February 9, 2024

Mr. Peter Blessing
Associate Chief Counsel (International)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20220

Re: Notice 2023-80

Dear Mr. Blessing:

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

Attached are ACT's comments on the application of the foreign tax credit rules and dual consolidated loss ("DCL") rules to certain types of taxes described in the global anti-base erosion ("GloBE") Rules, as requested by Section 4.01 of Notice 2023-80. We appreciate your consideration of these comments. ACT representatives welcome future discussion of these comments with your staff.

Yours sincerely,

Alliance for Competitive Taxation

cc: Lily Batchelder, Asst. Secretary for Tax Policy, U.S. Department of the Treasury
William M. Paul, Principal Deputy Chief Counsel, Internal Revenue Service
Scott Levine, Acting Deputy Assistant Secretary (International Tax Affairs), U.S. Department of the Treasury

ALLIANCE FOR COMPETITIVE TAXATION COMMENTS ON NOTICE 2023-80

I. INTRODUCTION

A substantial number of jurisdictions around the world have either enacted or are in the process of enacting new top-up taxes implementing the GloBE Rules (i.e., the income inclusion rule ("IIR"), the qualified domestic minimum top-up tax ("QDMTT"), and the undertaxed profits rule ("UTPR")). Notice 2023-80 (the "Notice") announces Treasury's and the IRS's intent to issue regulations addressing the treatment of these taxes under the U.S. foreign tax credit and dual consolidated loss ("DCL") rules. Below are ACT's comments on this initial guidance.

II. COMMENTS IN RELATION TO FOREIGN TAX CREDIT REGULATIONS

Under section 901, in the case of U.S. citizens and domestic corporations, a foreign tax credit is provided for the amounts of any income, war profits, and excess profits taxes paid or accrued to any foreign country or to any possession of the United States.[1] Accordingly, determining whether a top-up tax is a creditable foreign levy initially requires an analysis as to whether such tax constitutes a foreign income tax within the meaning of section 901. Treas. Reg. § 1.901-2 provides further guidance on the application of this statutory rule. Under Treas. Reg. § 1.901-2, for a foreign levy to qualify as an income tax, such levy must qualify as both a foreign tax and either a net income tax under or a tax in lieu of an income tax. As described further below, although the Notice does not provide any guidance with respect to whether a top-up tax qualifies as a foreign income tax under section 901 and the associated regulations, it treats certain types of top-up taxes as not creditable.

Section 2.03(2) of the Notice provides that each of the IIR, QDMTT, and UTPR top-up taxes imposed by a foreign country is analyzed as a separate levy under Treas. Reg. § 1.901-2(d). Accordingly, each top-up tax implemented pursuant to the GloBE Rules, including the UTPR top-up tax, will require a separate foreign tax creditability analysis under Treas. Reg. § 1.901-2(a) and Treas. Reg. § 1.901-2(d), as modified by the rules proposed in the Notice. However, the guidance provided in the Notice does not extend the application of the foreign tax credit rules to UTPR top-up taxes, other than providing that a UTPR top-up tax is analyzed as a separate levy.[2]

The Notice introduces new rules with respect to the creditability of "final top-up taxes." Pursuant to Section 2.02(2) of the Notice, a "final top-up tax" is defined as follows:

> [A] foreign income tax (tested tax) is a final top-up tax if, in computing the tested tax, the foreign tax law takes into account: (a) the amount of tax imposed on the direct or indirect owners of the entity subject to the tested tax by other countries (including the United States) with respect to the income subject to the tested tax, or (b) in the case of an entity subject to the tested tax

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1 Section 901(b)(1).

2 The Notice states that Treasury and the IRS continue to analyze issues related to the UTPR and intend to issue additional guidance.

> on income attributable to its branch in the foreign country imposing the tested tax, the amount of tax imposed on the entity by its country of residence with respect to such income.

