

FINANCE MEMORANDUM

New York City Treatment of IRC § 965 Repatriation Amounts for Tax Year 2017 under the General Corporation Tax, Unincorporated Business Tax, and Banking Corporation Tax

The federal Tax Cuts and Jobs Act (Public Law 115-97) requires certain US taxpayers to recognize mandatory deemed repatriation income as Subpart F income. In general, this is accomplished by U.S. shareholders recognizing post-1986 accumulated earnings and profits and deficits of certain foreign corporations under IRC § 965(a) and (b) (together referred to as the IRC § 965(a) inclusion amount). These taxpayers are then allowed to deduct a portion of the IRC § 965(a) inclusion amount under IRC § 965(c).

This Finance Memorandum contains instructions for reporting IRC § 965 amounts on 2017 New York City General Corporation Tax (“GCT”), Unincorporated Business Tax (“UBT”), and Banking Corporation Tax (“BTX”) returns and attachments. These instructions do not apply to reporting other amounts of Subpart F income, which should be reported according to the 2017 forms and instructions previously published.

- If a taxpayer has IRC § 965 amounts in its 2017 tax year and has already filed its 2017 New York City return, it must file an amended return using these instructions.
- If a taxpayer has IRC § 965 amounts in its 2017 tax year and has not yet filed its 2017 New York City return, it must use these instructions when filing its original return.

For information regarding underpayments of City tax that result from inclusions in taxable income under IRC § 965, refer to Finance Memorandum 18-4. For information regarding how Business Corporation taxpayers must treat IRC § 965 income for City purposes, refer to Finance Memorandum 18-7.

General Reporting Instructions for Tax Year 2017

IRC § 965 income is a component of federal taxable income, and there are no specific statutory modifications under the GCT, UBT, or BTX that exclude this income from City tax computations. Hence, for purposes of the GCT, UBT, and BTX, the net IRC § 965 income reported to the IRS pursuant to Subpart F, must be incorporated into the starting point of City tax calculations. Note that IRC § 965 income must be treated as dividends from stock for City tax purposes. The IRC § 965(a) inclusion amount must be classified as business income, investment income, or income from subsidiary capital, to the extent applicable, and deductions, including the deduction under IRC § 965(c) and interest deductions, must be attributed to the appropriate category of income. The net IRC § 965 income must be allocated, or in the case of income from subsidiary capital, excluded, in accordance with its classification and existing City law.

Under IRC § 965(n), taxpayers are permitted to make an election to not take IRC § 965 income into account in determining their net operating loss deduction (“NOL”) under IRC § 172 for the taxable year, and for purposes of determining NOL carrybacks and carryovers. Subchapter S Corporations and Unincorporated Businesses treated as partnerships for federal income tax purposes will be permitted to make an election similar to the election available under IRC § 965(n) for purposes of calculating their City tax. Unincorporated Businesses treated as individuals for federal income tax purposes, including individuals who are the sole members of disregarded entities who have made the IRC § 965(n) election for federal tax purposes must calculate their NOLs for City tax purposes in a manner consistent with their federal NOL calculation.

Elections under IRC § 965(m) by Real Estate Investment Trusts (“REITS”) to defer recognition of IRC § 965 income will be recognized for City tax purposes, as will elections under § 3.02 of Notice 2018-13 to use an alternative method to compute post-1986 earnings and profits.

The provisions regarding the deferral of net IRC § 965 transition tax payments under IRC § 965(h) and IRC § 965(i) do not apply for New York City tax purposes.

General Form Instructions for Tax Year 2017

For tax year 2017, the Internal Revenue Service (IRS) requires all taxpayers that have IRC § 965 income to complete and attach, to their federal return, an *IRC 965 Transition Tax Statement* that includes the IRC § 965(a) inclusion amount, IRC § 965(c) deduction, and the total federal net tax liability under IRC § 965, if applicable.¹ S Corporations and Partnerships must report the repatriated income on their federal tax returns. **Use your federal or pro-forma (see below) *IRC 965 Transition Tax Statement* when following the instructions in this Finance Memorandum.**

