proposed §1.951A-5, these Schedules K-1 (Proposed Regulation Schedules K-1) may have reported a distributive share of the domestic partnership's GILTI inclusion amount or a pro rata share of the S corporation's GILTI inclusion amount. In the absence of relief, to avoid potential penalties under section 6698, 6699, or 6722, these domestic partnerships and S corporations could be required to file returns for the 2018 taxable year consistent with the Final Regulations, and furnish Schedules K-1 consistent with their Form 1065 (Schedule K) or Form 1120S (Schedule K). The issuance of corrected Schedules K-1 consistent with the Final Regulations under these circumstances may result in significant additional costs to these domestic partnerships and S corporations and significant burden to the IRS related to processing amended returns based on corrected Schedules K-1.

After considering the compliance burden of domestic partnerships and S corporations associated with §1.951A-1(e), the Treasury Department and the IRS have decided to provide relief in this notice for certain domestic partnerships and S corporations (described in section 3 of this notice) so that they may apply the rules in the Proposed Regulations for taxable years ending before June 22, 2019. In addition, section 4 of this notice provides that certain penalties that might otherwise apply to domestic partnerships or S corporations that acted consistently with proposed §1.951A-5 prior to June 22, 2019, do not apply.

SECTION 3. APPLICATION OF PROPOSED §1.951A-5

It is anticipated that forthcoming regulations will provide that a domestic partnership or S corporation may apply the rules in proposed §1.951A-5, in their entirety, for taxable years that ended before June 22, 2019. Thus, for example, a domestic partnership that applies proposed §1.951A-5 for a taxable year ending before June 22, 2019, would file a Form 1065, including Form 8992, *U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI)*, for such taxable year on the basis of proposed §1.951A-5 and furnish to its partners for such taxable year Schedules K-1 on the basis of proposed §1.951A-5. The forthcoming regulations are expected to provide that in order to apply the rules in proposed §1.951A-5, a partnership or S corporation must satisfy the notification and reporting requirements described in section 5 of this notice.

Comments noted that proposed §1.951A-5 did not provide taxpayers with guidance in a number of areas. The adoption of an aggregate approach to domestic partnerships under §1.951A-1(e) did not resolve all of these open questions. Therefore, it is anticipated that forthcoming regulations applicable where there is reliance on this notice will provide, regarding future distributions by a partnership CFC of a partnership or S corporation, that the amount excludible from gross income under section 959 reflects only amounts included in income by a partner or shareholder under proposed §1.951A-5.

SECTION 4. INAPPLICABILITY OF PENALTIES

If a domestic partnership or S corporation satisfies the requirements of section 5

of this notice, penalties for failures described in sections 6698(a), 6699(a), 6722(a) or any similar provision will not apply to the domestic partnership or S corporation to the extent such failures arise from acting consistently with proposed §1.951A-5 prior to June 22, 2019 (such as, by issuing one or more Proposed Regulation Schedules K-1 and not reissuing Schedules K-1 based on the Final Regulations) including from filing a Form 1065 or Form 1120S based on the Final Regulations after June 21, 2019, that incorporates Schedules K-1 consistent with the Proposed Regulations that were issued before June 22, 2019.

SECTION 5. REQUIREMENTS FOR APPLICATION OF PROPOSED §1.951A-5 AND INAPPLICABILITY OF PENALTIES

.01 Notification

In order for the rules described in section 3 or section 4 of this notice to apply, a domestic partnership or S corporation must provide notification to each partner of the partnership or shareholder of the S corporation (1) that the Schedule K-1 provided to the partner or shareholder is consistent with proposed §1.951A-5; (2) whether the domestic partnership or S corporation filed a Form 1065 or Form 1120S consistent with proposed §1.951A-5 or the Final Regulations; and (3) that the notification is being provided in accordance with this notice. Such notification must be provided no later than the extended due date of the domestic partnership's or S corporation's tax return (September 16, 2019, in the case of a calendar-year filer), and may be provided through any reasonable method, including via mail, e-mail, or posting on a website through which the domestic partnership or S corporation would ordinarily disseminate tax

information to its partners or shareholders. In the event a domestic partnership or S corporation has filed its tax return and not filed for an extension of time to file its return, the notice described in this section 5.01 must be provided by the date on which the return would have been due had an extension been properly requested.

The domestic partnership or S corporation must also attach the notification described in the previous paragraph and Form 8992 reflecting computations under proposed §1.951A-5 to any tax return with respect to which the rules described in section 3 or 4 of this notice are being applied if the tax return has not been filed as of the date of publication of this notice.

