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Private Equity: Post OBBA-Global Business Acquisition

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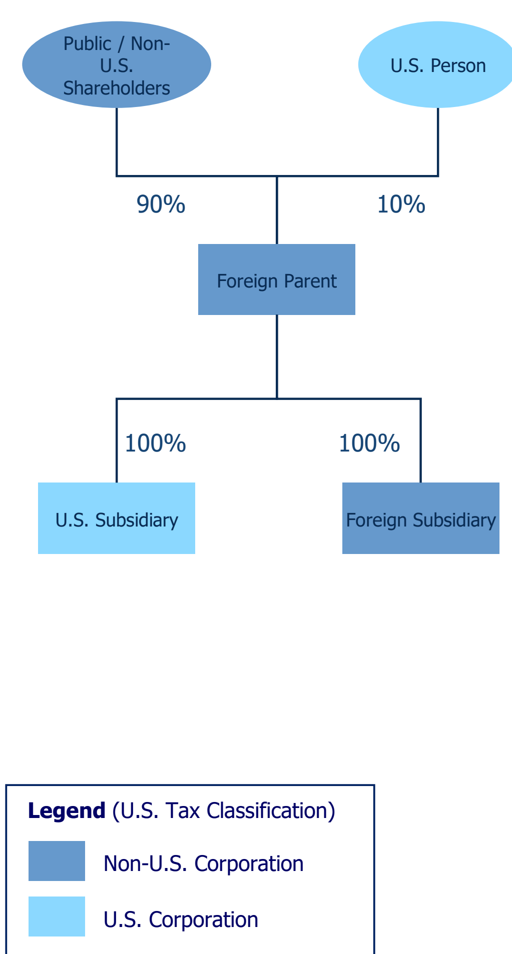
CFC Status and U.S. Shareholders

Background

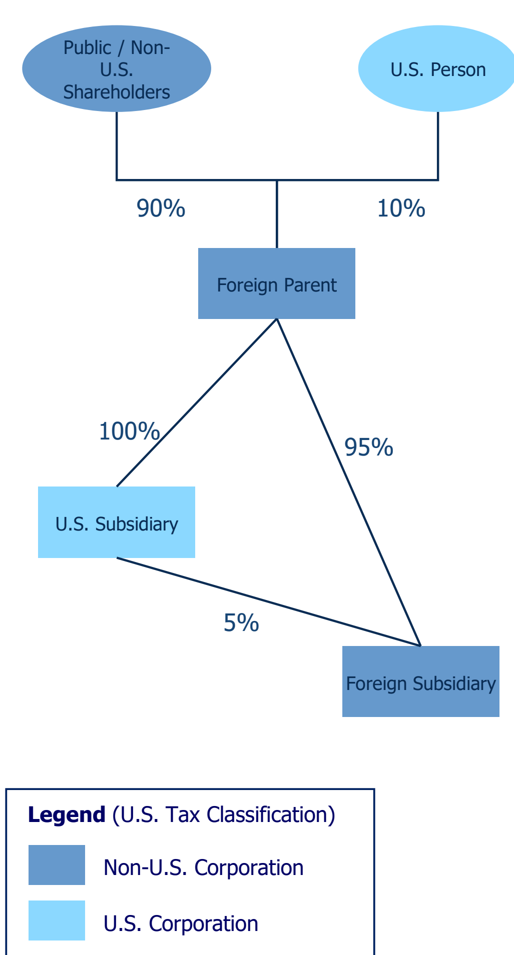
- Pre-OBBBA rules on CFC status
  - In 2017, the TCJA repealed the limitation on “downward attribution” in Section 958(b)(4).
  - The repeal had the effect of significantly expanding the universe of foreign corporations that were defined as “CFCs” under Section 957(a), and “United States Shareholders” of such CFCs under Section 951(b), in comparison to pre-TCJA law.
  - As a result, the existence of a single U.S. subsidiary in a foreign-parented group could cause all foreign subsidiaries of the group to be treated as CFCs.
- OBBBA addressed the above issue via:
  - Restoring Section 958(b)(4) (*i.e.*, reinstating limitation on downward attribution); and
  - Including new Section 951B, introducing additional categories of taxpayers: “Foreign Controlled Foreign Corporation” (“FCFC”) and “Foreign Controlled U.S. Shareholders” (“FCUSS”).
- New FCFC Regime
  - Section 951B creates a narrower substitute regime for downward-attribution cases by applying Subpart F concepts with FCFC and FCUSS standing in for CFC and U.S. shareholder, subject to specific carveouts.
  - A FCUSS generally is a U.S. person that, applying downward attribution, would be treated as owning at least 50% of the foreign corporation; an FCFC is a foreign corporation that is not otherwise a CFC but would fall within the regime because it is majority-owned by a FCUSS under those attribution rules.
  - The practical effect is to shrink the group of U.S. taxpayers subject to Subpart F / GILTI / section 956 inclusions from downward-attribution structures, while leaving other Code provisions that still use the traditional CFC / U.S. shareholder terminology unchanged, including section 245A.

Example 1 – Foreign Parent Group



- Pre-OBBBA (post-TCJA) rules
  - Foreign Subsidiary: Treated as CFC due to repeal of Section 958(b)(4) (downward attribution from Foreign Parent to U.S. Subsidiary).
  - U.S. Subsidiary: Treated as a U.S. shareholder (Section 951(b)) of the Foreign Subsidiary.
    - **No** Subpart F / GILTI / 956 inclusions, because it does not own any Section 958(a) stock of Foreign Subsidiary.
  - U.S. Person: Treated as U.S. shareholder of Foreign Subsidiary.
    - Subpart F / GILTI / 956 inclusions **apply**. No Section 245A available.
- Post-OBBBA rules
  - Foreign Subsidiary: Treated as FCFC (not treated as CFC).
  - U.S. Subsidiary: Treated as FCUSS with respect to the Foreign Subsidiary (Section 951B(b))
    - Subpart F rules technically apply through Section 951B, however, **no inclusions** because Sections 951, 951A and 956 still require Section 958(a) ownership.
  - U.S. Person: Not treated as FCUSS
    - **No** Subpart F / GILTI / 956 inclusions.
- Impact on Private Equity Funds
  - Significant impact to the extent private equity funds have investors that are U.S. shareholders.

