Inside 4Q2018

ACC Association of Corporate Counsel
SOUTH FLORIDA

FOCUS

President's Message

Carlos I. Cardelle

Happy Holidays, 2018!

As we close out calendar year 2018, I would like to pause and recognize the amazing work our Chapter has realized this year. Since our last newsletter, we held our 9th annual CLE conference *SUPERCOUNSELORS: Protectors of the Company* on September 27th. Thank you to all who attended and in particular our amazing sponsors who made this event one of the best conferences in our chapter's history. We are diligently planning our 10th annual CLE – so please stay tuned! I encourage any of our members who are interested in learning more about our Chapter or who would like to get involved to please serve on our CLE planning committee. Many members of this committee have gone on to serve on our Board of Directors. In October, we were treated to a special tour of Miami's dynamic Wynwood area thanks to our sponsor Littler! In November we went golfing at *Top Golf* thanks to Rumberger Kirk & Caldwell! It was a great time to network with our sponsor's amazing attorneys and practice our tee shots. At the end of November, another of our wonderful sponsors, Conzen O'Connor hosted a CLE Workshop focused on employment law – how best to conduct internal investigations. Thank you to all our sponsors for their wonderful hospitality and expertise!

Your Board of Directors also hosted our annual strategic planning meeting in early October. As part of our planning session, we adopted our Board's 2018 – 2019, *Dedicated to Serve*. Our Board is a dynamic group of professionals representing an array of industries throughout our tri-county area. We are grateful for their commitment to serve - we re-committed ourselves to making 2019 another great year for our members and sponsors alike. We are also very dedicated to our community outreach efforts – including our Law School Ambassadors program. I am happy to report that all four local law schools will participate in our Law School Ambassadors program for this upcoming year. You may have seen each of our ambassadors highlighted in previous editions of our newsletter – we hope to have our new ambassadors selected by early 2019.

Once again to our amazing sponsors, a big **THANK YOU**! Without your support we cannot provide the access to our great events. We are looking forward to partnering with you again. On behalf of our Board and Executive Director, we wish you a happy and healthy holiday season – looking forward to seeing all of you in 2019!

All the best,
Carlos Cardelle
President, ACC South Florida Chapter

ACC South Florida Upcoming Events

January 2019
CLE seminar presented by Shook, Hardy & Bacon L.L.P

February 2019
Social event presented by Akerman

March 2019
Social event presented by Bilzin Sumberg

The Eye of the GDPR Storm

By Tibor Nagy, Ogletree Deakins

The European Union's General Data Protection Regulation (GDPR) went into effect on May 25, 2018. It was preceded by years of debate, delays, and uncertainty on its final text. The months leading up to this date seemed quiet until a flood of emails barraged everyone's mailboxes — frantic requests from companies asking customers to officially opt-in or consent to receive their future messages. Now the storm seems to have abated, apart from the regular newsflash of a data breach or cyber hack at a big corporation or government institution.

GDPR is the European Union's latest answer to the privacy challenges of a rapidly digitalizing world with companies and governments controlling and processing large amounts of personal data. The regulation grants important rights to individuals or data subjects, including required consent or opt-in, the right to access, and the right to be forgotten, to name a few.

In addition, its application is not limited to the European Union and can, for instance, also affect US-based companies that process personal data of EU citizens. It is an important step up from the European Union's 1995 Data Protection Directive, which was their initial legislative answer to the first wave of digitalization and e-commerce.

Compliance with GDPR is proving to be a big challenge for companies. Namely, interpreting many of GDPR's provisions is not always easy. In addition, many companies struggle on where to assign responsibility for GDPR compliance. GDPR requires companies to appoint a Data Protection Officer (DPO), but attracting and retaining a DPO is no easy task. A DPO should also be able to call on the support of a number of people including, the board, the GC, CIO, and COO to engineer and implement an effective GDPR compliance roadmap.

Privacy, data protection, and information security are firmly on the general counsel's current priority list. Although sometimes initially and erroneously viewed as a purely legal issue, GDPR compliance is a large-scale issue that impacts the company's business model and reputation. It provides great opportunities for general counsel to use their legal, business, and leadership skills to add value to the company. As such, general counsel cannot afford digital illiteracy and must stay on top of digital technology and cybersecurity trends.