Accordingly, if, in computing the tested tax, the foreign tax law takes into account any taxes that are imposed under controlled foreign company ("CFC") tax regimes, as defined in the GloBE Rules, the tested tax is a final top-up tax. Applying this definition to the top-up taxes described above, an IIR top-up tax will be a final top-up tax, while a QDMTT will not be.[3] The Notice further provides that, if any amount of a taxpayer's U.S. federal income tax liability is taken into account in computing the amount of a final top-up tax, the final top-up tax will not be a creditable tax for U.S. foreign tax credit purposes. Accordingly, in cases where an IIR top-up tax is imposed on the income of a CFC of a US parent, such IIR top-up tax will not be creditable, because any taxes imposed by the United States on the income of the CFC under the subpart F and GILTI regimes[4] would be taken into account for purposes of computing the IIR top-up tax.[5]

It is our understanding, based on both the text of the Notice and public statements made by the Treasury and IRS officials, that the rationale for denying a foreign tax credit for final top-up taxes is to avoid situations in which the determination of the amount of tax to be paid becomes "circular" (i.e., the amount of the tax to be paid to the United States under the subpart F or GILTI regime depends in part on the amount of tax to be paid under an IIR, but the amount of tax paid under the IIR depends in part on the amount of tax paid under the U.S. subpart F or GILTI regime). However, the denial of a foreign tax credit is inconsistent with the clear statutory language. Congress provided in section 901(a) that, in the case of U.S. citizens and domestic corporations who choose to credit foreign taxes, such taxes are credited with the amounts provided in section 901(b) plus, in the case of a corporation, the taxes deemed to have been paid under section 960. Section 901(b)(1), in turn, provides that, subject to the section 904 limitations enacted by Congress, in the case of a U.S. citizen and a domestic corporation, the amount of *any* income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States is creditable.

When Congress has determined that a foreign income tax should not be treated as creditable for U.S. tax purposes, it has amended the statute to make it clear that the foreign tax in question is

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3 Taxes imposed under the UTPR would also appear to meet the definition of a final top-up tax, but, as noted, the Notice does not address the creditability of taxes imposed pursuant to the UTPR.

4 We note that the relevant OECD guidance provides an allocation formula for taxes arising under the GILTI regime (i.e., a Blended CFC Tax Regime) for purposes of the GloBE rules. This allocation formula is applicable for fiscal years that begin on or before December 31, 2025 but not including a fiscal year that ends after June 30, 2027. Therefore, some uncertainty remains with respect to the method of allocation of GILTI taxes for fiscal years that begin after December 31, 2025.

5 Under the GloBE rules, when IIR top-up taxes are imposed with respect to entities that have minority owners who are U.S. persons, such IIR top-up taxes will not take into account the taxes deemed paid by such minority shareholders under U.S. CFC regimes. Accordingly, in those situations, the proportionate share of the IIR top-up tax imposed on those entities remains creditable to those minority shareholders under this new requirement.

not eligible for the foreign tax credit. Section 901(j), for example, explicitly states that no credit is allowed for foreign income taxes paid, or deemed paid under section 960, to certain foreign countries, including countries that are not recognized by the United States, countries with respect to which the United States has severed diplomatic relations or does not conduct diplomatic relations, and countries that are designated as repeatedly providing support for acts of international terrorism. Under section 901(m), foreign tax credits for taxes that are paid or accrued in connection with a covered asset acquisition are disallowed. Section 901(i) provides that foreign income taxes that are treated as providing subsidies are not taxes for purposes of section 901 and therefore not creditable.

Further, although Congress has authorized Treasury to promulgate regulations under several subsections of section 901, none of these grants of authority authorizes Treasury to issue regulations determining the fundamental question of whether a foreign income tax is creditable. In particular, section 901 grants Treasury the authority to prescribe regulations in six distinct areas of the statute's application,[6] none of which can reasonably be interpreted to authorize Treasury to issue regulations that determine whether a particular foreign income tax is creditable under section 901.

The Notice does not provide an explanation of the statutory authority for this proposed rulemaking, nor does it articulate the policy considerations that underlie these regulations. Issuing regulations that almost certainly will be challenged by taxpayers on the basis that these regulations are not authorized by the statute will render an already complex and unstable international tax environment even more uncertain for taxpayers.[7]

While we recognize that the circularity concerns described above raise questions with respect to the appropriate interaction of U.S. tax law with a changing international tax landscape, the introduction of the GloBE Rules by other countries will present many issues that are best addressed by Treasury working with Congress to enact changes to the Internal Revenue Code that represent an appropriate U.S. policy response.[8] For example, the OECD's initiative raises numerous fundamental issues, including U.S. sovereignty, the appropriate role of tax incentives, and the interaction of the GloBE Rules with pre-existing treaty obligations. Attempting to address these issues by issuing isolated Treasury regulations, without full engagement with

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6 *See* sections 901(b)(5); 901(j)(4); 901(k)(4)(C); 901(l)(2)(D); 901(l)(3); and 901(m)(7).

