

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9956]

RIN 1545-BP91; RIN 1545-BP70

**Guidance on the Treatment of Qualified Improvement Property Under Sections 250(b) and 951A(d) and Guidance Related to the Foreign Tax Credit****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations under sections 250 and 951A addressing the calculation of qualified business asset investment (“QBAI”) for qualified improvement property (“QIP”) under the alternative depreciation system (“ADS”). This document also contains final regulations with transition rules relating to the impact on loss accounts of net operating loss (NOL) carrybacks allowed by reason of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). The final regulations affect United States shareholders of controlled foreign corporations, domestic corporations eligible for the section 250 deduction, and taxpayers that claim credits or deductions for foreign income taxes.

**DATES:**

*Effective date:* These regulations are effective on September 24, 2021.

*Applicability dates:* For dates of applicability, see §§ 1.250–1(b), 1.904(f)–12(j)(7), and 1.951A–7(a).

**FOR FURTHER INFORMATION CONTACT:**

Concerning §§ 1.250(b)–1(b)(2) and 1.250(b)–2(e)(2), Lorraine Rodriguez at (202) 317–6726; concerning § 1.904(f)–12, Jeffrey L. Parry at (202) 317–4916; concerning § 1.951A–3(e)(2), Jorge M. Oben at (202) 317–6934 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Background****I. Treatment of QIP Under Sections 250 and 951A**

On January 15, 2021, the Department of the Treasury (“Treasury Department”) and the IRS published proposed regulations (REG–111950–20) under sections 250, 951A, 1297, and 1298 in the **Federal Register** (86 FR 4582, as corrected at 86 FR 12886) (the “2021 proposed regulations”). The provisions in the 2021 proposed regulations under sections 250 and

951A, which were added to the Code in the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2234 (2017), addressed the treatment of QIP under the ADS for purposes of calculating QBAI.

The Treasury Department and the IRS received no written comments with respect to the proposed rules under sections 250 and 951A. A public hearing on the 2021 proposed regulations was not held because there were no requests to speak.

This rulemaking finalizes the portion of the 2021 proposed regulations under sections 250 and 951A, but does not finalize the portions of the 2021 proposed regulations under sections 1297 and 1298 (determining whether a foreign corporation is treated as a passive foreign investment company and the treatment of income and assets of a qualifying insurance corporation that is engaged in the active conduct of an insurance business). The Treasury Department and the IRS intend to finalize those portions of the 2021 proposed regulations separately.

**II. Treatment of Net Operating Losses Incurred in Post-2017 Taxable Years That Are Carried Back to Pre-2018 Taxable Years**

On November 12, 2020, the Treasury Department and the IRS published proposed regulations (REG–101657–20) in the **Federal Register** (85 FR 72078) (the “2020 FTC proposed regulations”), which included revisions to the transition rules for post-2017 NOL carrybacks to pre-2018 taxable years.

The Treasury Department and the IRS received no written comments with respect to the proposed revisions to the transition rules that address post-2017 NOL carrybacks to pre-2018 taxable years. A public hearing on the 2020 FTC proposed regulations was held on April 7, 2021.

This rulemaking finalizes the portion of the 2020 FTC proposed regulations that addresses the transition rules for post-2017 NOL carrybacks to pre-2018 taxable years. This rulemaking does not finalize any other portions of the 2020 FTC proposed regulations. The Treasury Department and the IRS intend to finalize those portions of the 2020 FTC proposed regulations separately.

**Summary of Comments and Explanation of Revisions**

The Treasury Department and the IRS received no written comments with respect to the proposed rules under sections 250 and 951A or the transition rules that address post-2017 NOL carrybacks to pre-2018 taxable years. Therefore, those portions of the

proposed regulations are being finalized without substantive change.

**Special Analyses****I. Regulatory Planning and Review—Economic Analysis**

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

**II. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) generally requires that a federal agency obtain the approval of the OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

There are no information collection requirements associated with these final regulations.

**III. Regulatory Flexibility Act**

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

**A. Regulations Regarding the Treatment of QIP Under Sections 250 and 951A**

The economic impact of the regulations regarding the treatment of QIP under sections 250 and 951A is not likely to be significant because these regulations merely clarify that the technical amendment to section 168 enacted in section 2307(a) of the CARES Act applies to determine the adjusted basis of property under section 951A(d)(3) as if it had originally been part of section 13204 of the Act. The clarification resolves an ambiguity and adopts the interpretation that does not require duplicative recordkeeping for the basis in this property. Therefore, this rule should reduce recordkeeping and compliance burdens that might otherwise apply. In addition, the regulations do not impose a collection of information burden on any person, including small entities. Accordingly, it is hereby certified that the regulations regarding the treatment of QIP under sections 250 and 951A will not have a significant economic impact on a substantial number of small entities.