Now that the initial excitement of GDPR has settled and the flurry of consent emails has subdued, it is tempting to carry on with business as usual. For example, the media is focused on the Brexit negotiations in Brussels, although the European Data Protection Authorities (DPAs) are convening in the city on October 22-26 during their 40th International Conference.

In fact, many DPAs already received the authority to impose much bigger fines through their national legislations. Presently, GDPR allows fines of up to four percent of annual global turnover or 20 million Euro, whichever is higher.

The DPAs are now assessing and planning for the future. Companies should use this valuable time and continue implementing their GDPR compliance roadmap to batten down the hatches. We are only in the eye of the GDPR storm.

ACC News

ACC Xchange: The Mid-Year Meeting for Advancing Legal Executives

This reimagined conference (April 28-30, Minneapolis, MN) combines ACC's Mid-Year Meeting and Legal Operations Conference into one powerful event, delivering the trailblazing programs, content, training, and networking you need all in one place, at one time. Register today for cutting-edge mix of advanced-level education at *www.acc.com/xchange*.

Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. *Download the case study* on Plaza Home Mortgage and the ACC Vendor Risk Service. Visit *www.acc.com/VRS* for more information.

2018 ACC Global Compensation Report

For companies seeking to stay competitive in the marketplace and lawyers considering career moves, access to detailed compensation data for in-house counsel and legal operations professionals is absolutely essential. Based on responses from more than 5,000 lawyers in corporate legal departments from 65 countries and 39 different industry sectors, this first-ever ACC Global Compensation Report is precisely the resource you need. Download the free Executive Summary at *www.acc.com/compenstation*.

2019 ACC Annual Meeting: Keep the Momentum Going

Exceptional in-house lawyers make attending the ACC Annual Meeting a priority. Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event on in-house counsel. Learn more at *am.acc.com*.

ACC Alliance

Have you considered that you and your professional legal services may be subject to malpractice scrutiny? Legal malpractice lawsuits can happen unexpectedly—even to in-house counsel. If you rely solely on the protection of corporate management liability coverage, your personal assets and reputation could be at risk. It may surprise you to learn that some of your peers have discovered firsthand that risky coverage gaps often exist. Since 1996, the ACC has turned to Chubb to address malpractice issues unique to in-house counsel. Learn more about Chubb at *www.chubb/acc*.

To effectively manage copyright, it is critical to understand when permission is needed and how to evaluate exceptions and limitations to copyright protection. Copyright Clearance Center's (CCC) Education Certificate Program can help. ACC members receive 25% off registrations made through 12.31.18 with promo code: ACC2018. Visit *http://go.copyright.com/acc2018/education* for a complete schedule.

Recent Tax Court Ruling Will Impact Outbound Tax Planning by U.S. Individuals

By Jeffrey L. Rubinger

On September 18, 2018, the U.S. Tax Court, in *Smith v. Commissioner,*[1] held that an actual distribution of earnings and profits received by U.S. individual shareholder of a controlled foreign corporation (CFC) that has previously made a Section 962 election is not entitled to treat such distribution as a "qualified dividend" paid from by a deemed U.S. C corporation. As a result of this Tax Court decision, it is likely that many U.S. individual shareholders of CFCs that are not tax resident in jurisdictions that have concluded comprehensive income tax treaties with the United States will choose to own these CFCs through U.S. C corporations, potentially exposing themselves to double taxation when they sell their shares. Prior to the release of the *Smith* case, tax practitioners had hoped for favorable guidance on the tax consequences of making a Section 962 election.

Background

The Tax Cuts and Jobs Act ("TCJA") represents the most significant tax reform package enacted since 1986. Included in this reform are a number of crucial changes to existing international tax provisions. While many of these international changes relate directly to U.S. corporations doing business outside the United States, they nevertheless will have a substantial impact on U.S. individuals with the same overseas activities or assets.

