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# Understanding the Foreign-Derived Intangible Income Deduction (FDII)

...and further  
information from the  
international tax segment

# Downward Attribution: An Uphill Battle?

By **Joanne Fay**

Non-US businesses may do business in the US through US corporations,

especially “blockers”. The Tax Cuts and Jobs Act in 2017 created a surprising new regime for certain US subsidiaries in foreign-parented groups. Depending

on the group’s structure, certain non-US subsidiaries may now be deemed to have US shareholders, and that creates the risk of unplanned Subpart F, Section 965, and GILTI income inclusions until the US Congress fixes the problem.

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The risk arises from the wholesale repeal of rules that barred “downward attribution” of ownership of stock from a foreign person to a US person (Section 958(b)(4)). Assume a foreign parent corporation owns 100% of both a US subsidiary and a non-US subsidiary. Foreign parents may have shareholders that are US persons. Before repeal, foreign parents’ ownership of the non-US subsidiary would not have been attributed to the US subsidiary. After repeal, the ownership of the non-US subsidiary is attributed to the US subsidiary, making the non-US subsidiary a “controlled foreign corporation”, creating risk of unanticipated income inclusions.

The breadth of the repeal has created significant uncertainty. The

US Treasury has not published any guidance on this aspect of downward attribution (although it has on others). Legislative history, and the “Blue Book” of the Congress’s Joint Committee on Taxation, indicate Congress intended the repeal to apply only to a narrow set of abusive cases. But the

statute does not reflect that intent. Uncertainty prevails until Congress passes a technical corrections bill.

In January 2019, a technical corrections bill was introduced in the House of Representatives, but the bill has languished.

In the meantime, inbound investors should examine their capital structures. Planning ideas may mitigate outcomes. As for audit strategy, the legislative history and the Blue Book are “substantial authority” against certain penalties and tactical support for one’s position, in general.



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