Example 2 – Foreign Parent Group
(U.S. Subsidiary owns less than 10% of Foreign Subsidiary)

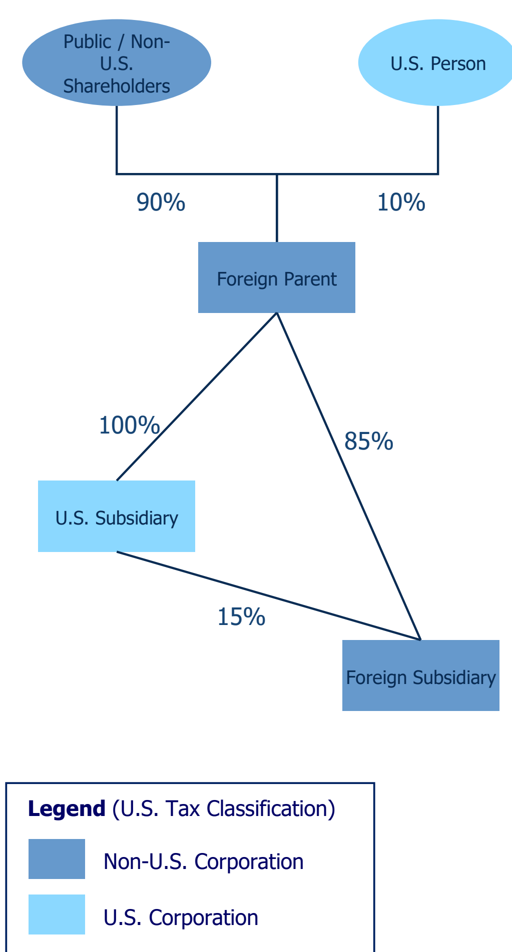


- Pre-OBBBA (post-TCJA) rules
  - Foreign Subsidiary: Treated as CFC due to repeal of Section 958(b)(4) (downward attribution from Foreign Parent to U.S. Subsidiary).
  - U.S. Subsidiary: Treated as a U.S. shareholder (Section 951(b)) of the Foreign Subsidiary.
    - Subpart F / GILTI / 956 inclusions **apply** due to its 5% Section 958(a) interest in the Foreign Subsidiary.
    - Section 245A DRD potentially available (subject to limitations) because the U.S. Subsidiary is a U.S. shareholder (Section 951(b)).
  - U.S. Person: Treated as U.S. shareholder of Foreign Subsidiary.
    - Subpart F / GILTI / 956 inclusions **apply**. No Section 245A available.

- Post-OBBBA rules
  - Foreign Subsidiary: Treated as FCFC (not treated as CFC).
  - U.S. Subsidiary: Treated as FCUSS with respect to the Foreign Subsidiary (Section 951B(b))
    - Subpart F rules **apply** through Section 951B to treat FCUSS similarly to a U.S. shareholder of the FCFC.
    - Subpart F / GILTI / 956 inclusions **apply** with respect to its 5% Section 958(a) ownership interest.
    - Section 245A exemption **might not be** available because Section 245A applies to “United States shareholders,” and the U.S. Subsidiary is not treated as a U.S. shareholder after reinstatement of Section 958(b)(4).
    - Section 956 inclusions therefore taxable.
  - U.S. Person: Not treated as FCUSS
    - **No** Subpart F / GILTI / 956 inclusions.

Example 3 – Foreign Parent Group

(U.S. Subsidiary owns 10% or more of Foreign Subsidiary)



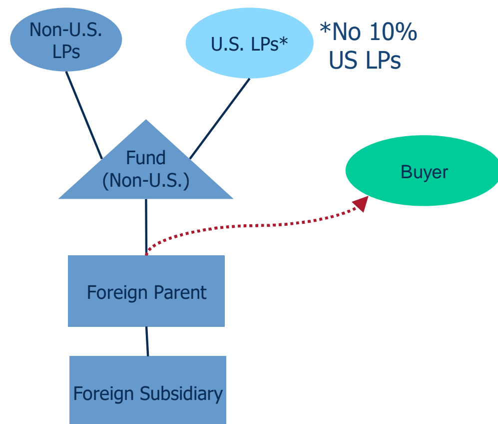
- Pre-OBBBA (post-TCJA) rules
  - Foreign Subsidiary: Treated as CFC due to repeal of Section 958(b)(4) (downward attribution from Foreign Parent to U.S. Subsidiary).
  - U.S. Subsidiary: Treated as a U.S. shareholder (Section 951(b)) of the Foreign Subsidiary.
    - Subpart F / GILTI / 956 inclusions **apply** due to to its 15% Section 958(a) interest in the Foreign Subsidiary.
    - Under Section 245A, U.S. Subsidiary may be eligible for dividend exemption (including from Section 956 inclusions) because it is a domestic corporation that qualifies as a “United States shareholder.”.
  - U.S. Person: Treated as U.S. shareholder of Foreign Subsidiary.
    - Subpart F / GILTI / 956 inclusions **apply**. No Section 245A available.

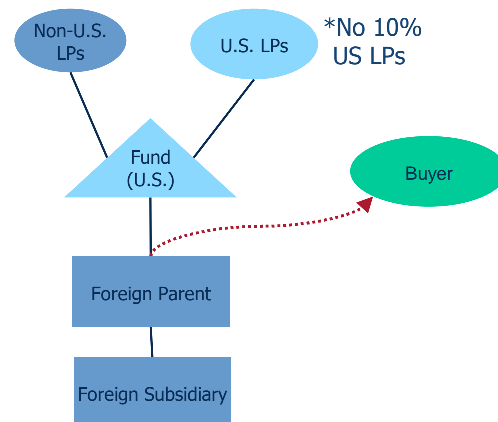
- Post-OBBBA rules
  - Foreign Subsidiary: Treated as FCFC (not treated as CFC).
  - U.S. Subsidiary: Treated as FCUSS with respect to the Foreign Subsidiary (Section 951B(b))
    - Subpart F / GILTI / 956 inclusions **apply** with respect to its 15% Section 958(a) interest in the Foreign Subsidiary.
    - Because U.S. Subsidiary directly owns ≥10% of Foreign Subsidiary, it is also treated as a United States shareholder.
    - As a result, Section 245A **may apply**, allowing exemption for actual dividends and potentially eliminating taxable Section 956 inclusions.
  - U.S. Person: Not treated as FCUSS
    - **No** Subpart F / GILTI / 956 inclusions.

CFCF Regime – Potential Implications

- De-CFC Transactions May Now Occur
  - Reinstatement of Section 958(b)(4) eliminates downward attribution from foreign owners to U.S. entities, meaning certain foreign subsidiaries that were previously treated as CFCs may no longer be classified as CFCs.
  - Internal restructurings or ownership changes may therefore result in "De-CFC" transactions, potentially affecting:
    - Subpart F / GILTI / NCTI inclusions
    - Section 367(b) consequences
    - Availability of Section 245A dividend exemption
- Related-Party Look-Through (Section 954(c)(6))
  - The related-party look-through rule generally requires the payor to be a related CFC.
  - Because the FCFC regime substitutes FCFC / FCUSS terminology in certain contexts, payments between CFCs and FCFCs may fall outside the scope of Section 954(c)(6) look-through.
    - This may affect intercompany financing and cash-pooling structures common in multinational portfolio groups.
- PFIC Implications
  - Where an entity becomes "De-CFCed" but remains an FCFC, the traditional CFC-PFIC overlap rule may no longer apply.
- Fund Level Implications
  - In flow-through private equity structures, foreign portfolio companies may be "De-CFCed" with respect to a U.S. blocker where the blocker holds <50% ownership, potentially eliminating Subpart F / GILTI/NCTI inclusions at the blocker level.
  - Any such structuring requires careful analysis of attribution rules, including ownership through partnerships and overlapping investor bases, as well as implications for carry and co-investment structures.
    - Cross-border structuring must also consider interaction with Pillar Two / global minimum tax regimes and other post-acquisition restructuring considerations.