.02 Schedule K-1 Distribution Reporting

If a domestic partnership or S corporation furnished a Schedule K-1 based on proposed §1.951A-5, the domestic partnership or S corporation must separately state on Schedules K-1 for subsequent taxable years the partner's or shareholder's distributive share or pro rata share of a foreign corporation's distributions to the domestic partnership or S corporation of earnings and profits that relate to the GILTI inclusion amount of the partnership or S corporation that was reflected on the first mentioned Schedules K-1. This information must be provided for each taxable year of the domestic partnership or S corporation following the taxable year to which the first Schedule K-1 relates. The information could be used by a partner of a domestic partnership or a shareholder of an S corporation that receives a Schedule K-1 separately stating such distributions to calculate its gross income if such partner or shareholder filed inconsistently with the first Schedule K-1 and did not include in gross

income its distributive share or pro rata share of the GILTI inclusion amount reported on such Schedule K-1.

SECTION 6. EXAMPLES

It is anticipated that the forthcoming regulations described in this notice will provide rules consistent with the following examples. Comments are requested as to the results described in these examples and what general standards or principles should be applied with respect to the application of the Proposed Regulations.

Example 1 – Filing Form 1065 applying proposed §1.951A-5 – (i) Facts. USP, a domestic corporation, and Individual A, a United States citizen unrelated to USP, own 95% and 5%, respectively, of the interests in PRS, a domestic partnership. PRS owns 100% of the single class of stock of FC1, a controlled foreign corporation with no earnings and profits prior to 2018. USP also owns 100% of the single class of stock of FC2, a controlled foreign corporation. USP, Individual A, PRS, FC1, and FC2 use the calendar year as their taxable year. For the 2018 taxable year, FC1 had \$100x of tested income and no other items. For the 2018 taxable year, FC2 had a tested loss of \$45x. Based on proposed §1.951A-5, PRS provided Schedules K-1 for the 2018 taxable year to USP and Individual A on March 15, 2019, that indicated a pro rata share of tested income of \$95x to USP and a distributive share of a GILTI inclusion amount of \$5x to Individual A. These Schedules K-1 were based on a determination of tested income of FC1 and a GILTI inclusion amount of \$100x to PRS under proposed §1.951A-5. Under either proposed §1.951A-5 or the Final Regulations, USP's GILTI inclusion amount for the 2018 taxable year was \$50x (\$95x, USP's pro rata share of FC1's tested income, less \$45x, USP's pro rata share of FC2's tested loss), all of which is with respect to FC1 under section 951A(f)(1) and §1.951A-5(b). Based on the Schedule K-1 that Individual A received from PRS, Individual A included its distributive share of PRS's GILTI inclusion amount, or \$5x, in income for the 2018 taxable year. PRS intends to file Form 1065 for the 2018 taxable year on September 16, 2019, and would like to apply the rules in proposed §1.951A-5 under this notice. In 2019, FC1 earns no income and distributes \$100x out of earnings and profits to PRS.

(ii) Analysis – (A) Notification. In order to rely on proposed §1.951A-5 to file Form 1065 for the 2018 taxable year, as described in Section 5.01 of this notice, PRS must provide notification to USP and Individual A that (1) the Schedules K-1 they received for the 2018 taxable year were consistent with proposed §1.951A-5; (2) PRS is filing its Form 1065 for the 2018 taxable year under proposed §1.951A-5; and (3) the notification is being provided as required under this notice. Additionally, because PRS

is filing after the issuance of this notice, PRS must attach a similar notification statement to its Form 1065 for the 2018 taxable year as described in Section 5.01 of this notice.

(B) Schedule K-1 distribution reporting. For the 2019 taxable year, the year of the distribution of earnings and profits of FC1 that relate to PRS's GILTI inclusion amount, under section 5.02 of this notice, PRS must separately state on the Schedules K-1 furnished to USP and Individual A their distributive shares of such distribution from FC1. Thus, with respect to USP's Schedule K-1, \$95x of the \$100x distribution from FC1 is a separately stated item, and with respect to Individual A's Schedule K-1, \$5x of the \$100x distribution from FC1 is a separately stated item. USP included \$50x in income under section 951A for the 2018 taxable year with respect to FC1; thus, only \$45x (\$95x - \$50x) of the \$95x of separately stated income is included in USP's income (before the application of section 245A) for the 2019 taxable year. Individual A included \$5x in income as a distributive share of PRS's GILTI inclusion amount with respect to FC1; thus, none of the \$5x of separately stated income is included in Individual A's income for the 2019 taxable year.