Most of the most talked about provisions of the TCJA includes a *partial* shift from a worldwide system of taxing such U.S. corporate taxpayers to a semi-territorial system of taxation. This "territorial" taxation is achieved through the creation of a dividends received deduction ("DRD") for such domestic corporate taxpayers under Section 245A. This provision will allow a U.S. C corporation

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[1] 151 T.C. No. 5 (2018)

Past Events

Littler and ACC South Florida in Wynwood

ACC South Florida members joined **Littler** on a private dining and art walking tour of **Wynwood Arts District** presented by **Miami Culinary Tours**. We walked through Wynwood and tasted food of local restaurants while learning about the colorful history and art of Wynwood.

Member Appreciation Event

ACC South Florida invited members to gather for an annual appreciation event in July. Sponsored in part by **Bloomberg Law**, the event featured **Debbie Epstein Henry** an expert consultant, best-selling author and public speaker on careers as she lead a discussion on **Striking the Self-Promotion Balance, Building Relationships & Mastering the Art of the Ask**. For the second year in a row and by popular demand, a professional photographer provided free headshots to members.

Bloomberg Law®

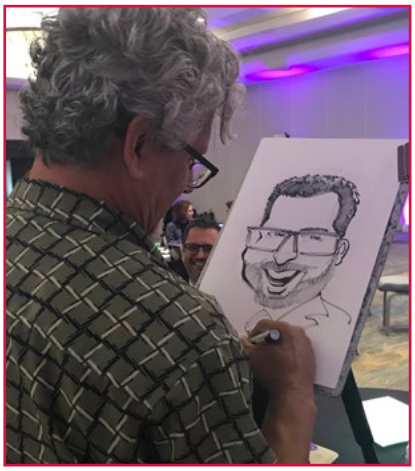
Quantum House Event

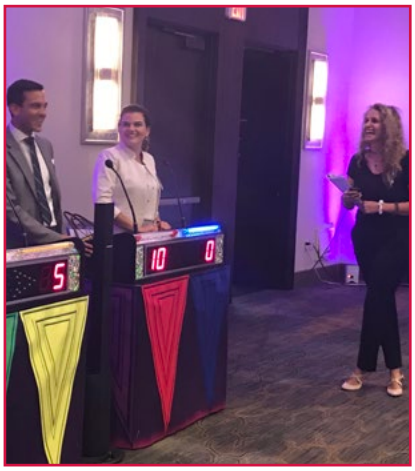
ACC South Florida has teamed up with **Quantum House** in West Palm Beach for a family-friendly event in September. Quantum House is a caring and supportive home that lessens the burden for families whose children are receiving treatment in Palm Beach County for a serious medical condition. ACC Members and their families prepared and served lunch to families staying at Quantum House as part of their Chef-for-a-Day Program.

9th Annual CLE Conference

ACC South Florida Members and Sponsors came together for **ACC South Florida's 9th Annual CLE Conference presented by Bilzin Sumberg**. The conference took place ocean-side in September at the Marriott Harbor Beach Resort & Spa in Fort Lauderdale. The theme of this year's conference was "**SUPERCOUNSELORS: Protectors of the Company**" and many attendees dressed the superhero part and sponsor competed for the best display matching the theme.

Bilzin Sumberg





ACC South Florida Chapter and Rumberger, Kirk and Caldwell at Topgolf Miami Gardens

ACC South Florida members joined **Rumberger, Kirk & Caldwell** for an evening of friendly competition, cocktails and small bites at **Topgolf Miami Gardens**. Great time at a fun venue!

40 YEARS
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The Me Too Tip-Off

ByDavid M. Gobeo and Michelle Schlesinger

As the #MeToo movement continues to gain momentum, its reach spans across the working world. What makes this movement unique is the public backlash that businesses face, even if an alleged incident occurred outside of a legal statute of limitations. Many prominent corporations have been at the center of some of the most high-profile sexual harassment cases. While these claims began in the entertainment industry, recently the professional sports industry has come under scrutiny, as, in September 2018, the Dallas Mavericks released the full results of a seven-month sexual harassment investigation. An investigation, according to the Dallas Morning News, that revealed "numerous instances of sexual harassment and other improper workplace conduct" spanning across a 20-year time-period.