- Flow-through entities must include their distributive shares and pro rata shares of any IRC § 965 amounts from other flow-through entities when computing their federal *IRC 965 Transition Tax Statement*.
- To properly complete their New York City returns, fiduciary filers (estates and trusts) that have a net IRC § 965 amount not distributed to beneficiaries must follow the applicable instructions below:
 - A pro-forma federal Form 1041 (with accompanying schedules) must be completed.
 - The pro-forma federal Form 1041 must include, on page 1, line 8, *Other income*, the entire net IRC § 965 amount (including both the net IRC § 965 amount not distributed to beneficiaries and the net IRC § 965 amount distributed to beneficiaries).
 - New York City returns must be completed following the instructions for New York City returns, but using the amounts from the pro-forma federal Form 1041 (with accompanying pro-forma schedules) rather than the amounts from the federal Form 1041 filed with the IRS.
 - A copy of the federal and pro-forma Form 1041 must be attached to the 2017 New York City return.

¹ See I.R.S. Pub. No. 5292, Cat. No. 15018A (Apr. 6, 2018), IRC § 965(h)(6), and IRS *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns*, Answer 9.

- The IRC § 965(a) inclusion amount is on Line 1 of the *IRC 965 Transition Tax Statement*.
- The IRC § 965(c) deduction amount is on Line 3 of the *IRC 965 Transition Tax Statement*.
- The net IRC § 965 amount is the IRC § 965(a) inclusion amount less the IRC § 965(c) deduction from the *IRC 965 Transition Tax Statement*.
- Lines 4 through 7 of the *IRC 965 Transition Tax Statement* are inapplicable for New York City tax purposes.
- Attach a copy of the federal *IRC 965 Transition Tax Statement*, along with accompanying worksheets used to compute the IRC § 965 amounts, to the 2017 New York City tax return.
 - If the taxpayer is part of a federal affiliated group that files a consolidated return, but is required to file a separate City return, the taxpayer should compute and attach a pro forma *IRC 965 Transition Tax Statement*, and accompanying worksheets, to show IRC § 965 amounts computed on a separate basis.
 - The designated agent of the combined group must complete a pro-forma *IRC 965 Transition Tax Statement* and accompanying worksheets as if the New York City group was one taxpayer. A captive REIT combined group member that has made the IRC § 965(m) election would only include 8% of its IRC § 965(a) inclusion amount and its IRC § 965(c) deduction amount on the pro forma statement.
- Attach a copy of each Form 5471 required to be filed with the IRS in connection with IRC § 965 income.
- Attach a copy of any statement provided to the IRS pursuant to IRC § 965(n), IRC § 965(m), or Notice 2018-13, § 3.02. Taxpayers who are Subchapter S Corporations and Unincorporated Businesses treated as partnerships for federal income tax purposes making the IRC § 965(n)-like election, must attach a statement to their return indicating their intention to not apply their NOLs against IRC § 965 income.

Instructions for S Corporation Taxpayers Filing Form NYC-3L or NYC-3A

- Schedule B, Line 1: Include the net IRC § 965 amount on this line. IRC § 965(a) inclusion should be included on Part I, Line 13 of form NYC-ATT-S-CORP, and IRC § 965(c) deduction should be included on Part II, Line 19 of form NYC-ATT-S-CORP.
- Schedule B, Line 3: If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is income from subsidiary capital, in addition to amounts otherwise included on Line 3, include an amount equal to:
 - $\text{Total IRC § 965(c) deduction} \times (\text{IRC § 965(a) inclusion amount from subsidiary capital} \div \text{total IRC § 965(a) inclusion amount})$
- Schedule B, Line 9(a): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is income from subsidiary capital, include that portion of the IRC § 965(a) inclusion amount on this line.
- Schedule B, Line 10: If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is dividend income from non-subsidary corporations, other than dividends from stocks not meeting the holding period requirement under IRC § 246(c), include that portion less the 965(c) deduction amount attributable to that income in the calculation of the amount to be included on this line. The IRC § 965(c) deduction amount attributable to the 50% of IRC § 965(a) amounts that are dividends from non-subsidary corporations is to be calculated as follows:
 - $\text{Total IRC § 965(c) deduction} \times (50\% \text{ of IRC § 965(a) amount constituting dividends from}$

non-subsubsidiary corporations ÷ total IRC § 965(a) inclusion amount).