7 We note in this regard that the Notice, despite providing that final top-up taxes are not creditable, also provides that such taxes are not deductible under section 275 (for taxpayers who are otherwise claiming credits for foreign taxes paid) and further provides that taxpayers are nevertheless required to include a gross-up amount under section 78 with respect to such taxes. In effect, the Notice provides that final top-up taxes *can* be treated as income taxes for purposes of section 275 and section 78, while simultaneously providing that such taxes *cannot* be treated as income taxes for purposes of section 901. Without regard to whether this treatment may be sensible as a policy matter, there does not appear to be any meaningful statutory support for such an approach.

8 In addition, we note that Treasury and the IRS have addressed circularity issues in other contexts, s*ee e.g.*, Treas. Reg. § 1.1502-11. We believe that Treasury and the IRS, in consultation with Congress, could address in a more targeted manner the potential circularity concerns presented by the interaction of the GloBE Rules with the foreign tax credit provisions.

Congress, is unlikely to produce a coherent, stable outcome that can be supported by both policymakers and taxpayers.

Accordingly, ACT respectfully recommends that the Notice be withdrawn to the extent it treats a top-up tax that is a foreign income tax as not being eligible for the foreign tax credit.[9] ACT representatives would welcome the opportunity to work with IRS and Treasury officials, as well as with members of Congress and their staffs, to help formulate a holistic policy response to the many important and fundamental issues raised by the changing international tax landscape, including the introduction of the GloBE Rules and other developments in countries around the world.

III. COMMENTS IN RELATION TO DUAL CONSOLIDATED LOSS RULES

In Section 3 of the Notice, Treasury and the IRS announced that they are studying the extent to which the DCL rules (i.e., section 1503(d) and the regulations thereunder) should apply with respect to the GloBE Rules, including the extent to which jurisdictional blending under the GloBE Rules should result in a foreign use of a DCL. The Notice provides important, limited relief with respect to "legacy DCLs" (i.e., DCLs incurred in taxable years before the GloBE Rules become effective),[10] stating that Treasury and the IRS intend to issue regulations providing that a foreign use will not be considered to occur with respect to a legacy DCL solely because all or a portion of the deductions or losses that comprise the legacy DCL are taken into account in determining the Net GloBE Income for a particular jurisdiction. Such relief would be subject to an anti-abuse rule as provided in the Notice.

ACT commends Treasury and the IRS for providing relief via the Notice with respect to legacy DCLs; however, while the Notice provides welcome relief for legacy DCLs, it also introduces considerable uncertainty for many taxpayers. It suggests that, going forward, taxpayers will need to reconsider the potential application of the DCL rules in many common fact patterns as a result of the introduction of the GloBE Rules in other countries, despite the fact that Congress has not made any substantive changes to the relevant statutory provisions in more than thirty years. It is doubtful whether the application of the GloBE Rules implicates the policies underlying the DCL rules; consequently, ACT believes any potential application of the DCL rules in this context should be done in consultation with Congress through revisions to the relevant statutory provisions.

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9 As noted above, the Notice does not address the application of the foreign tax creditability rules to UTPR top-up taxes. We note, however, that to the extent any further administrative rulemaking efforts introduce new requirements to render a UTPR top-up tax that is a foreign income tax not creditable under section 901, in the absence of a Congressional act, issues that are similar to those under the Notice will arise.

10 Under the Notice, legacy DCLs are DCLs incurred in (i) taxable years ending on or before December 31, 2023, and (ii) provided the taxpayer's taxable year begins and ends on the same dates as the fiscal year of the multinational group that could take into account as an expense any portion of a deduction or loss comprising such a DCL, taxable years beginning before January 1, 2024, and ending after December 31, 2023.