Sports Illustrated was the first to report allegations against the Dallas Mavericks in an exclusive story in February 2018. After interviewing more than a dozen current and former employees, the outlet described the corporate culture as "rife with misogyny and predatory sexual behavior" including "public fondling by the team president; outright domestic assault by a high-profile member of the Mavs.com staff; unsupportive or even intimidating responses from superiors who heard complaints of inappropriate behavior from their employees; and even an employee who openly watched pornography at his desk." The investigation found no wrongdoing by Mavericks owner Mark Cuban, but due to what the investigation deemed "institutional and other failures," Cuban has agreed to donate $10 million to organizations that support the leadership and development of women in sports and that work to combat domestic violence.

Further, the Mavericks will have to give the NBA's league office quarterly reports on its progress toward effectuating and meeting the recommendations included in the report from the investigation. The recommendations include: immediately reporting to the league office any instances or allegations of significant misconduct by any employee; continually enhancing and updating annual "Respect in the Workplace" training for all staff, including ownership; and implementing a program to train all staff, including ownership, on issues related to domestic violence, sexual assault, and sexual harassment. Such a public remedy has other companies scrambling to learn from Mark Cuban and the Maverick's mistakes. What can be done to prevent something similar from happening in their company's backyard?

First and foremost, every employer should have an effective anti-harassment policy tailored to its unique company structure. Standard policies are not going to cut it in this highly specialized area. The anti-harassment policy should be up-to-date and disseminated to all employees. An effective prevention program should not only include an explicit policy against sexual harassment that is clearly and regularly communicated to employees, but also necessitates having a procedure in place for resolving sexual harassment complaints as they arise. The procedure should be designed to encourage victims of harassment to come forward, and should offer alternative avenues of reporting (in case a direct supervisor is the perpetrator of the harassment). Effective remedies, including protection of victims and witnesses against retaliation, are imperative to a successful program.

Additionally, training provides an added defense when a sexual harassment complaint is received. Yearly training of all employees is encouraged, although not legally required by federal law. Notably, class-room style training has been proven to be the most effective, and should be implemented where possible. The training will ideally be conducted by a person with expertise –including but not limited to (1) employee assistance programs, (2) attorneys, and (3) human resources service companies.

That being said, proper policies, procedures, and training may not be enough to protect corporations who fail to make the fundamental cultural shift toward urged by the #Metoo movement. Corporations need buy-in from their highest-level executives to effect change, otherwise the policies and procedures are worth little more than the paper on which they are printed. Promoting open communication, transparency, and accountability at all levels in the workplace is key to moving a company in the right direction.

From a practical standpoint, employers should also: (1) require prompt reporting by employees; (2) discourage romantic relationships at work; (3) be cognizant of what is written in text or email; (4) scrutinize behavior at work parties and after-work events; (4) pay attention to pictures and jokes circulated at work; (5) inspect the break room, lunch room and work area for offensive materials; and (6) let no harassment complaints go uninvestigated.

There are a number of tools available to corporations to successfully navigate the #MeToo movement's changing landscape. Corporations just have to be willing to look. Otherwise, they may end up like the Mavericks - another expensive #MeToo speed bump on the road ahead.

About the Authors:

David M. Gobeo, a partner in FordHarrison's West Palm Beach office, represents employers in a broad range of employment matters including against claims of discrimination, harassment, and wage and hour violations. He routinely represents clients in charges of discrimination before the Equal Employment Opportunity Commission, the Florida Commission on Human Relations, and various local agencies. David also advises clients on the use of employment policies and procedures to reduce litigation risk. David can be reached at dgobeo@fordharrison.com or 561-345-7512.

Michelle Schlesinger is an associate in FordHarrison's West Palm Beach office who concentrates her practice on the representation of management in employment law disputes. Her experience is not limited to litigation and includes proactive day-to-day advice as well as training on an array of employment laws and regulations such as discrimination and harassment avoidance, pay equity, and pre-employment screening. Michelle can be reached at mschlesinger@fordharrison.com or 561-345-7504.

A Fuzzy Accommodation: Examining Service Animals and the Workplace in Florida

By Stella Chu

With news of growing airline restrictions on emotional support and service animals continuing to make headlines, employers may want to reexamine their ADA policies and procedures to ensure adequate compliance with federal and state laws addressing disability protections in the workplace.