- Schedule B, Line 11: Subchapter S Corporations will be permitted to make an election similar to the election available under IRC § 965(n) for purposes of calculating their City tax. In order to make this election, taxpayers must attach a statement to their return indicating their intention to not apply their NOLs against IRC § 965 income. All taxpayers who make this election must enter the amount that would have been allowed if the taxpayer had no income under IRC § 965(a) and no corresponding deduction under IRC § 965(c), provided that a taxpayer's NOL deduction cannot exceed its NYC taxable income.
- Schedule B, Line 20 (a): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is investment income, that portion of the IRC § 965(a) inclusion amount should be included in the calculation of the amount to be included on Schedule B, Line 20(a).
- Schedule B, Line 20(f): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is investment income, the portion of taxpayer's IRC § 965(c) deduction that is attributable to such income must be included on Schedule B, Line 20(f), and calculated as follows:
 - Total IRC § 965(c) deduction x (IRC § 965(a) inclusion amount that is investment income reported on Schedule B, Line 20(a) ÷ total IRC § 965(a) inclusion amount).
- Schedule B, Line 21: When apportioning NOLs to investment income, taxpayers who have made the election not to apply NOLs against their IRC § 965 income must exclude all IRC § 965 amounts from both the numerator and the denominator of the ratio by which they multiply the net operating loss at this step.

Instructions for Banking Corporation Taxpayers Filing Forms NYC-1 and NYC-1A

- Schedule B, Line 1: Include the net IRC § 965 amount on this line. IRC § 965(a) inclusion amount should be included on Part I, Line 13 of form NYC-ATT-S-CORP, and IRC § 965(c) deduction should be included on Part II, Line 19 of form NYC-ATT-S-CORP.
- Schedule B, Line 23: If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 1 is income from subsidiary capital, include this amount in the calculation of the amount to be included on Schedule B Line 23, and exclude any corresponding deduction under IRC § 965(c) as follows:
 - 60% of IRC § 965(a) inclusion amount from subsidiary capital - [Total IRC § 965(c) deduction x (60% of IRC § 965(a) inclusion amount from subsidiary capital ÷ total IRC § 965(a) inclusion amount)]
- Schedule B, Line 27: Subchapter S Corporations will be permitted to make an election similar to the election available under IRC § 965(n) for purposes of calculating their City tax. In order to make this election, taxpayers must attach a statement to their return indicating their intention to not apply their NOLs against IRC § 965 income. All taxpayers who make this election must enter the amount that would have been allowed if the taxpayer had no income under IRC § 965(a) and no corresponding deduction under IRC § 965(c), provided that a taxpayer's NOL deduction cannot exceed its NYC taxable income.

Instructions for Unincorporated Business Taxpayers Filing Form NYC-204

- On Schedule B, Line 3: Include net amount of IRC § 965 income, calculated by subtracting the deduction allowed under IRC § 965(c) from the IRC § 965(a) inclusion amount.
- Schedule B, Line 21: The IRC § 965(a) inclusion amount on Schedule B, Line 3, other than

dividends from stocks not meeting the holding period requirement under IRC § 246(c), less the IRC § 965(c) deduction amount attributable to that income, should be included in the calculation for Schedule B, Line 21. The IRC § 965(c) deduction amount attributable to 50% of IRC § 965(a) amounts that are dividends other than dividends from stocks not meeting the holding period requirement under IRC § 246(c) is to be calculated as follows:

