§ 1.909–6T Pre-2011 foreign tax credit splitting events (temporary).

(a) Foreign tax credit splitting event—

(1) In general. This section provides rules for determining whether foreign income taxes paid or accrued by a section 902 corporation (as defined in section 909(d)(5)) in taxable years beginning on or before December 31, 2010 (pre-2011 taxable years and pre-2011 taxes) are suspended under section 909 in taxable years beginning after December 31, 2010 (post-2010 taxable years) of a section 902 corporation. Paragraph (b) of this section identifies an exclusive list of arrangements that will be treated as giving rise to foreign tax credit splitting events in pre-2011 taxable years (pre-2011 splitter arrangements). Paragraphs (c), (d), and (e) of this section provide rules for determining the related income and pre-2011 split taxes paid or accrued with respect to pre-2011 splitter arrangements. Paragraph (f) of this section provides rules concerning the application of section 909 to partnerships and trusts. Paragraph (g) of this section provides rules concerning the interaction between section 909 and other Internal Revenue Code (Code) provisions.

(2) Taxes not subject to suspension under section 909. Pre-2011 taxes that will not be suspended under section 909 or paragraph (a) of this section are:

(i) Any pre-2011 taxes that were not paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section;

(ii) Any pre-2011 splitter taxes that were not paid or accrued in connection with a pre-2011 splitter arrangement identified in paragraph (b) of this section (pre-2011 split taxes) but that were deemed paid under section 902(a) or 960 on or before the last day of the pre-2011 taxable year;

(iii) Any pre-2011 split taxes if either the payor section 902 corporation took the related income into account in a pre-2011 taxable year or a section 902 shareholder (as defined in §1.909–1T(a)(2)) of the relevant section 902 corporation took the related income into account on or before the last day of the section 902 corporation’s last pre-2011 taxable year; and

(iv) Any pre-2011 split taxes paid or accrued by a section 902 corporation in taxable years of such section 902 corporation beginning before January 1, 1997.

(b) Pre-2011 splitter arrangements. The arrangements set forth in this paragraph (b) are pre-2011 splitter arrangements.

(1) Reverse hybrid structure splitter arrangements. A reverse hybrid structure exists when a section 902 corporation owns an interest in a reverse hybrid. A reverse hybrid is an entity that is a corporation for U.S. Federal income tax purposes but is a pass-through entity or a branch under the laws of a foreign country imposing tax on the income of the entity. As a result, the owner of the reverse hybrid is subject to tax on the income of the entity under foreign law. A pre-2011 splitter arrangement involving a reverse hybrid structure exists when pre-2011 taxes are paid or accrued by a section 902 corporation with respect to income of a reverse hybrid that is a covered person...
(2) Foreign consolidated group splitter arrangements. A foreign consolidated group exists when a foreign country imposes tax on the combined income of two or more entities. Tax is considered imposed on the combined income of two or more entities even if the combined income is computed under foreign law by attributing to one such entity the income of one or more entities. A foreign consolidated group is a pre-2011 splitter arrangement to the extent that the taxpayer did not allocate the foreign consolidated tax liability among the members of the foreign consolidated group based on each member’s share of the consolidated taxable income included in the foreign tax base. The related income is the earnings and profits attributable to the activities of the disregarded entity. Examples of a disregarded entity include a disregarded entity owned by the same section 902 corporation, two disregarded entities owned by a partnership with one or more partners that are section 902 corporations, a section 902 corporation and a disregarded entity that is owned by that section 902 corporation, or a partnership in which the section 902 corporation is a partner and a disregarded entity that is owned by such partnership.

(B) The owner of the disregarded debt instrument pays a foreign income tax attributable to a payment or accrual on the instrument.

(C) The payment or accrual on the disregarded debt instrument gives rise to a deduction for foreign tax purposes and the issuer of the instrument incurs a shared loss that is taken into account under foreign law by one or more entities that are covered persons with respect to the owner of the instrument.

(i) Split taxes and related income. In situations described in paragraph (b)(3)(i) of this section, pre-2011 taxes paid or accrued by a section 902 corporation with respect to the section 902 corporation. A pre-2011 splitter arrangement involving a reverse hybrid structure may exist even if the reverse hybrid has a deficit in earnings and profits for a particular year (for example, due to a timing difference). Such taxes paid or accrued by the section 902 corporation are pre-2011 split taxes. The related income is the earnings and profits (computed for U.S. Federal income tax purposes) of such other member attributable to the activities of that other member that gave rise to income included in the foreign tax base with respect to which the pre-2011 split taxes were paid or accrued. No inference should be drawn from the treatment of foreign consolidated groups under section 909 as to the determination of the person who paid the foreign income tax for U.S. Federal income tax purposes.
paid or accrued by the owner of the disregarded debt instrument with respect to amounts paid or accrued on the instrument (up to the amount of the shared loss) are pre-2011 split taxes. The related income of a covered person is an amount equal to the shared loss, determined without regard to the actual amount of the covered person’s earnings and profits.