Fund-Level Considerations – U.S. vs. Non-U.S. Funds

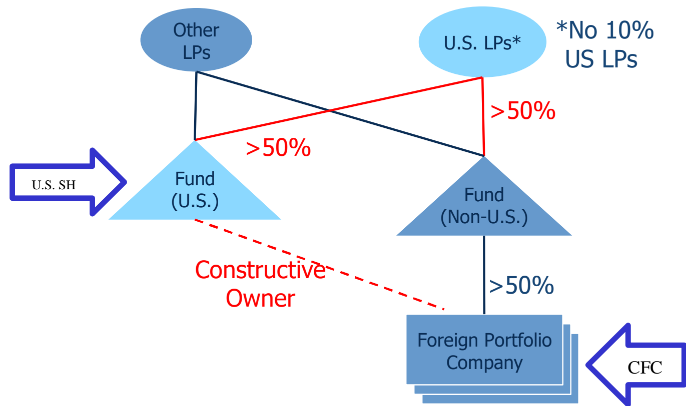




- Impact of Section 958(b)(4) Reinstatement and Section 951B Regime
  - With Section 958(b)(4) reinstated and the new Section 951B FCFC regime, CFC status once again depends more directly on actual U.S. ownership, making the choice of U.S. vs. non-U.S. holding partnership more relevant in private equity structures.
- Subpart F / NCTI (GILTI) vs. Section 1248
  - Subpart F and GILTI/NCTI inclusions generally apply on a look-through basis to U.S. shareholders owning ≥10% of a CFC.
  - Section 1248 does not follow the same look-through framework; gain on the disposition of CFC stock can be recharacterized as dividend income based on historic CFC earnings and profits.
  - As a result, structures that generate no current inclusions for certain U.S. investors may still create Section 1248 dividend treatment on exit.
- Private Equity Structuring Considerations
  - Where foreign portfolio companies are held through a U.S. partnership, U.S. LP ownership may cause the entity to be treated as a CFC, potentially exposing U.S. investors to Subpart F / NCTI inclusions and Section 1248 dividend recharacterization on exit.
    - Holding foreign corporations through non-U.S. partnerships may mitigate these effects where U.S. ownership thresholds are not exceeded.

Legend (U.S. Tax Classification)

CFC Status and Tax Compliance in PE Funds (Form 5471 Filings)



Fund Structure Example:

- Foreign Portfolio Company is a CFC through:
  - Upward attribution to U.S. LPs (Sections 318(a)(2)(A) and 958(b); and
  - Downward attribution to the U.S. Fund (Section 318(a)(3)(A) and Treas. Reg. 1.958-2(d)(1)(i)).
  - These are different attribution rules from Section 958(b)(4) attribution that was reinstated.
- As a result, U.S. Fund is treated as a U.S. shareholder, with constructive ownership of Foreign Portfolio Company.
- This will require the U.S. Fund to file Form 5471 with respect to all CFCs (*i.e.,* Foreign Portfolio Companies in this structure).

- Attribution in Private Equity Fund Structures
  - Constructive ownership rules (Sections 318, 958) may cause foreign portfolio companies to be treated as CFCs through partnership attribution, even where direct U.S. ownership appears limited.
  - The presence of a U.S. partnership in the fund structure can cause the partnership to be treated as a U.S. shareholder, potentially triggering Form 5471 reporting.
- Cross-Attribution Across Fund Vehicles
  - A U.S. partnership may cause attribution across parallel or affiliated fund vehicles, including offshore AIVs, due to overlapping U.S. investor bases.
  - As a result, foreign portfolio companies held through non-U.S. vehicles may still be treated as CFCs, creating additional tax compliance obligations.
- Structuring Considerations
  - Removing U.S. partnerships from the holding structure (*e.g.*, using Cayman partnerships) may reduce the likelihood that attribution rules create CFC status.
  - This approach can help reduce Form 5471 reporting requirements and related tax compliance costs at the fund level.

Legend (U.S. Tax Classification)

Private Equity
Structuring Domestic and Global Acquisitions
Post-OBBBA

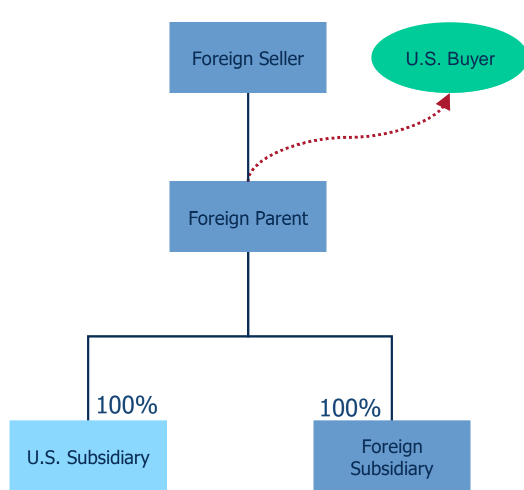
OBBBA – Key Changes Affecting Private Equity Tax Modeling

- Changes to Core Business Tax Deductions
  - Several provisions in the OBBBA directly affect tax shields and timing of cash taxes in leveraged acquisitions:
    - **Bonus depreciation**: 100% expensing made permanent for qualified property acquired beginning January 20, 2025.
    - **Interest deductibility:** Section 163(j) calculation permanently returns to an EBITDA-based limitation, allowing greater interest deductions in leveraged structures.
    - **U.S. R&D:** Immediate expensing reinstated for domestic research costs; foreign R&D remains amortized over 15 years.
    - **Section 199A deduction**: Qualified business income deduction made permanent for pass-through investors.
  - These provisions increase early-period deductions, materially changing tax modeling assumptions used in acquisition underwriting.
- Changes to International Tax Provisions
  - OBBBA also modified several international rules relevant to global portfolio companies:
    - **GILTI renamed "NCTI"** with an effective tax rate of approximately 12.6%.
    - **FDII renamed "FDDEI"** with effective tax rate of approximately 14% (or potentially lower depending on expense allocation).
      - Since interest and R&D expense are not allocated to FDDEI, expenses incurred to generate FDDEI are deducted at 21%, meaning that the effective FDDEI tax rate can be lower than 14%.
    - **Expense allocation rules changed**, limiting allocation of interest and R&D to foreign-source income categories.
    - **Subpart F / NCTI inclusion rules modified**, requiring income inclusion for U.S. shareholders that own CFC shares at any time during the year.
  - These changes affect both cross-border cash tax modeling and structuring decisions.
    - For example: projected IRR, leverage capacity, exit valuations.

