



# TaxNewsFlash

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## Proposed regulations: Dual consolidated loss rules, including treatment of intercompany transactions, Pillar Two taxes, and certain disregarded payments

The U.S. Treasury Department and IRS today released [proposed regulations](#) (REG-105128-23) that address certain issues arising under the dual consolidated loss (DCL) rules, including:

- Extending the treatment of “legacy DCLs” in Notice 2023-80 to DCLs incurred in tax years beginning August 6, 2024, subject to an anti-abuse rule
- Clarifying that jurisdictional blending under a qualifying domestic minimum top-up tax (QDMTT), income inclusion rule (IIR), or pursuant to a safe harbor will create a foreign use when the proposed regulations are finalized
- Providing a special exception when a taxpayer’s top-up tax under Pillar Two is deemed to be zero by operation of a transitional country-by-country safe harbour that includes rules addressing duplicate loss arrangements
- Clarifying the interaction of the DCL rules with the intercompany transaction rules in Treas. Reg. § 1.1502-13
- Excluding from DCL computations certain amounts arising from the ownership of stock, including gain on stock sales, certain dividends, and subpart F and global intangible low-taxed income (GILTI) inclusions
- Modifying the scope of the separate unit definition to implement the other Pillar Two-related changes
- Clarifying that denial of deductions in a foreign jurisdiction by reasons of the Pillar Two or EU Anti-Tax Avoidance Directive (ATAD 2) anti-double deduction measures does not create a “mirror legislation” foreign use
- Introducing a complex new set of rules addressing foreign hybrid entities that generate losses through disregarded payments of interest or royalties, and that are not already counteracted through a foreign jurisdiction’s anti-hybrid rules

Comments and requests for a public hearing on the proposed regulations are due by October 7, 2024.

### Background

Final DCL regulations contained in Treas. Reg. §§ 1.1503(d)-1 through 8 were issued in 2007. The international tax landscape has changed since 2007. In particular, foreign countries have enacted tax provisions that incorporate recommendations made by the Organisation of Economic Cooperation and

Development (OECD), including the basis and profits shifting (BEPS) recommendations and global anti-base erosion (GloBe) rules. The 2024 proposed DCL regulations address several of the issues raised by the BEPS provisions and the GloBe rules and address other issues that are unrelated to changes created by the OECD recommendations.

The Treasury Department and the IRS in December 2023 released Notice 2023-80, which described the interaction of the DCL rules with the GloBe rules and temporarily extended relief from the 2022 foreign tax credit final regulations offered by Notice 2023-55. Read [TaxNewsFlash](#)

Notice 2023-80 announced that limited guidance would be proposed for certain “legacy DCLs” (i.e., DCLs incurred (1) in tax years ending on or before December 31, 2023, and (2) DCLs incurred in tax years beginning before January 1, 2024, and ending after December 31, 2023 (provided the taxpayer’s U.S. tax year begins and ends on the same dates as the fiscal tax year of the multinational enterprise (MNE) group under the GloBe rules). Under that guidance, a foreign use does not 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 under the GloBe rules, subject to an anti-abuse rule.

The most immediately relevant part of the proposed DCL regulations is that they extend the legacy DCL relief to all DCLs incurred in tax years that begin before August 6, 2024, subject to an anti-abuse rule.

The proposed DCL regulations intend to make any jurisdictional netting resulting from a QDMTT, an IIR, or the application of transitional country-by-country safe harbour a foreign use of a DCL. The 2024 proposed DCL regulations would provide a special exception if a taxpayer’s top-up tax under Pillar Two is deemed to be zero by operation of a transitional country-by-country safe harbour that includes rules addressing duplicate loss arrangements.

The modifications related to OECD recommendations are perhaps the most significant part of the new guidance. The 2024 proposed DCL regulations however also propose changes to a variety of topics, e.g., clarifying the interaction of Treas. Reg. § 1.1502-13 with DCL computations, and substantially modifying a rule that includes in the DCL computation income amounts arising from the ownership of stock, such as subpart F and GILTI income.

KPMG will be providing additional, more detailed analysis of the proposed DCL regulations in the future.

### **Proposed applicability dates**

The proposed regulations are generally proposed to apply to tax years ending on or after August 6, 2024, and a taxpayer may rely on the proposed regulations for any tax year ending on or after that date and before the proposed regulations are finalized, provided that the taxpayer and all members of its consolidated group apply the proposed regulations in their entirety and in a consistent manner for all tax years beginning with the first tax year of reliance until the applicability date of those final regulations.

In addition, a taxpayer may rely on the foreign use exception described in Notice 2023-80 for any tax year ending on or after December 11, 2023, and before August 6, 2024, provided that the taxpayer and all members of its consolidated group apply those rules in their entirety and in a consistent manner for all tax years beginning with the first tax year of reliance until the applicability date of the final regulations on this topic.

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