Title I of the ADA – which applies to private entities with more than 15 employees – does not expressly address service animals in the workplace. It does, however, require that employers make reasonable accommodations for employees with disabilities unless the accommodation would cause an undue hardship to the operation of the business or present a direct threat to health and safety. For this reason, an employee must specifically request that the service animal be present as an accommodation for their disability. In turn, the employer should take this request seriously, as it would with any other reasonable accommodation request.

Which animals are considered service animals in Florida?

Florida's service animal law applies to animals that are trained to do work or perform tasks for someone with a physical, mental, psychiatric, sensory, or intellectual disability. The work the animal does must be directly related to the person's disability. For example, an animal might provide stability and balance to someone with impaired mobility, might alert someone who has a hearing impairment to sounds, or might interrupt someone with a psychiatric disability from engaging in self-destructive or dangerous acts. For access to public accommodations, only service dogs and miniature horses are covered.

The ADA defines a service animal as a dog that is individually trained to perform tasks or do work for the benefit of a person with a disability. (In some cases,

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Welcome New Members!

Nisha Bhatia
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EVP & General Counsel,
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Counsel,
JM Family Enterprises, Inc.,
Deerfield Beach

Douglas Fischer
General Counsel,
Greenlane, Boca Raton

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Wealth Partners Compliance
Consulting, LLC, Palm Beach

Jason Lane
Assistant General Counsel,
Chewy.com, Dania Beach

Voula Liroff
Vice President & General
Counsel, HealthChannels,
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Corey Manley
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BFS Capital, Coral Springs

Tobias Meyer
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Robert Mino
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Christopher O'Reilly
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Fiesta Restaurant Group,
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Senior Legal Counsel,
Dufry Group, Miami

James Utterback
Senior Counsel, Beckman
Coulter, Inc., Miami

Jonathan Walder
Senior Counsel, 777
Partners, Miami

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a miniature horse may also qualify as a service animal under the ADA). The tasks or work the animal does must be directly related to the person's disability.

Neither law covers pets or what some call "emotional support animals": animals that provide a sense of safety, companionship, and comfort to those with psychiatric or emotional disabilities or conditions. Although these animals often have therapeutic benefits, they are not individually trained to perform specific tasks for their handlers. It is worthwhile to note, however, a recent case that may hint at the loosening of limitations when it comes to emotional support animals and the workplace, particularly in Florida. In 2017, the EEOC filed a complaint under Title I of the ADA in a Florida federal court against a trucking company claiming that the employer wrongfully failed to accommodate a truck driver's request to have his dog with him as he drove his trucking routes *(EEOC v. CRST Int'l*, Inc., filed March 2, 2017).[1] The lawsuit specifically described the plaintiff's dog as an "emotional support/service animal" prescribed by his psychiatrist to assist the plaintiff in "coping with his disabilities and to maintain appropriate social interactions and workplace functions." The fact that the EEOC brought suit may signal the changing of the tide as to how restrictive employers can be when affording emotional support animal accommodations to their employees.

Does the employer need to accommodate…the animal?

Florida law does not outline a list of accommodations that must be provided for the animal, but the ADA does require necessary accommodations, "such as a designated area to relieve itself, bowls of water or assistance with the handling of the dog." Under both the ADA and Florida law, an employee or agent can be asked if the dog is a service animal and what work or tasks it is trained to perform.

Likewise under the Florida statute, a service dog can also be removed from the premises if the animal is not housebroken, if it is out of control and the handler does not take action to control it, or if it poses as a threat to the health and safety of others. The presence of another employee's mild allergy to a service animal is not usually a sufficient reason to prohibit the accommodation.

Employers have a legal duty under Title I of the ADA (and Florida law) to engage in the interactive process, but accommodations should not be limitless.

Employers should go through the same process and make the same individualized inquiry when an employee seeks permission to use a service animal as when use of a special chair, a schedule adjustment, or other more common accommodation is requested. For example, the following are some factors to consider when determining whether to grant an accommodation request involving a service animal:

- the employee's disability and the service animal's function are related;
- the service animal will improve the worker's ability to perform his or her job;
- the animal has had sufficient training to not be a disruptive presence in the workplace; and
- the accommodation does not present an undue hardship.