The DCL rules prevent the use of an economic loss twice, once against income that is subject to U.S. tax and also against income subject to foreign tax (i.e., referred to as "double-dipping"). The DCL rules generally prohibit the "domestic use" of a DCL unless a taxpayer can demonstrate that there is no possibility of foreign use or the taxpayer makes a domestic use election.[11] Demonstrating no possibility of foreign use is, in practice, very difficult, and, as a result, the domestic use election is often the primary means by which a taxpayer is able to avoid the application of the DCL rules. However, the domestic use election is available only when the taxpayer is able to certify that there has not been, and will not be, a foreign use of the loss.[12]

Against the backdrop of these pre-existing statutory and regulatory DCL rules, the GloBE Rules introduce significant complexity and uncertainty for taxpayers. The GloBE Rules apply jurisdictional blending (i.e., netting the income of entities in a tested jurisdiction) which may result in the use of losses of one entity located in a jurisdiction to offset the income of another entity located in the same jurisdiction. Jurisdictional blending is not optional under the GloBE Rules and taxpayers do not have an elective mechanism to opt out of this quasi-consolidation regime. As a result, in many circumstances in which a taxpayer previously was able to make a domestic use election, the enactment of the GloBE Rules in other countries could restrict a taxpayer's ability to make the election or result in a recapture of a DCL for which such an election was made. For example, if a taxpayer has a foreign affiliate with a DCL that is not part of a foreign consolidated group or otherwise eligible to share its loss with other foreign affiliates under the relevant local tax rules, the taxpayer could generally avail itself of a domestic use election prior to the enactment of the GloBE Rules in the relevant foreign country. Under the jurisdictional blending required by the GloBE Rules, however, the loss incurred by the foreign affiliate could be considered to give rise to an impermissible foreign use of the loss, eliminating the ability to make a domestic use election (or forcing the recapture of a such a loss).

ACT believes that applying the DCL rules in this context will not advance the policy goals that led Congress to enact the DCL rules. As acknowledged by the Notice, it may often be the case that a DCL that is taken into account under the GloBE Rules as part of a jurisdictional blending computation will never produce a tax benefit. This will occur in cases where the DCL offsets the income of another entity for purposes of the Globe Rules, but the effective tax rate in the jurisdiction is at or above the minimum tax rate (without regard to the loss). In addition, the GloBE Rules are computed on a financial accounting base that will often differ significantly from the regular U.S. income tax base, and the Globe Rules make use of concepts (e.g., deferred tax) that will often be very challenging to compare to U.S. tax principles to determine whether a U.S. DCL has been used by a foreign affiliate in a way that potentially implicates the policies underlying the DCL rules.

As the above discussion suggests, the GloBE Rules attempt to achieve a limited, distinct set of policy goals that differ in important respects from the goals of the income taxes enacted by the United States and other countries. While the purpose of national income taxes is to raise revenue for the country that enacted the tax, the purpose of the GloBE Rules is simply to ensure

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[11] Treas. Reg. § 1.1503(d)-6(c), (d).
[12] Treas. Reg. § 1.1503(d)-6(d)(1).

that a minimum amount of tax is paid, over time, on income earned within each jurisdiction that is within the scope of the rules. Consistent with this purpose, although the GloBE Rules require jurisdictional blending, they also permit the cross-border allocation of attributes, including losses and taxes paid, in the computation of the amount of income and tax that is considered to relate to each jurisdiction.[13] In short, while Congress has determined that the DCL rules are an appropriate mechanism to restrict the use of the same loss under the income tax systems of two separate jurisdictions, each of which is attempting to raise revenue from the imposition of its tax, it is questionable at best whether those same rules should be applied to a computation under the GloBE Rules that, in the most common circumstances for most taxpayers, is unlikely to give rise to *any* incremental income tax liability.

Further, in December 2023, the Inclusive Framework published guidance which includes an anti-double-dipping rule (i.e., the duplicate loss arrangement rule) which denies the use of a loss in double-dipping cases for purposes of the GloBE Rules.[14] While the application of this rule is currently limited to determine whether a tested jurisdiction qualifies for the transitional CbCR safe harbor, OECD and Treasury officials have publicly stated that similar rules are being developed for purposes of the GloBE Rules. Because these rules are being developed specifically in the context of computations under the GloBE Rules, they can be tailored to address more precisely the policy considerations that should apply in the context of the GloBE computations. Congress and Treasury should consider the resulting OECD guidance before making any determinations regarding the appropriate U.S. policy response.