OBBBA – Implications for PE Deal Modeling and Structuring

- Impact on LBO Tax Modeling
  - Tax models used in private equity acquisitions must now reflect several structural changes:
    - **Higher interest deductibility** under EBITDA-based Section 163(j) increases allowable leverage and reduces early-year taxable income.
    - **Permanent bonus depreciation** significantly increases acquisition-year tax deductions for qualifying assets.
    - **Immediate expensing of U.S. R&D** accelerates tax benefits for portfolio companies with significant development activities.
  - These factors generally reduce near-term cash taxes, improving free cash flow available for debt service and equity returns (DPI).
- Implications for Cross-Border Structuring
  - The international provisions also affect whether portfolio companies should be held under U.S. or non-U.S. holding structures. Such considerations include:
    - **NCTI / FDDEI effective tax rates**, which influence whether income should be located inside or outside the United States.
    - **Expense allocation changes**, which can affect the ability to shield foreign income with U.S. interest expense.
    - **Subpart F / NCTI inclusion rules**, which now allocate income based on ownership during the year rather than solely at year-end.
- Practical Structuring Considerations for PE Sponsors
  - When evaluating global acquisitions post-OBBBA, sponsors typically reassess:
    - Whether to centralize debt in U.S. holding entities to maximize interest deductions;
    - Whether foreign operations should remain outside the U.S. tax base to manage NCTI exposure; and
    - How to structure intercompany financing and IP ownership to optimize both tax efficiency and exit flexibility.

Example 1 – Sale of Foreign Parent to U.S. Person / PE Fund

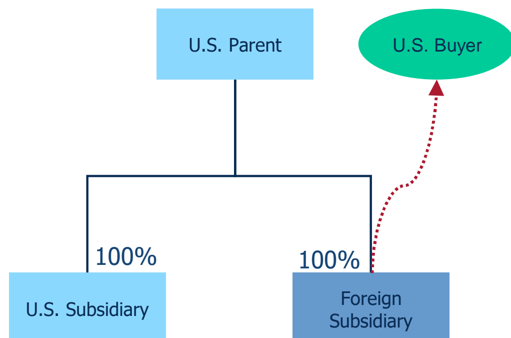


Example:

- U.S. Buyer (or U.S. PE Fund) purchases 100% equity of Foreign Parent from Foreign Seller.

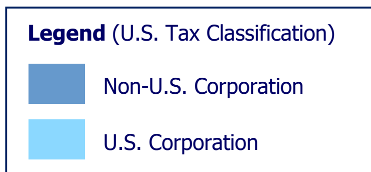
- Pre-OBBBA
  - U.S. Buyer: Treated as a U.S. shareholder of both Foreign Parent and Foreign Subsidiary for the tax year of acquisition.
  - Foreign Parent: Treated as CFC only after the purchase.
  - Foreign Subsidiary: Treated as CFC for entire year.
  - Income Inclusions:
    - Subpart F and GILTI income from both Foreign Parent and Foreign Subsidiary are allocated to U.S. Buyer, *however,*
    - Foreign Parent's income is generally proportionately reduced for the portion of the year in which Foreign Parent was not a CFC.
      - Section 245A-5 election available to end CFC tax year.
- Post-OBBBA
  - U.S. Buyer: Treated as U.S. shareholder for both non-U.S. entities for tax year of purchase.
  - Income Inclusions:
    - U.S. Buyer includes pro-rata share of Subpart F and NCTI (GILTI) for portion of year in which it owns the entities.
      - Availability of Section 245A-5 election is unclear? Treasury granted authority to issue regulations to address mid-year closing of CFC year on dispositions
- Other considerations: (i) 338 elections, (ii) Impact on extraction of U.S. Subsidiary

Example 2 – Sale of Foreign Subsidiary / CFC



Example:

- U.S. Buyer (or U.S. PE Fund) purchases 100% equity of Foreign Subsidiary from U.S. Parent.



- Pre-OBBBA
  - U.S. Buyer: Treated as U.S. shareholder of Foreign Subsidiary for tax year of closing.
  - U.S. Parent/Seller:
    - May rely on a §245A-5 election to mitigate potential §1248 dividend recharacterization.
    - Seller generally recognizes mid-year Subpart F and GILTI inclusions through the date of disposition.
  - Foreign Subsidiary: Treated as CFC for entire year.
  - Income Inclusions:
    - U.S. Buyer includes post-acquisition Subpart F and GILTI with respect to the Foreign Subsidiary*.*
- Post-OBBBA
  - U.S. Buyer: Treated as U.S. shareholder of Foreign Subsidiary for tax year of closing.
  - U.S. Parent/Seller: Not clear if can make election similar to Section 245A-5.
  - Income Inclusions:
    - Under OBBBA, Subpart F and NCTI (GILTI) income are allocated b/w U.S. Parent and U.S. Buyer based on actual ownership periods of Foreign Subsidiary

Global Acquisitions – Trapped Cash

- Trapped Cash in Cross-Border Private Equity Transactions
  - Private equity sponsors frequently acquire businesses where cash balances exist in foreign operating subsidiaries but cannot be repatriated efficiently. Common drivers include:
    - Dividend withholding taxes in operating jurisdictions.
    - Intermediate holding companies without treaty access.
    - Local capital maintenance rules or distribution limitations.
  - In practice, these balances are often maintained through intercompany loans rather than distributions, allowing groups to move liquidity without triggering taxable repatriation.

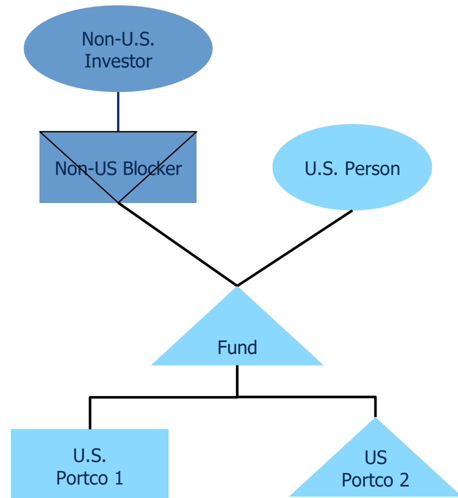
- Upstream Loan Architecture
  - Multinational portfolio companies frequently implement upstream loan structures whereby operating subsidiaries lend excess cash to group treasury entities. Typical characteristics:
    - Loans documented on arm's-length terms with interest and repayment schedules.
    - Funds used for working capital, acquisition financing, or group debt service.
    - Loans may be rolled or refinanced periodically, rather than repaid.
  - In many cases, these arrangements function as ordinary-course treasury management, similar to cash pooling structures used by public multinationals. Repaying loans prior to closing may trigger withholding tax leakage, reducing transaction value.

- Deal Structure Considerations
  - Whether existing intercompany loans create immediate tax leakage if repaid;
  - Whether treaty-eligible holding companies could reduce withholding tax if loans are unwound post-closing; or
  - Whether intercompany balances should remain in place as part of the post-closing treasury structure.