Example 2 – Filing Form 1065 under Final Regulations with Schedule K-1s issued under proposed §1.951A-5 – (i) Facts. The facts in this Example 2 are the same as in Example 1, except that PRS files Form 1065 on September 16, 2019, under the Final Regulations.

(ii) Analysis – (A) Notification. In order to file Form 1065 for the 2018 taxable year under the Final Regulations but not be subject to potential penalties with respect to the Schedules K-1 for the 2018 taxable year, PRS must provide notification to USP and Individual A as described in section 5.01 of this notice that (1) the Schedules K-1 they received for the 2018 taxable year were consistent with proposed §1.951A-5; (2) PRS is filing its Form 1065 for the 2018 taxable year under the Final Regulations; and (3) the notification is being provided as required under this notice. Additionally, because PRS is filing after the issuance of this notice, PRS must attach a similar notification statement to its Form 1065 for the 2018 taxable year as described in section 5.01 of this notice.

(B) Schedule K-1 distribution reporting. For the 2019 taxable year, the year of the distribution of earnings and profits of FC1 that relate to the 2018 taxable year Schedules K-1 issued by PRS that reflected a GILTI inclusion amount of PRS, PRS must separately state on the Schedules K-1 furnished to USP and Individual A their distributive shares of such distribution from FC1 under section 5.02 of this notice. Thus, with respect to USP's Schedule K-1, \$95x of the \$100x distribution from FC1 is a separately stated item, and with respect to Individual A's Schedule K-1, \$5x of the \$100x distribution from FC1 is a separately stated item. USP included \$50x in income under section 951A for the 2018 taxable year with respect to FC1; thus, only \$45x (\$95x - \$50x) of the \$95x of separately stated income is included in USP's income (before the application of section 245A) for the 2019 taxable year. Individual A included \$5x in

income based on the Schedule K-1 for the 2018 taxable year as a distributive share of PRS's GILTI inclusion amount with respect to FC1; thus, none of the \$5x of separately stated income is included in Individual A's income for the 2019 taxable year.

SECTION 7. COORDINATION WITH REV. PROC. 2019-32

A partnership that is eligible for and elects the relief provided in Rev. Proc. 2019-32 (granting to eligible partnerships an extension of time to file a superseding Form 1065 and furnish a corresponding Schedule K-1 (Form 1065) to each of its partners) is eligible to apply the rules described in this notice. However, under Rev. Proc. 2019-32, a partnership eligible for and electing the relief provided in Rev. Proc. 2019-32 must timely furnish Schedules K-1 that are consistent with the superseding Form 1065; thus, in the case of a partnership electing the relief provided in Rev. Proc. 2019-32, Schedules K-1 consistent with the Final Regulations must be furnished if the partnership files Form 1065 consistent with the Final Regulations.

SECTION 8. APPLICABILITY DATE

Forthcoming regulations will provide that they may be applied to taxable years ending before June 22, 2019. Before the issuance of the forthcoming regulations, a domestic partnership or S corporation may rely on the rules described in this notice.

SECTION 9. PAPERWORK REDUCTION ACT

The collections of information in section 5.01 of this notice are reflected in the submission to the Office of Management and Budget (OMB) for review in accordance with Paperwork Reduction Act (44 U.S.C. 3507(c)) (PRA) that is associated with Form 1065 and Form 1120S (OMB control number 1545-0123) because the notification requirements in section 5.01 are closely related to the Schedules K-1 for such forms.

The collections of information in section 5.02 of this notice will be reflected in submissions to the OMB for review in accordance with the PRA that are associated with Form 1065 and Form 1120S (OMB control number 1545-0123). These submissions will be updated in the ordinary course.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections 5.01 and 5.02. This information is required to allow partners of domestic partnerships and shareholders of S corporations to ensure that they are taxed only once with respect to a GILTI inclusion amount of a domestic partnership or S corporation that applied the rules in proposed §1.951A-5. This information is also required to allow the IRS to verify that partners and shareholders are taxed only once with respect to such a GILTI inclusion amount. The collections of information are required in order for section 4 of this notice to apply. The likely respondents are business or other for-profit institutions.

The burdens associated with the notification requirements in section 5.01 of this notice would be so minor as to not impact the estimated burdens provided in such submission. The burdens associated with the reporting requirements in section 5.02 of this notice are also minor.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by U.S.C.

6103.

SECTION 10. DRAFTING AND CONTACT INFORMATION

The principal author of this notice is Joshua P. Roffenbender of the Office of Associate Chief Counsel (International). For further information regarding this notice contact Joshua P. Roffenbender at (202) 317-6934 (not a toll free call).