Unfortunately, the proliferation of fraudulent requests for accommodation has created an atmosphere of cynicism and skepticism that could cause unjust discrimination against individuals submitting bona fide requests. But, just because companies need to be open to granting employee requests to use emotional support or other service animals at work doesn't mean it's always appropriate. For that reason, employers still need to carefully evaluate any reasonable accommodation request for legitimacy – which may include requesting extensive medical documentation regarding the employee's disability and explaining how the service animal's presence will relate to his or her ability perform the duties of the job. Of note, under the Florida law[2], misrepresenting a dog as a service animal is punishable as a criminal offense.

Although this area of disability law is still evolving, employers should continue to be mindful to keep their disability accommodation policies up to date and to evaluate any service or emotional animal request as any other reasonable accommodation.

About the Author:

Stella Chu has experience in a wide range of employment and labor law matters, including discrimination, retaliation, wage and hour, and union-related issues. She represents domestic and multinational employers in connection with claims in both state and federal courts.

Prior to joining Littler, Stella represented local colleges on a variety of employment issues, as well as national and international product manufacturers in hundreds of product liability, premise liability, and commercial cases.

[1]Upon defendant's motion, the case was eventually transferred to the Northern District of Iowa, Cedar Rapids Division where it is currently pending under Case No. 17-CV-129-CJW.

[2]Fla. Stat. § 413.08(9), effective July 1, 2015.

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to deduct the "foreign-source portion" of any dividends it receives from a 10%-or-more-owned foreign corporation (other than a PFIC), as long as the recipient has owned the stock of the payor for more than one year during the prior two year period. Assuming the foreign payor has no income that is effectively connected to a U.S. trade or business ("ECI") and no dividend income from an 80%-owned U.S. subsidiary, the entire dividend generally will be exempt from U.S. federal income tax under this provision. In a corresponding change to Section 1248, when the relevant stock of a CFC is sold or exchanged, any amount of gain that is recharacterized as a dividend to a corporate U.S. shareholder under Section 1248 also is eligible for this DRD assuming the stock has been held for at least one year.

Despite these shifts toward partial territoriality, the new law retains the Subpart F rules that apply to tax currently certain income earned by CFCs (i.e., foreign corporations that are more than 50% owned by 10% U.S. shareholders (under the new law, both the 10% and 50% standards are measured by reference to either vote or value), as well as introducing a new category of income puzzlingly called "global intangible low-taxed income" (GILTI), though it has almost nothing to do with income from intangibles. GILTI will include nearly all income of a CFC other than ECI, Subpart F income (including Subpart F income that is excludible under the Section 954 (b)(4) high-tax exception), or income of taxpayers with very significant tangible depreciable property used in a trade or business. As a result, the much-hyped "territorial" tax system will be drastically limited in scope.

The New GILTI Tax

The GILTI tax, imposed under Section 951A, applies to U.S. shareholders (both corporate and individual) of CFCs at ordinary income tax rates. Accordingly, U.S. individual shareholders of CFC typically will be subject to tax on GILTI inclusions at a 37% rate (the new maximum individual U.S. federal income tax rate). U.S. C corporations that are shareholders of CFCs, on the other hand, are entitled under new Section 250 to deduct 50% of the GILTI inclusion, resulting in a 10.5% effective tax rate on such income. Additionally, such corporate shareholders are permitted to claim foreign tax credits for 80% of the foreign taxes paid by the CFC that are attributable to the relevant GILTI inclusion. Accounting for the 50% deduction and foreign tax credits, if any, a corporate U.S. shareholder's GILTI inclusion that is subject to a rate of foreign income tax of at least 13.125% should result in no further U.S. federal income tax being due.

In addition to the above GILTI provisions, Section 250 also permits U.S. corporations to deduct 37.5% of "foreign-derived intangible income" (FDII), resulting in an effective U.S. federal income tax rate of 13.125% on such income. FDII is the portion of the U.S. corporation's net income (other than GILTI and certain other income) that exceeds a 10% rate of return on the U.S. corporation's tangible depreciable business assets and is attributable to certain sales of property (including leases and licenses) to foreign persons or to the provision of certain services to any person located outside the United States.