Cash Repatriation Planning – Treaty, Substance, GAAR/SAAR

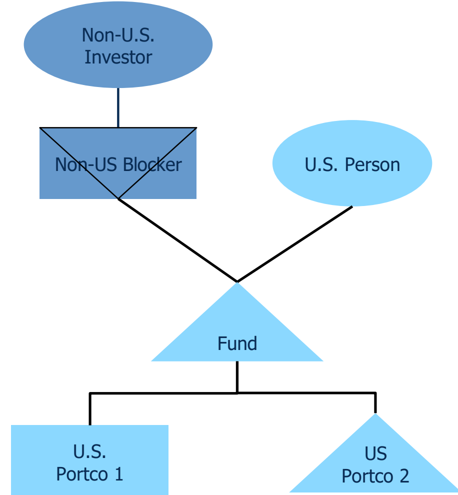
- Treaty Access and Holding Company Structures
  - Cross-border private equity structures often rely on treaty-eligible holding companies to reduce withholding taxes on:
    - Dividend
    - Interest
    - Royalties and other fee payments
    - Intermediate holding companies without treaty access
    - Local capital maintenance rules or distribution limitation
  - Common jurisdictions include Netherlands, UK, Luxembourg, and Ireland, depending on treaty networks. However, accessing treaty benefits increasingly requires demonstrable economic substance, including:
    - Local management and decision-making
    - Employees or operational functions
    - Sufficient capitalization and risk assumption
- Increasing Anti-Avoidance Scrutiny
  - Recent developments have increased scrutiny of cross-border financing and holding structures:
    - GAAR / SAAR regimes in ,multiple jurisdictions targeting perceived tax-motivated structures
    - Evolving standards around beneficial ownership and treaty entitlement
  - These developments can affect global holding structures, intercompany loan structures and cash repatriation planning.
- Considerations for Private Equity Funds:
  - Holding company location and substance requirements must be considered at the time of acquisition.
  - Intercompany financing structures should be designed to withstand future anti-avoidance scrutiny.
  - PE funds must balance tax efficiency with exit flexibility.

Foreign Reverse Hybrid and Treaty Benefits



- Blocker for ECI-Generating Investments
  - Non-US investors typically do not want to file US tax returns or directly pay US taxes.
  - Foreign reverse hybrid entity is a non-US entity that is flow-through under local law and elects classification as a corporation for US tax purposes.
- Tax Treatment of FDAP Income
  - If non-US investor is in a treaty jurisdiction and such jurisdiction views Non-US Blocker and Fund as fiscally transparent, then treaty benefits available on FDAP income (e.g., dividend from US Portco 1). 1.894-1(d).
    - Preamble to regulations expressly reserved on the application of treaty benefits to business profits earned by fiscally transparent entities.
  - Consider characterization of LLC by non-US jurisdiction.
- Tax Treatment of ECI, GLAM 2025-002
  - ECI subject to corporate tax at 21% under Section 882 and 30% BPT under Section 884.
  - BPT reduced by treaty?
    - Often Non-US Blocker not formed in a treaty jurisdiction.
    - Even if formed in a treaty jurisdiction, generally not a resident for treaty purposes because not "liable to tax" in local jurisdiction.

Foreign Reverse Hybrid and Treaty Benefits



- GLAM 2025-002
  - Treaty benefits (i.e., reduced BPT rate) are available for the portion of the dividend equivalent amount (DEA) allocable to non-US investors who are residents of a treaty country and who satisfy the LOB provision.
  - The LOB provision is applied at the owner level for reverse foreign hybrids.
  - The fiscally transparent entity provision in the treaty allows income to be treated as derived by the owner to the extent it is so treated under the owner's country's tax law.
  - Non-US Blocker remains the taxpayer for U.S. tax purposes and must pay BPT at the reduced treaty rate for treaty-qualified owners and at the statutory 30% rate for non-qualified owners.
  - Based on 2016 model treaty, but same result under 1981, 1996, and 2006 model treaties.

Inversions and Anti-Inversion Rules (section 7874)

Typical Pre-Inversion Structure

USCO Shareholders

New Holding Company (non-US)

FORCO Shareholders

USCO (US)

FORCO (non-US)

US Subsidiaries

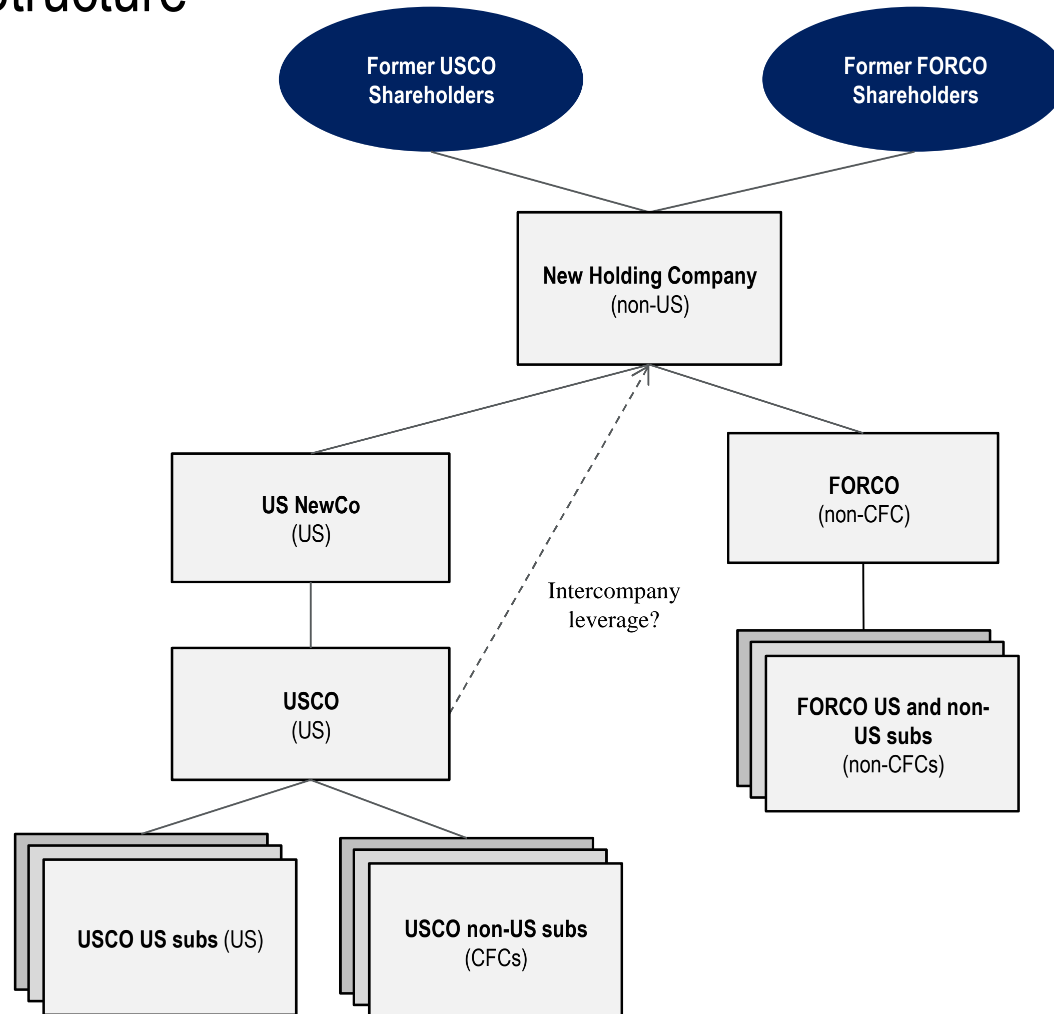
Foreign Subsidiaries (CFCs)

US Subsidiaries

Foreign Subsidiaries (non-CFCs)

Inversions and Anti-Inversion Rules (section 7874)

Typical Post-Inversion Structure



Inversions and Anti-Inversion Rules (section 7874)