(4) Hybrid instrument splitter arrangements—(i) In general. A hybrid instrument for purposes of this paragraph (b)(4) is an instrument that either is treated as equity for U.S. Federal income tax purposes but is treated as indebtedness for foreign tax purposes (U.S. equity hybrid instrument), or is treated as indebtedness for U.S. Federal income tax purposes but is treated as equity for foreign tax purposes (U.S. debt hybrid instrument).

(ii) U.S. equity hybrid instrument splitter arrangement. If the issuer of a U.S. equity hybrid instrument is a covered person with respect to a section 902 corporation that is the owner of the U.S. equity hybrid instrument, there is a pre-2011 splitter arrangement with respect to the portion of the pre-2011 taxes paid or accrued by the owner section 902 corporation with respect to the amounts on the instrument that are deductible by the issuer as interest under the laws of a foreign jurisdiction in which the issuer is subject to tax but that do not give rise to income for U.S. Federal income tax purposes. Pre-2011 split taxes are the pre-2011 taxes paid or accrued by the section 902 corporation on the income that would have been offset by the interest paid or accrued on the U.S. debt hybrid instrument had such interest been deductible for foreign tax purposes. The related income with respect to a U.S. debt hybrid instrument is the gross amount of the interest income recognized for U.S. Federal income tax purposes by the owner of the U.S. debt hybrid instrument, determined without regard to the actual amount of the owner’s earnings and profits.

(c) General rules for applying section 999 to pre-2011 split taxes and related income—(1) Annual determination. The determination of related income, other income, pre-2011 split taxes, and other taxes, and the portion of these amounts that were distributed, deemed paid or otherwise transferred or eliminated must be made on an annual basis beginning with the first taxable year of the section 902 corporation beginning after December 31, 1996 (post-1996 taxable year) in which the section 902 corporation paid or accrued a pre-2011 tax with respect to a pre-2011 splitter arrangement and ending with the section 902 corporation’s last pre-2011 taxable year. Annual amounts of related income and pre-2011 split taxes are aggregated for each separate pre-2011 splitter arrangement.

(2) Separate categories. The determination of annual and aggregate amounts of related income and pre-2011 split taxes with respect to each pre-2011 splitter arrangement must be made for each separate category as defined in §1.904–4(m) of the section 902 corporation, each covered person, and any other person that succeeds to the related income and pre-2011 split taxes.
In the case of a pre-2011 splitter arrangement involving a shared loss (as described in paragraph (b)(3) of this section), the amount of the related income in each separate category of the covered person is equal to the amount of income in that separate category that was offset by the shared loss for foreign tax purposes. In the case of a pre-2011 splitter arrangement involving a U.S. equity hybrid instrument (as described in paragraph (b)(4)(ii) of this section), the related income is assigned to the issuer's separate categories in the same proportions as the pre-2011 split taxes. Earnings and profits, including related income, are assigned to separate categories under the rules of §§1.904–4, 1.904–5, and 1.904–7. Foreign income taxes, including pre-2011 split taxes, are assigned to separate categories under the rules of §1.904–6. A section 902 shareholder must consistently apply methodologies for determining pre-2011 split taxes and related income with respect to all pre-2011 splitter arrangements.

(d) Special rules regarding related income—(1) Annual adjustments. In the case of each pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), a covered person's aggregate amount of related income must be adjusted each year by the net amount of income and expense attributable to the activities of the covered person that give rise to income included in the foreign tax base, even if the net amount is negative and regardless of whether the section 902 corporation paid or accrued any pre-2011 split taxes in such year.

(2) Effect of separate limitation losses and deficits. Related income is determined without regard to the application of §1.960–1(i)(4) (relating to the effect of separate limitation losses on earnings and profits in another separate category) or section 952(c)(1) (relating to certain earnings and profits deficits).

(3) Pro rata method for distributions out of earnings and profits that include both related income and other income. If the earnings and profits of a covered person include amounts attributable to both related income and other income, including earnings and profits attributable to taxable years beginning before January 1, 1997, then distributions, deemed distributions, and inclusions of related income and other income on a pro rata basis. Any reduction of a covered person's earnings and profits that results from a payment on stock that is not treated as a dividend with respect to all pre-2011 split taxes.

(4) Alternative method for distributions out of earnings and profits that include both related income and other income. Solely for purposes of identifying the amount of pre-2011 split taxes of a section 902 corporation that are suspended as of the first day of the section 902 corporation's first post-2010 taxable year, in lieu of the rule set forth in paragraph (d)(3) of this section, a section 902 shareholder may choose to treat all distributions, deemed distributions, and inclusions out of earnings and profits of a covered person as attributable first to related income. A section 902 shareholder may choose to use this alternative method on a timely filed original income tax return for the first post-2010 taxable year in which the shareholder computes an amount of foreign income taxes deemed paid with respect to a section 902 corporation that paid or accrued pre-2011 split taxes. Such choice by a section 902 shareholder is evidenced by employing the method on its income tax return; the section 902 shareholder need not file a separate statement. A section 902 shareholder that chooses this alternative method must consistently apply it with respect to all pre-2011 splitter arrangements.