- Total IRC § 965(c) deduction x (50% of IRC § 965(a) inclusion amount constituting dividends other than dividends from stocks not meeting the holding period requirement under IRC § 246(c) ÷ total IRC § 965(a) inclusion amount).
- Schedule B, Line 29(a): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 3 is investment income, include this amount in the calculation for Schedule B, Line 29(a).
- Schedule B, Line 29(f): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 3 is investment income, in addition to amounts otherwise included on Schedule B, Line 29(f), include an amount equal to:
 - Total IRC § 965(c) deduction x (IRC § 965(a) inclusion amount that is investment income ÷ total IRC § 965(a) inclusion amount)
- Schedule A, Line 3b: Taxpayers who subtracted a distributive share of any IRC § 965(a) inclusion amounts that constitute business income received from another partnership on Line 23 of Schedule B should add back the same percentage of such income as the other partnership allocated to the City for purposes of determining its own business income. Taxpayers who added back a distributive share of any IRC § 965(c) deductions corresponding to business income from another partnership on Line 15 of Schedule B should subtract the same percentage of this deduction that the other partnership allocated to the City for purposes of determining its own business income.
- Schedule A, Line 7b: Taxpayers who subtracted a distributive share of any IRC § 965(a) inclusion amounts that constitute investment income received from another partnership on Line 23 of Schedule B should add back the same percentage of such income as the other partnership allocated to the City for purposes of determining its own investment income. Taxpayers who added back a distributive share of IRC § 965(c) deductions corresponding to investment income from another partnership on Line 15 of Schedule B should subtract the same percentage of this deduction that the other partnership allocated to the City for purposes of determining its own investment income.
- Schedule A, Line 11: Unincorporated Businesses treated as partnerships for federal income tax purposes will be permitted to make an election similar to the election available under IRC § 965(n) for purposes of calculating their City tax. In order to make this election, taxpayers must attach a statement to their return indicating their intention to not apply their NOLs against IRC § 965 income. All taxpayers who make this election must enter the amount that would have been allowed if the taxpayer had no income under IRC § 965(a) and no corresponding deduction under IRC § 965(c), provided that a taxpayer's NOL deduction cannot exceed its NYC taxable income.

Instructions for Unincorporated Business Taxpayers Filing Form NYC-202 and NYC-202EIN

- Schedule B, Line 5: Include net amount of § 965 income, calculated by subtracting the deduction allowed under IRC § 965(c) from the IRC § 965(a) inclusion amount. Fiduciary filers (estates and trusts) must include the **entire** net IRC § 965 amount (including both the net IRC § 965 amount **not** distributed to beneficiaries and the net IRC § 965 amount **distributed** to beneficiaries), even though

only the net IRC § 965 amount distributed to a beneficiary is included in *Other income* reported on federal Form 1041, page 1, line 8.

- Schedule B, Line 17: If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 5 is dividend income other than dividends from stocks not meeting the holding period requirement under IRC § 246(c), include this amount less the IRC § 965(c) deduction amount attributable to that income in the calculation for Schedule B, Line 17. The IRC § 965(c) deduction amount attributable to 50% of IRC § 965(a) amounts that are dividends other than dividends from stocks not meeting the holding period requirement under IRC § 246(c) is to be calculated as follows:
 - Total IRC § 965(c) deduction x (50% of IRC § 965(a) inclusion amount constituting dividends other than dividends from stocks not meeting the holding period requirement under IRC § 246(c) ÷ total IRC § 965(a) inclusion amount).
- Schedule B, Line 25(a): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 5 is investment income, include this amount in the calculation for Schedule B, Line 25(a).
- Schedule B, Line 25(f): If any portion of the IRC § 965(a) inclusion amount on Schedule B, Line 5 is investment income, in addition to amounts otherwise included on Line 25(f), include an amount equal to:
 - Total IRC § 965(c) deduction x (IRC § 965(a) inclusion amount that is investment income ÷ total IRC § 965(a) inclusion amount).
 - Schedule A, Line 11: All taxpayers who make an election under IRC § 965(n) must enter the amount that would have been allowed if the taxpayer had no income under IRC § 965(a) and no corresponding deduction under IRC § 965(c), provided that a taxpayer's NOL deduction cannot exceed its NYC taxable income. Unincorporated Businesses treated as individuals for federal income tax purposes, including individuals who are the sole members of disregarded entities, and trusts and estates, who have made the IRC § 965(n) election for federal tax purposes must calculate their NOLs for City tax purposes in a manner consistent with their federal NOL calculation, and must attach the statement provided to the IRS in connection with IRC § 965(n) to their City return.