Current Tax Consequences of Inversion Transactions

- Current US tax law discourages inversions by imposing tax consequences on the corporations involved, their shareholders, and their officers and directors.
- The particular consequences to the new holding company depend on the post-closing percentage interest held by USCO shareholders (*whether US or foreign*) in the new foreign holding company as a result of the transaction ("by reason of" shares):
  - **80% or more: Deemed US Corporation**
    - The new foreign holding company is treated as a US taxpaying corporation for US tax purposes (as well as, potentially, being a tax resident in the jurisdiction of organization).
  - **Between 60% and 80%: Limitation on tax benefits**
    - The holding company is respected as a foreign corporation, but other costs apply.
Limitations on the US corporation's ability to use its tax attributes for 10 years after the inversion
  - **Less than 60%: No consequences under section 7874. (Other rules, such as section 367, may apply for outbound transactions)**
  - **"Substantial Business Activities" Exception**
    - The consequences above do not apply if the new group conducts "substantial business activities" in the new jurisdiction. This exception is very narrow (looking to tangible property, payroll, revenues etc.), and generally only will apply to a substantial operating company in the relevant jurisdiction.
- The ownership percentages above are computed using various presumptions and rules that may seem (and be) arbitrary and surprising in practice; the ratio for this purpose may not seem consistent with common sense.

Inversions and Anti-Inversion Rules (section 7874)

Some Surprising Presumptions and Other Nuances

- Anti-stuffing Rules – Disregard increases in foreign company attributable to cash or securities within prior three years.
  - As a result, a newly formed foreign company, or one which has received equity investment for the transaction, may be subject to this rule and shares attributable to the foreign company may be substantially (or entirely) disregarded.
  - Even where a foreign corporation is acquiring a US corporation for cash, a small rollover (more than 5% de minimis) by US shareholders may mean that the rollover shares are the only ones counted, creating an inversion.
- Third country exception – may disregard stock attributable to the foreign acquired corporation, where an acquisition of a foreign company and the domestic company are made through a third-country acquiror. (E.g., Caymans holding company).
- Anti-NOCD Rules – Deem additional stock to be issued attributable to the US company, to adjust for "extraordinary" distributions made within 3 prior years.
- Acquisitions of multiple U.S. corporations pursuant to a plan (i.e., prior 3 years) are aggregated, subject to certain exceptions.
- "Internal group restructurings" may be excluded (e.g., foreign parent contributes U.S. corporation to a new foreign holding company). But rules have surprising exceptions and may not apply where new investments have been made.
- Anti-inversion rules may apply to the direct or indirect acquisition of "substantially all the properties held" by a domestic corporation (*i.e.*, asset or stock acquisitions) or "substantially all the properties constituting a trade or business of a domestic partnership."
  - Although the partnership rule does not appear to make substantial sense, it is clear in the statute. (Notwithstanding that the partnership is not itself taxed on income, whether or not it is domestic, and that the trade or business need not give rise to ECI.)

Inversions and Anti-Inversion Rules (section 7874)

When Might PE Investors Care?

- Diligence in acquisitions and justifying positions on exit –
  - The rules are complicated and surprising, and less well-advised companies (including foreign companies that don't consider US tax material to their operations) may have inadvertently been inverted. It is better to discover this before a portfolio company has been acquired than afterwards. The diligence process may be very detailed (i.e., looking at domestic entity acquisitions, capital contributions, NOCDs and other stock issuances, for a three year look-back period).
  - Even well-advised companies may have taken positions (e.g., the relative value of US and non-US businesses) that are potentially subject to challenge.
- Internal or external structuring
  - May be of particular relevance for portfolio companies reorganizing into another country, or acquisitions by foreign companies of US target companies (particularly with some degree of roll-over).
- Relates to the fundamental question of structuring US vs. non-US holding companies, or funds
  - Under current law (reasonably low marginal tax rates, FDII, GILTI, side-by-side agreement on Pillar II) the United States appears to be a good jurisdiction for holding a global corporate structure. But tax laws or other laws may change, and anti-inversion rules make it difficult (perhaps impossible) to ever leave the US for tax purposes.
  - Anti-inversion rules can apply as well to domestic partnerships. Although generally PE and other funds take the position that they are not engaged in a trade or business, this position may be subject to risk (cf, YA Global). The acquisition of a trade or business, including a non-US trade or business, by a foreign corporation from a domestic partnership may lead to anti-inversion risk.

Renewable Energy Credits Post-OBBBA

Renewable Energy Credits Under OBBBA – “FEOC” Rules

Relevance of SFE/FIE Rules to PE and other funds

- Any portfolio company that might generate renewable energy credits for itself, or to sell for cash
  - Particularly relevant to infrastructure investments e.g., solar, wind, batteries and other energy storage, energy generators (including AI and similar companies)
- Any portfolio company in the supply chain for renewable energy credit producers that may need to certify as to status
- Any portfolio company that may purchase credits (FIE status might affect ability to utilize credits), or needs to diligence other companies producing or selling credits
- Certifying non-SFE status as a lender (should apply only to originations not secondary purchases of loans)
- “De-FEOC” transactions – opportunities to acquire equity by non-SFE, to enable SFEs (generally, Chinese controlled companies) to qualify for credits or to be suppliers to US companies that are concerned about credits

Renewable Energy Credits Under OBBBA – "FEOC" Rules

Chinese National (SFE) — 24%

Chinese Company (SFE) — 24%

Australian Company — 20%

Non-SFE *unless*:
Controlled by another SFE,
or principal place of business
in China

NASDAQ Public Float — 32%

Holding Company (Cayman)

SFE if controlled
(>50%) by SFEs
FIE otherwise

IP Company (China)