### B. Foreign Tax Credit Transition Rules Addressing Post-2017 NOL Carrybacks to Pre-2018 Taxable Years

The foreign tax credit transition rules addressing post-2017 NOL carrybacks to pre-2018 taxable years provide guidance needed to comply with statutory changes and affect individuals and

corporations claiming foreign tax credits. Adequate data are not available at this time to certify that a substantial number of small entities would be unaffected. However, the Treasury Department and the IRS have determined that the regulations will not have a significant economic impact on domestic small business entities. Based

on information from the Statistics of Income 2017 Corporate File, foreign tax credits as a percentage of three different tax-related measures of annual receipts (see Table for variables) by corporations are substantially less than the 3 to 5 percent threshold for significant economic impact.

Size (by business receipts)	Under \$500,000 (%)	\$500,000 under \$1,000,000 (%)	\$1,000,000 under \$5,000,000 (%)	\$5,000,000 under \$10,000,000 (%)	\$10,000,000 under \$50,000,000 (%)	\$50,000,000 under \$100,000,000 (%)	\$100,000,000 under \$250,000,000 (%)	\$250,000,000 or more (%)
FTC/Total Receipts .....	0.12	0.00	0.00	0.00	0.01	0.01	0.02	0.28
FTC/(Total Receipts-Total Deductions) .....	0.61	0.03	0.09	0.05	0.35	0.71	1.38	9.89
FTC/Business Receipts .....	0.84	0.00	0.00	0.00	0.01	0.01	0.02	0.05

Source: Statistics of Income (2017) Form 1120.

In addition, these final regulations do not impose a collection of information burden on any person, including small entities. Accordingly, it is hereby certified that the foreign tax credit transition rules addressing post-2017 NOL carrybacks to pre-2018 taxable years will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Internal Revenue Code, the notices of proposed rulemaking preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on their impact on small business, and no comments were received.

### IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. These regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

### V. Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These regulations do not have

federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

### Drafting Information

The principal authors of these regulations are Jorge M. Oben, Jeffrey L. Parry, and Larry R. Pounders of the Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

### Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

**Authority:** 26 U.S.C. 7805.

■ **Par. 2.** Section 1.250–1 is amended by revising the first sentence of paragraph (b) and adding a sentence at the end of the paragraph to read as follows:

### § 1.250–1 Introduction.

\* \* \* \* \*

(b) \* \* \* Except as otherwise provided in this paragraph (b), §§ 1.250(a)–1 and 1.250(b)–1 through 1.250(b)–6 apply to taxable years beginning on or after January 1, 2021. \* \* \* The last sentence in § 1.250(b)–2(e)(2) applies to taxable years beginning after December 31, 2017.

■ **Par. 3.** Section 1.250(b)–2 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

### § 1.250 (b)–2 Qualified business asset investment (QBAI).

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \* For purposes of applying section 250(b)(2)(B) and this paragraph (e), the technical amendment to section 168(g) (to provide a recovery period of 20 years for qualified improvement property for purposes of the alternative depreciation system) enacted in section 2307(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020) is treated as enacted on December 22, 2017.

\* \* \* \* \*

### § 1.904–2 [Amended]

■ **Par. 4.** Section 1.904–2(j)(1)(iii)(D) is amended by removing the language “§ 1.904(f)–12(j)(5)” and adding in its place the language “§ 1.904(f)–12(j)(6)”.

■ **Par. 5.** Section 1.904(f)–12 is amended by:

- 1. Removing paragraph (j)(6);
- 2. Redesignating paragraph (j)(5) as paragraph (j)(6); and
- 3. Adding new paragraphs (j)(5) and (j)(7);

The additions read as follows:

### § 1.904(f)–12 Transition rules.

\* \* \* \* \*

(j) \* \* \*

(5) *Treatment of net operating losses incurred in post-2017 taxable years that are carried back to pre-2018 taxable years*—(i) *In general.* Except as provided in paragraph (j)(5)(ii) of this section, a net operating loss incurred in a taxable year beginning after December 31, 2017 (a “post-2017 taxable year”), which is carried back, pursuant to section 172, to a taxable year beginning before January 1, 2018 (a “pre-2018 carryback year”), will be carried back under the rules of § 1.904(g)–3(b). For purposes of applying the rules of § 1.904(g)–3(b), income in a pre-2018 separate category in the taxable year to which the net operating loss is carried back is treated as if it included only income that would be assigned to the post-2017 general category. Therefore, any separate limitation loss created by reason of a passive category component of a net operating loss from a post-2017 taxable year that is carried back to offset general category income in a pre-2018 carryback year will be recaptured in post-2017 taxable years as general category income, and not as a combination of general, foreign branch, and section 951A category income.