Impact on Individual U.S. Taxpayers

While the TCJA substantially reduced the top U.S. corporate tax rate from 35% to 21%, individual U.S. income tax rates were not materially altered (i.e., the maximum individual U.S. federal income tax rate was reduced from 39.6% to 37%). Nevertheless, the reductions in corporate tax rates and other relevant entity-level changes should be expected to have a dramatic impact on outbound U.S. tax planning for individual shareholders of CFCs.

Owning CFCs Through C Corporations

As noted above, GILTI is taxable to U.S. individual shareholders at a 37% rate (the current maximum individual U.S. federal income tax rate). U.S. individual shareholders who own their CFCs through a U.S. C corporation, on the other hand, are entitled to deduct 50% of the relevant GILTI inclusion at the corporate level before any tax is imposed at the current U.S. federal corporate tax rate of 21%, resulting in a 10.5% effective tax rate on such income. Additionally, such U.S. corporate shareholders are permitted to claim foreign tax credits for 80% of the foreign taxes paid by the CFC that are attributable to the relevant GILTI inclusions. Accounting for the 50% deduction and foreign tax credits, where a C corporation U.S. shareholder's annual GILTI inclusions are subject to an effective rate of foreign income tax of at least 13.125%, the GILTI provisions should result in no further U.S. federal income tax being due on such inclusion. Furthermore, actual distributions from the C corporation holding company generally will be subject to a rate of 20% (plus a potential 3.8% surtax).

The one potential downside of owning shares of a CFC through a U.S. C corporation (as opposed to individually or through a pass-through entity, such as a partnership or S corporation) is the potential for double taxable on the eventual sale of the CFC shares - once at the corporate level and a second time when a distribution is made to the individual shareholders of the after-tax profits.

Planning Using Section 962

Section 962, which has been a part of the Code since 1962, allows an individual (or trust or estate) U.S. shareholder of a CFC to elect to be subject to corporate income tax rates on amounts which are included in income under Section 951(a) (i.e., subpart F inclusions and amounts included under Section 956). The purpose behind this provision is…to avoid what might otherwise be a hardship in taxing a U.S. individual at high bracket rates with respect to earnings in a foreign corporation which he does not receive. This provision gives such individuals assurance that their tax bur-

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dens, with respect to these undistributed foreign earnings, will be *no heavier than they would have been had they invested in an American corporation doing business abroad.* (emphasis added).

The U.S. federal income tax consequences of a U.S. individual making a Section 962 election are as follows. First, the individual is taxed on amounts included in his gross income under Section 951(a) at corporate tax rates. Second, the individual is entitled to a deemed-paid foreign tax credit under Section 960 as if the individual were a domestic corporation. Third, when an actual distribution of earnings is made of amounts that have already been included in the gross income of a U.S. shareholder under Section 951(a), the earnings are included in gross income again to the extent they exceed the amount of U.S. income tax paid at the time of the Section 962 election.

Historically, elections under Section 962 were made infrequently. Under the new law, however, it was thought that Section 962 would become increasingly relevant to many more U.S. individual shareholders of CFCs. As noted above, the new GILTI provisions will cause U.S. individual shareholders of CFCs to be subject to U.S. federal income tax at a 37% rate on a new category of income, which will be taxed in the same manner as Subpart F income (including with respect to eligibility to make a Section 962 election as to such income).

The lower 21% corporate income tax rate under the new law coupled with the inability of individual shareholders to claim indirect foreign tax credits under Section 960 mean that, in some cases, U.S. individuals investing in CFCs through U.S. corporations will be better off from a tax perspective under the TCJA than U.S. individual shareholders making such investments in CFCs directly. For this reason, individual U.S. shareholders should consider whether it is beneficial to make Section 962 elections going forward, which would allow them to claim indirect foreign tax credits on any amounts included under subpart F, as well as under the GILTI provisions.