(5) Distributions, deemed distributions, and inclusions of related income. Distributions, deemed distributions, and inclusions of related income (including indirectly through a partnership) to persons other than the payor section 902 corporation retain their character as related income with respect to the associated pre-2011 split taxes.
(6) Carryover of related income. Related income carries over to other corporations in the same manner as earnings and profits carry over under section 381, § 1.367(b)–7, or similar rules, and retains its character as related income with respect to the associated pre-2011 split taxes.

(7) Related income taken into account by a section 902 shareholder. Related income will be considered taken into account by a section 902 shareholder to the extent that the related income is recognized as gross income by the section 902 shareholder, or by an affiliated corporation described in paragraph (d)(9) of this section, upon a distribution, deemed distribution, or inclusion (such as under section 951(a)) out of the earnings and profits of the covered person attributable to such related income.

(8) Related income taken into account by a payor section 902 corporation. Related income will be considered taken into account by a payor section 902 corporation if:

(i) The related income is reflected in the earnings and profits of such section 902 corporation for U.S. Federal income tax purposes by reason of a distribution, deemed distribution, or inclusion out of the earnings and profits of the covered person attributable to such related income; or

(ii) The payor section 902 corporation and the covered person are combined in a transaction described in section 381(a)(1) or (a)(2).

(9) Related income taken into account by an affiliated group of corporations that includes a section 902 shareholder. A section 902 shareholder will be considered to have taken related income into account if one or more members of an affiliated group of corporations (as defined in section 1504) that files a consolidated Federal income tax return that includes the section 902 shareholder takes the related income into account.

(10) Distributions of previously-taxed earnings and profits. Distributions and deemed distributions described in paragraph (d) of this section (including in the case of a section 902 shareholder that has chosen the alternative method described in paragraph (d)(4) of this section) do not include distributions of amounts described in section 959(c)(1) or (c)(2), which are distributed before amounts described in section 959(c)(3).

(e) Special rules regarding pre-2011 split taxes—(1) Taxes deemed paid pro-rata out of pre-2011 split taxes and other taxes. If the pre-2011 taxes of a section 902 corporation include both pre-2011 split taxes and other taxes, then foreign taxes deemed paid under section 902 or 960 or otherwise removed from post-1986 foreign income taxes in pre-2011 taxable years will be treated as attributable to pre-2011 split taxes and other taxes on a pro-rata basis.

(2) Pre-2011 split taxes deemed paid in pre-2011 taxable years. Pre-2011 split taxes deemed paid in pre-2011 taxable years in connection with a dividend paid to a shareholder described in section 902(b) retain their character as pre-2011 split taxes. The section 902(b) shareholder will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(3) Carryover of pre-2011 split taxes. Pre-2011 split taxes that carry over to another foreign corporation, including under section 381, § 1.367(b)–7 or similar rules, retain their character as pre-2011 split taxes. The transferee foreign corporation will be treated as the payor section 902 corporation with respect to those pre-2011 split taxes.

(4) Determining when pre-2011 split taxes are no longer treated as pre-2011 split taxes. For each pre-2011 splitter arrangement, as related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section, a ratable portion of the associated pre-2011 split taxes will no longer be treated as pre-2011 split taxes. In the case of a pre-2011 splitter arrangement involving a reverse hybrid or a foreign consolidated group (as described in paragraphs (b)(1) and (b)(2) of this section, respectively), if aggregate related income is reduced to zero (other than as a result of a distribution, deemed distribution, or inclusion described in paragraph (d) of this section) or less than zero, pre-2011 split taxes will retain their character as pre-2011 split taxes until the amount of aggregate related income is positive and
the related income is taken into account by the payor section 902 corporation or a section 902 shareholder as provided in paragraph (d) of this section.

(f) Rules relating to partnerships and trusts—(1) Taxes paid or accrued by partnerships. In the case of foreign income taxes paid or accrued by a partnership, the taxes will be treated as pre-2011 split taxes to the extent such taxes are allocated to one or more section 902 corporations and would be pre-2011 split taxes if the partner section 902 corporation had paid or accrued the taxes directly on the date such taxes are included by the section 902 corporation under sections 702 and 706(a). Further, any foreign income taxes subject to section 909 will be suspended in the hands of the partner section 902 corporation.

(2) Section 704(b) allocations. Partnership allocations that satisfy the requirements of section 704(b) and the regulations thereunder will not constitute pre-2011 splitter arrangements except to the extent the arrangement is otherwise described in paragraph (b) of this section (for example, a payment or accrual on a disregarded debt instrument that gives rise to a shared loss).

(3) Trusts. Rules similar to the rules of paragraph (f)(1) of this section will apply in the case of any trust with one or more beneficiaries that is a section 902 corporation. (4) Other foreign tax credit provisions. Section 909 does not affect the applicability of other restrictions or limitations on the foreign tax credit under existing law, including, for example, the substantiation requirements of section 905(b).

(h) Effective/applicability date. This section applies to foreign income taxes paid or accrued by section 902 corporations in pre-2011 taxable years for purposes of computing foreign income taxes deemed paid with respect to distributions or inclusions out of earnings and profits of section 902 corporations in taxable years of the section 902 corporation beginning after December 31, 2010.

(i) Expiration date. The applicability of this section expires on February 9, 2015.