In summary, ACT appreciates the relief provided by Treasury and the IRS with respect to the interaction of the DCL rules with the GloBE Rules in the context of legacy DCLs. As noted, however, the issues that are posed by the interaction of the DCL rules with the GloBE Rules require close coordination with Congress to develop more holistic and sustainable solutions. The DCL rules, in their current form, do not require the presence of an actual benefit for their application; apply very broadly; and are very complex and difficult to navigate for taxpayers. ACT believes that applying the DCL rules in the context of the GloBE Rules introduces unnecessary challenges and will very often not implicate the issues that the DCL rules were enacted to address.

In light of the above, ACT respectfully recommends that appropriate and timely guidance be published to provide that the DCL rules apply without regard to the foreign income tax laws that implement the GloBE Rules. ACT believes this result could be achieved by explicitly establishing that the application of the GloBE Rules does not constitute foreign use within the meaning of the DCL rules. We note that the regulations have already foreseen there may be a need to determine that certain events and transactions do not result in foreign use. Under

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[13] *See e.g.*, OECD/Inclusive Framework, Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two), December 2021, Article 3.4.5 and Article 4.3.

[14] OECD/Inclusive Framework, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), December 2023, Section 2.6.3.

Treas. Reg. § 1.1503(d)-3(c)(9), the Commissioner of Internal Revenue is explicitly authorized to:

> provide, by guidance published in the Internal Revenue Bulletin, that certain events or transactions do or do not result in a foreign use. Such guidance may also modify the triggering events and rebuttals described in [Treas. Reg. § 1.1503(d)-6(e)], and the exceptions thereto under [Treas. Reg. § 1.1503(d)-6(f)], as appropriate.

The issuance of guidance under this procedure or, if preferred by Treasury and the IRS, another approach would provide an opportunity for consultation with Congress to develop an appropriately targeted statutory approach. ACT representatives would welcome the opportunity to participate in discussions to develop such an approach.

IV. COMMENTS WITH RESPECT TO NONCOMPULSORY PAYMENT RULES

Although Treasury and the IRS did not specifically request comments in the Notice with respect to the potential interaction between the "noncompulsory payment" rules[15] and taxes imposed pursuant to the GloBE Rules, ACT believes that the GloBE Rules present unique challenges that necessitate a re-examination of the existing regulations. In particular, the current regulations generally provide that the determination of whether a tax is considered a compulsory payment is based on whether the *taxpayer*[16] has taken appropriate steps to reduce, over time, the taxpayer's liability for foreign income tax. Thus, with very limited exceptions, the regulations do not permit an analysis of the total tax burden that is imposed on a group of related taxpayers.[17]

By contrast, the GloBE Rules provide for: (i) the computation of tax on a per jurisdiction basis (i.e., taking into account income, losses, credits, etc. across a group of related taxpayers within a jurisdiction) and (ii) the imposition of certain types of tax (i.e., the IIR or the UTPR) on a taxpayer in a different jurisdiction than the taxpayer that earned the relevant income. As a result, a globally engaged company applying the GloBE Rules will inevitably confront numerous circumstances in which it will not be economically rational to take action to reduce a specific taxpayer's tax liability (because such an action will result in a dollar-for-dollar increase in another related entity's tax liability), but the current regulations may deny a foreign tax credit for a portion of the tax that is paid in these situations.[18]

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15 Treas. Reg. § 1.901-2(e)(5).

16 Taxpayer is defined in the regulations as the person on whom foreign law imposes legal liability for the tax. Treas. Reg. § 1.901-2(f)(1).

17 The 2022 Final Regulations do provide that a taxpayer's decision of whether to join in the filing of a consolidated return or surrender a loss pursuant to a group relief or similar regime will generally not give rise to a noncompulsory amount of tax. Treas. Reg. § 1.901-2(e)(5)(iii)(B)(2).