(ii) *Foreign source losses in the post-2017 separate categories for foreign branch category income and section 951A category income.* Net operating losses attributable to a foreign source loss in the post-2017 separate categories for foreign branch category income and section 951A category income are treated as first offsetting general category income in a pre-2018 carryback year to the extent available to be offset by the net operating loss carryback. If the sum of foreign source losses in the taxpayer's separate categories for foreign branch category income and section 951A category income in the year the net operating loss is incurred exceeds the amount of general category income that is available to be offset in the carryback year, then the amount of foreign source loss in each of the foreign branch and section 951A categories that is treated as offsetting general category income under this paragraph (j)(5)(ii), is determined on a proportionate basis. General category income in the pre-2018 carryback year is first offset by foreign source loss in the taxpayer's post-2017 separate category for general category income in the year the net operating loss is incurred before any foreign source loss in that year in the separate categories for foreign branch category income and section 951A category income is carried back to reduce general category income. To the extent a foreign source loss in a post-2017 separate category for foreign branch category

income or section 951A category income offsets general category income in a pre-2018 taxable year under the rules of this paragraph (j)(5)(ii), no separate limitation loss account is created.

\* \* \* \* \*

(7) *Applicability date.* Except as otherwise provided in this paragraph (j)(7), this paragraph (j) applies to taxable years ending on or after December 31, 2017. Paragraph (j)(5) of this section applies to carrybacks of net operating losses incurred in taxable years beginning on or after January 1, 2018.

■ **Par. 6.** Section 1.951A–3 is amended by adding a sentence at the end of paragraph (e)(2) to read as follows:

**§ 1.951A–3 Qualified business asset investment.**

\* \* \* \* \*

(e) \* \* \*

(2) \* \* \* For purposes of applying section 951A(d)(3) and this paragraph (e), the technical amendment to section 168(g) (to provide a recovery period of 20 years for qualified improvement property for purposes of the alternative depreciation system) enacted in section 2307(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (2020) is treated as enacted on December 22, 2017.

\* \* \* \* \*

**Douglas W. O'Donnell,**

*Deputy Commissioner for Services and Enforcement.*

Approved: September 10, 2021.

**Mark J. Mazur,**

*Acting Assistant Secretary of the Treasury (Tax Policy).*

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## DEPARTMENT OF LABOR

### Wage and Hour Division

#### 29 CFR Parts 531, 578, 579 and 580

**RIN 1235–AA21**

#### Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal

**AGENCY:** Department of Labor, Wage and Hour Division.

**ACTION:** Final rule.

**SUMMARY:** In December 2020, the Department promulgated a final rule (2020 Tip final rule) to amend its tip regulations to address the Consolidated Appropriations Act of 2018 (CAA) amendments to section 3(m) of the Fair

Labor Standards Act (FLSA), among other things. In this final rule, the Department withdraws two portions of the 2020 Tip final rule that have not yet gone into effect addressing civil money penalties (CMPs) and finalizes proposed changes to those portions of the 2020 Tip final rule. The Department also modifies regulatory provisions adopted by the 2020 Tip final rule addressing managers and supervisors.

**DATES:** As of November 23, 2021 Wage & Hour is withdrawing the revisions to §§ 578.3, 578.4, 579.1, 579.2, 580.2, 580.3, 580.12, and 580.18, published December 30, 2020, at 85 FR 86756, delayed until April 30, 2021, on February 26, 2021, at 86 FR 11632, and delayed until December 31, 2021, on April 29, 2021 at 86 FR 22597.

This final rule is effective November 23, 2021.

#### FOR FURTHER INFORMATION CONTACT:

Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.

#### SUPPLEMENTARY INFORMATION:

##### I. Executive Summary

Section 3(m) of the FLSA allows an employer that satisfies certain requirements to count a limited amount of the tips received by its “tipped employees” as a credit toward the employer's Federal minimum wage obligation (known as a “tip credit”). See 29 U.S.C. 203(m)(2)(A). In 2018, Congress passed the Consolidated Appropriations Act (CAA), Public Law 115–141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148–49 (2018), which amended section 3(m). The CAA added a new statutory provision at section 3(m)(2)(B) which expressly prohibits employers from keeping employees' tips