Some of the unanswered questions facing taxpayers in this context are, first, whether individual U.S. shareholder who makes a Section 962 election is eligible to claim the 50% GILTI deduction under Section 250 (which would have the effect of reducing the effective U.S. tax rate on such income to 10.5%). Based on the clear intent behind Section 962, which is to ensure that an individual U.S. shareholder who has an inclusion under Subpart F (including for this purpose, inclusions under Section 951(A) is subject to tax under Section 11 as if the shareholder invested abroad through a U.S. C corporation, such deduction should be allowed.

Another potential issue, prior to the *Smith* decision, was the tax characterization of an actual distribution of earnings and profits that were previously included in the U.S. shareholder's gross income under Section 951(a). This issue arises whenever the CFC is located in a non-treaty jurisdiction, such that dividends paid by such a CFC could not qualify for the reduced "qualified dividend" rate under Section 1(h)(11). When an actual distribution is made from such a company, the question is whether the distribution should be treated as coming from the CFC (and therefore be classified as ordinary income), or instead as coming from the deemed C corporation created by the Section 962 election (and thus be classified as qualified dividends). As explained above, the objective behind Section 962 is to tax the individual U.S. shareholder in the same amount that she would have been taxed had the investment in the CFC been made through a domestic C corporation. To achieve this objective and avoid exposing the shareholder to a significantly higher rate of tax in the United States, where 962 election is in place, any distribution of earnings and profits by the CFC would seem to logically be treated as coming from a domestic C corporation.

Unfortunately, the Tax Court in *Smith* did not agree with this argument, thereby putting U.S. individual shareholders who make Section 962 elections on unequal footing with those U.S. individual shareholders who actually own shares of a CFC through a U.S. C corporation. This outcome likely will cause many individual owners of CFC to once again consider whether Section 962 should have should be used in everyday tax planning.

About the Author:

Jeffrey L. Rubinger is known worldwide as the lawyer to seek out when companies require a creative, sophisticated solution to a complex international tax situation. From U.S. companies expanding overseas to foreign businesses investing in the United States, clients turn to Jeffrey for his extensive knowledge of the tax laws in a wide variety of jurisdictions, including countries in South America, Europe, Asia, and the Middle East. He is distinctive in Florida for his significant experience with outbound matters. Jeffrey's previous career as a certified public accountant at a major accounting firm gives him a thorough understanding of the business issues his clients face every day.

ACC South Florida Ambassador Program

ACC South Florida selected 8 law students for its 2018 Ambassadors Program. The Ambassador Program is a unique networking and educational opportunity that provides rare access to ACC South Florida's in-house counsel membership and its law firm sponsors.

Selected law students, or "ACC South Florida Ambassadors": receive a scholarship in the amount of $1,000.00; and volunteer at various community service/pro bono events during the year. ACC South Florida Ambassadors are also invited to attend all ACC South Florida events. Below are biographies of two representative ACC South Florida Ambassadors.

Lance Maynard

Lance is originally from Pawleys Island, South Carolina, and is a graduate of the College of Charleston. Last summer, Lance worked as an in-house legal intern at NextEra Energy, Inc. and will be spending the upcoming summer with Jones Day Miami. Lance looks forward to completing his J.D./ MBA in May of 2020.

Maya Frucht

Maya Frucht is a 3L at the University of Miami School of Law. She has intern with Judge Marcia Cooke at the U.S. District Court for the Southern District of Florida, and has worked at Miami's Innocence Clinic providing post-conviction relief to the wrongfully convicted.

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Executive Director Letter

Hello Members and Sponsors!

I know I say this every year but WOW - the year went by so quickly! 2018 was a great year - we had our best ever annual CLE conference with over 250 attendees (ahem, I mean, Superheroes!), many fun and unique social events put on by our generous sponsors and we gave back to our community through service events and pro bono clinics. We are already gearing up for 2019 and hope many more of you will join us as we continue to expand our programming throughout the three counties.

None of this happens without our members, sponsors and Board of Directors who come together to make this such a wonderful organization. Thank you for your continued support of ACC South Florida - I hope each of you have a wonderful holiday season and best wishes for the New Year.

Christina Y. Kim
Executive Director, ACC South Florida