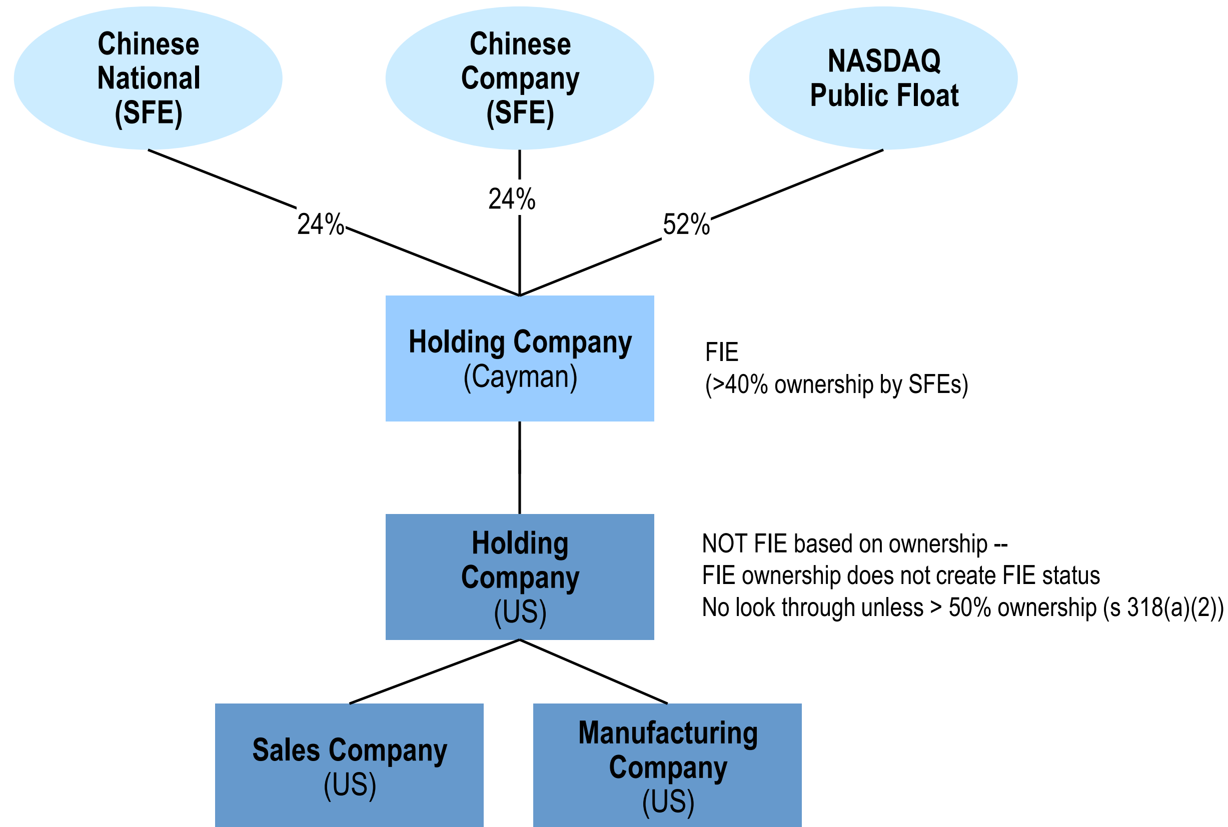
Holding Company (US)

SFEs because controlled
(>50%) by SFE

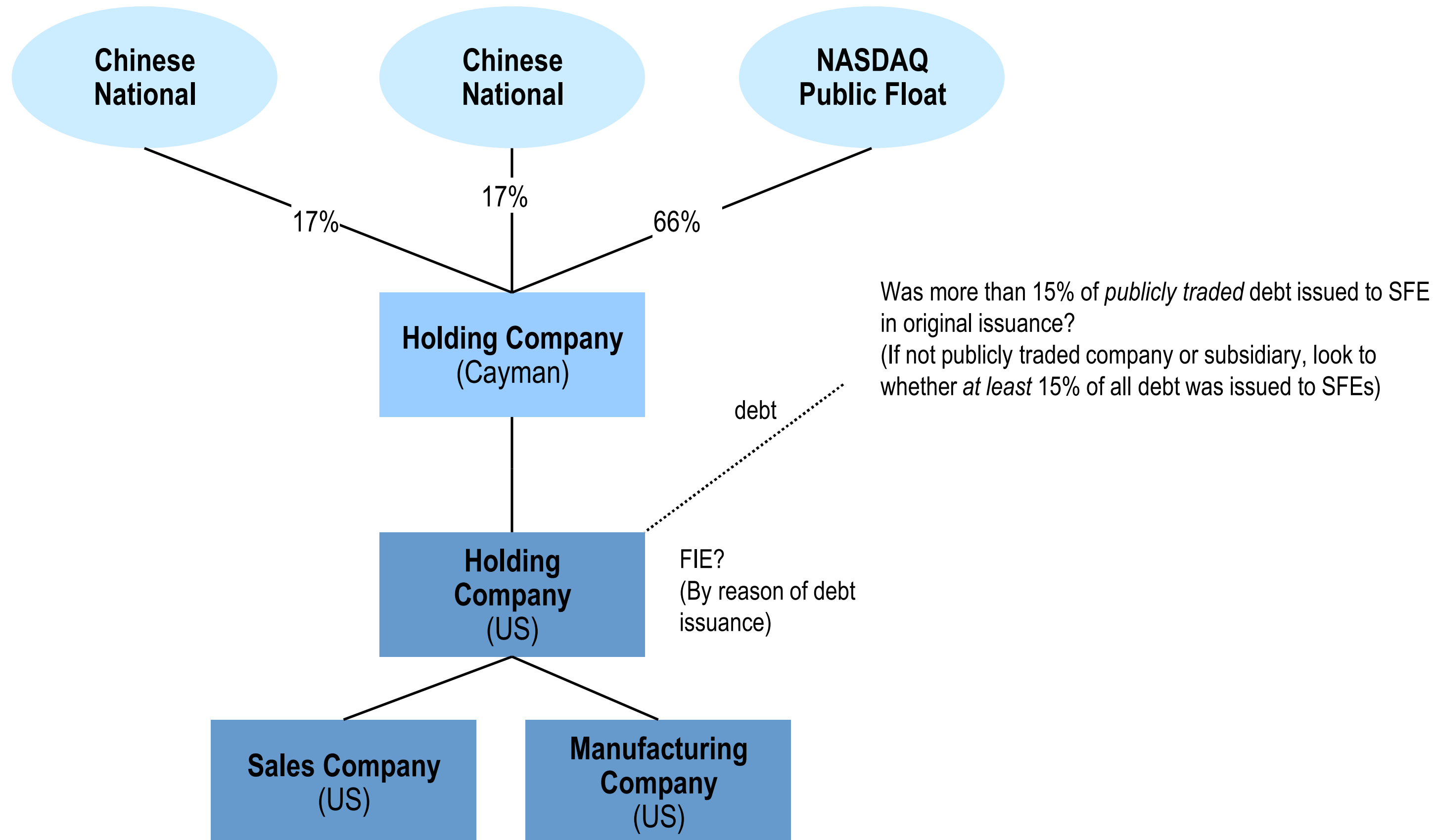
Sales Company (US)

Manufacturing Company (US)