18 For example, consider a globally engaged company with a subsidiary in a jurisdiction with a generally applicable 12% tax rate. The jurisdiction offers an election that could reduce the tax rate to 7%, provided the subsidiary makes the election. The subsidiary is owned by a holding company in a jurisdiction that has enacted an IIR pursuant to the GloBE Rules. Under these facts, if the subsidiary

ACT recognizes the interaction of the GloBE Rules with the existing regulations presents complex issues. We welcome the opportunity to discuss these potential interactions with Treasury and the IRS to develop a modified approach that protects the interests of the United States while avoiding irrational outcomes for companies.

V. COMMENTS IN RELATION TO EXTENSION OF TEMPORARY RELIEF IN NOTICE 2023-55

In Section 4.04 of the Notice, Treasury and the IRS extended the relief previously provided in Notice 2023-55 with respect to the determination of whether a tax meets the definition of a foreign income tax under sections 901 and 903. Final regulations issued on January 4, 2022 (the "2022 Final Regulations") fundamentally changed the creditability analysis for a significant number of taxes that have historically been considered as being eligible for foreign tax credits under sections 901 and 903.[19] ACT commends Treasury and the IRS for extending the relief from the application of certain portions of the 2022 Final Regulations, including expanding the relief to cover intended changes to the non-duplication requirement under section 903.

As we noted in a prior submission, ACT acknowledges that the introduction of digital services taxes ("DSTs") raises significant policy issues. The 2022 Final Regulations introduced novel and significant restrictions on the creditability of foreign taxes, however, calling into question or denying the creditability of foreign taxes that had existed for decades and had consistently been treated as creditable under the Internal Revenue Code and relevant regulations. Consistent with our prior submissions and the other recommendations included in this letter, ACT believes that fundamental policy changes of this magnitude should only be undertaken by Treasury and the IRS through close consultation with Congress by making the appropriate revisions to the relevant statutory provisions.[20] Any regulation that makes such sweeping changes to a settled area of the tax law without guidance from Congress will destabilize the tax system and very likely be challenged as an administrative action that lacks the necessary statutory authority.[21] Accordingly, ACT recommends that Treasury and the IRS maintain the approach described in the Notice with respect to the creditability of foreign taxes until Congress has addressed the question of whether and how the foreign tax credit should be changed. In addition, as we have previously recommended,[22] ACT respectfully requests that Treasury and the IRS reconsider the

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makes the election, every dollar of tax reduction in the subsidiary will result in an additional dollar of IIR paid by the holding company, and thus, while the overall foreign tax burden for the globally engaged company will remain the same, the tax paid by the holding company will have increased, potentially implicating the noncompulsory payment rules.

19 ACT previously submitted comments on February 24, 2022, laying out some of the issues arising under the 2022 Final Regulations.

20 *See* Notice 2023-55, Section 3.

21 We note that under the temporary relief provided in Notice 2023-55, as extended by the Notice, DSTs, which ACT understands were the main impetus behind the changes to the definition of creditability in the 2022 Final Regulations, do not qualify as foreign income taxes.

22 ACT provided comments on this issue in a letter to Secretary Yellen dated January 23, 2023, discussing the 2022 proposed foreign tax credit regulations.

rules in Treas. Reg. § 1.861-20 for allocating and apportioning foreign income taxes with respect to certain remittances.[23] These changes pose significant compliance issues and create illogical outcomes for certain taxpayers and do not implicate any of the policy concerns raised by the introduction of DSTs.

VI. CONCLUSION

ACT commends Treasury's and the IRS's efforts in Notice 2023-80 to provide guidance and relief to taxpayers in the current unstable international tax environment. ACT respectfully recommends that:

- Notice 2023-80 be withdrawn to the extent it treats a top-up tax that is a foreign income tax as being eligible for foreign tax credit;
- Treasury and the IRS issue guidance providing that the DCL rules apply without regard to the foreign income tax rules that implement top-up taxes under the GloBE Rules;
- Treasury and the IRS re-examine the existing noncompulsory payment regulations to take into account the enactment of the GloBE Rules, and;
- The relief provided in the Notice from the application of the 2022 Final Regulations be extended until such time as Congress has addressed changing the foreign tax credit.

ACT representatives would welcome the opportunity to discuss these matters with you at your convenience.

[23] Treas. Reg. § 1.861-20(d)(3)(v)(C)(1)(ii).