Renewable Energy Credits Under OBBBA – “FEOC” Rules

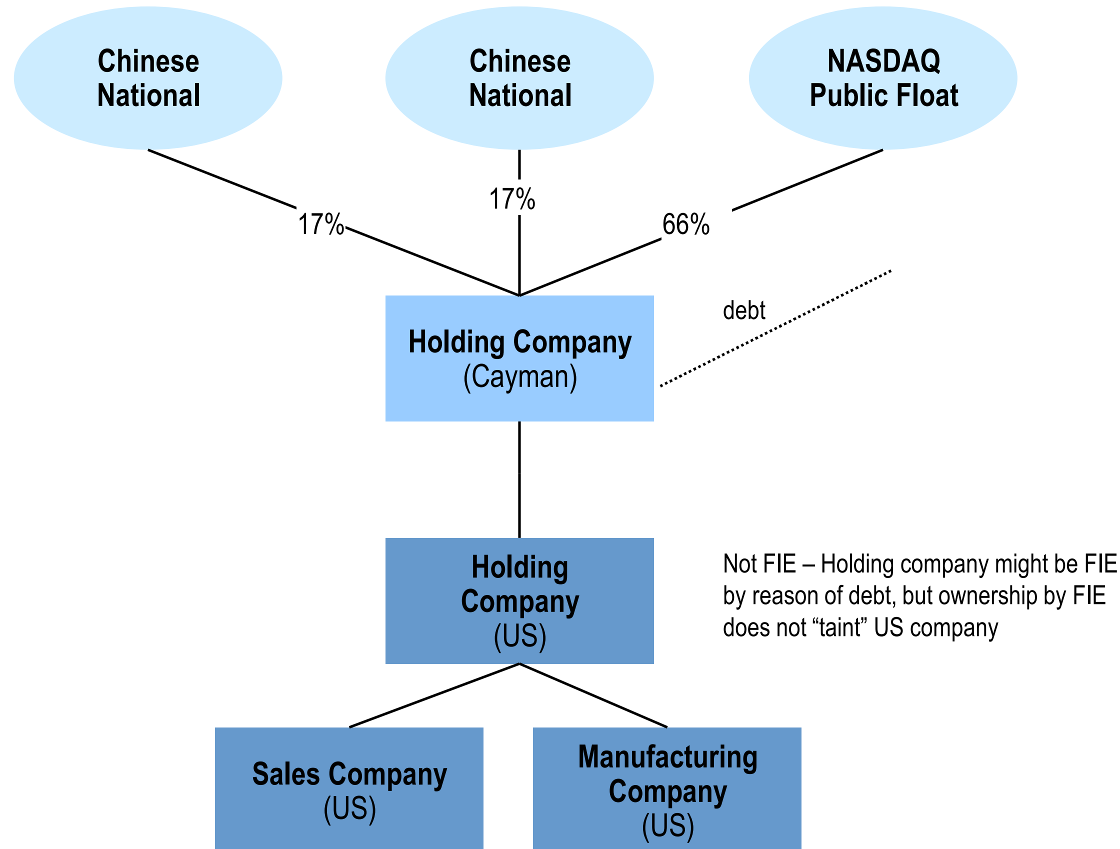


Renewable Energy Credits Under OBBBA – "FEOC" Rules



Was more than 15% of *publicly traded* debt issued to SFE in original issuance?
(If not publicly traded company or subsidiary, look to whether *at least* 15% of all debt was issued to SFEs)

Renewable Energy Credits Under OBBBA – “FEOC” Rules



Not FIE – Holding company might be FIE by reason of debt, but ownership by FIE does not “taint” US company

Renewable Energy Credits Under OBBBA – “FEOC” Rules

Supply Chain –
“material assistance cost ratio” (MACR)

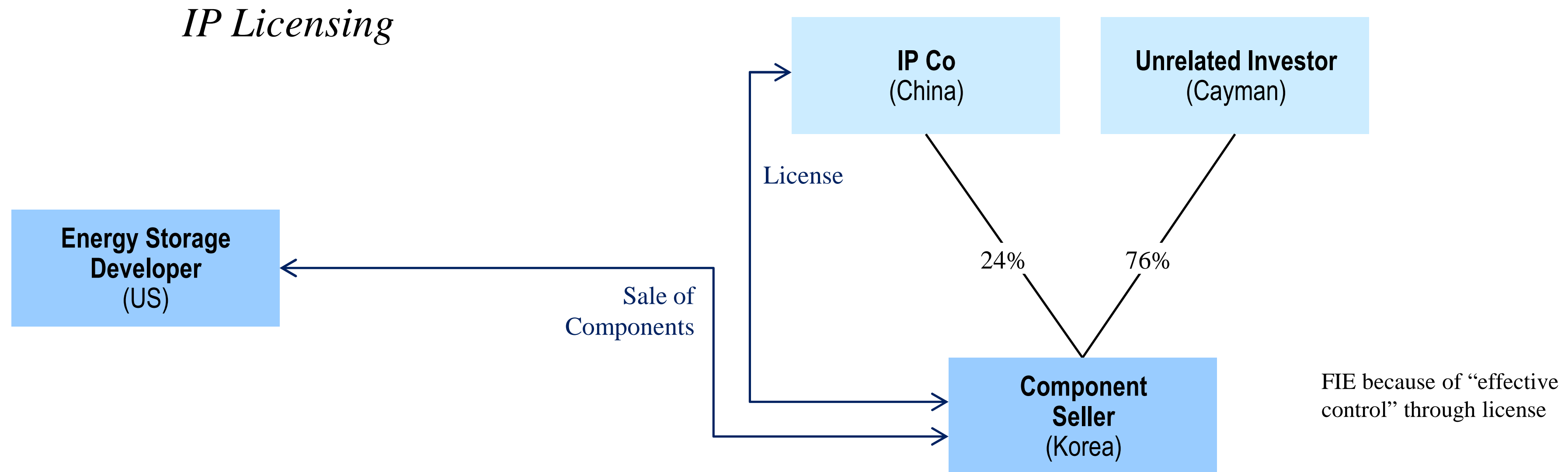
Solar Panel Manufacturer (US) ← Sale of Subcomponents — **Tier 1 Supplier** (US) ← Sale of Subcomponents — **Tier 2 Supplier** (China)

Tier 1 Supplier (US) ← Sale of Subcomponents — **Tier 2 Supplier** (Korea)

Tier 2 Supplier (China): SFE

Tier 2 Supplier (Korea):
SFE?
FIE?
What percentage of its components came from SFE/FIE?

Renewable Energy Credits Under OBBBA – “FEOC” Rules



Opportunity Zone Funds Post-OBBA

Qualified Opportunity Zone Funds under OBBA – One Page Summary

Taxpayer

Taxpayer

Taxpayer

- Roll over of *capital gain* from unrelated purchaser within 180 days (recognized after 12/31/26)
- No offsetting positions
- *May* be acquired in secondary transaction

Partnership makes QOF rollover election within 180 days of realization

Partner makes QOF rollover election. 180 day period measured by partner's allocated gain (generally end of year, or tax return filing date) or partnership's recognized gain

- Could be a C corporation, S corporation or a partnership

QOF

- Basis adjustment year 5 intended to offset 10% of deferred gain (can apply to gain on sale of QOF or allocated capital gain). 30% basis adjustment for qualified rural opportunity zones
- Recognition of deferred gain 5 years after investment (or on disposition, if earlier) – *rolling* deferral
- Elective basis adjustment to FMV after ten year holding period related to future gain. (Basis adjustment to FMV at year 30)

- Issued for cash in primary issuance (no secondary acquisitions)

90% asset test

QOZB Partnership

QOZB Corporation

QOZB Property (90% asset test)

QOZB Property

- Acquired for purchase after 2017, from unrelated person (20% overlapping ownership test)
- Original use commences in QOZ or "substantial improvement" (100% increase in basis within 30 months, or 50% for QROF)
- Real estate (land) excluded from original use. Unclear how improvement taken into account
- During "substantially all" holding period, "substantially all" use is in QOZ

QOZB Business Property owned by QOZB Partnership or Corporation

- Substantially all (70%) tangible asset test (purchased or leased) meets QOZB Property test. (5 year tail period if it ceases to qualify)
- 50% gross income from active ToB. No sun or sin business.
- Substantially all intangible property used in ToB (cash ok if working capital 31 month budget and schedule safe harbor met)
- No more than 5% non-qualifying financial assets (structurally no subsidiaries, cash safe harbor with written working capital plan)
- Redemption limitations (QOZB Corporation)

Thank you

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