Office of Chief Counsel
Internal Revenue Service
memorandum

Number: **202439014**
Release Date: 9/27/2024

CC:INTL:B02
POSTS-114031-24

UILC: 965.00-00

date: August 23, 2024

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subject: Dealer in Commodities in Treas. Reg. §1.965-1(f)(13)

This Chief Counsel Advice responds to your request for assistance under section 965 of the Internal Revenue Code ("Code"). This memorandum provides non-taxpayer-specific legal advice regarding when a specified foreign corporation will be considered a dealer in commodities for purposes of the specified commodity exception of Treas. Reg. §1.965–1(f)(13). This advice may not be used or cited as precedent.

I. ISSUE

What does the term "dealer in commodities" mean for purposes of Treas. Reg. §1.965–1(f)(13)?

II. CONCLUSION

Given the absence of a definition for the term "dealer in commodities" in Treas. Reg. §1.965–1(f)(13), the best definition consistent with the purpose of section 965(c) is the common and ordinary dictionary definition (common parlance). Based on common parlance, dealers are persons that conduct a business of buying and selling property in a relevant market without converting it into another form of property. A "dealer in commodities" is therefore a person that conducts a business of buying and selling commodities in a relevant market without converting the commodities into another form of property.

III. BACKGROUND

For purposes of this memo, assume that USP is a United States shareholder (as that term is defined in section 951(b)) ("U.S. shareholder") of various specified foreign corporations ("SFCs") (as that term is defined in section 965(e)). The SFCs that regularly buy and sell commodities may fall within one of three categories:

1. SFCs that purchase commodities from related or unrelated parties/SFCs and sell the same commodities to related or unrelated parties/SFCs ("Category 1 SFCs").

2. SFCs that purchase commodities from related or unrelated parties/SFCs, process the commodities into other commodities, and sell the processed commodities to related or unrelated parties/SFCs ("Category 2 SFCs").

3. SFCs that would be Category 2 SFCs but that also sell unprocessed commodities to related or unrelated parties/SFCs ("Category 3 SFCs").

Whether the SFCs may benefit from the "specified commodity exception" under Treas. Reg. §1.965–1(f)(13) (discussed below) will depend upon whether the SFCs hold the commodities in their "capacity as a dealer or trader in commodities." This memorandum focuses solely on the issue of whether the SFCs are considered to hold commodities in their capacity as a dealer for purposes of the specified commodity exception.

IV. SECTION 965(c)'S LEGAL FRAMEWORK

In general, the effective rate of tax on a U.S. shareholder's section 965 inclusion amount varies based on the "cash position" of the U.S. shareholder's SFCs.[1] Under section 965(c)(1), a U.S. shareholder of a deferred foreign income corporation[2] is generally allowed a deduction, from its section 965 inclusion amount, that generally results in a 15.5% rate of tax on the U.S. shareholder's aggregate foreign cash position and an 8% rate of tax otherwise. Section 965(c)(3)(A) defines the aggregate cash position of a U.S. shareholder based on the cash positions of the U.S. shareholder's SFCs measured on certain cash measurement dates.[3]

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[1] *See generally* section 965(c) (providing for a deduction, the amount of which varies based on a U.S. shareholder's pro rata share of the cash position of each of its SFCs).

[2] Section 965(d)(1) defines a deferred foreign income corporation as any specified foreign corporation ("SFC") of a U.S. shareholder which has accumulated post-1986 deferred foreign income greater than zero.

[3] *See* Treas. Reg. §1.965-1(f)(15) (it defines the cash measurement dates to consist of the first cash measurement date, the second cash measurement date, and the final cash measurement date). The first cash measurement date of an SFC is the close of the last taxable year of the SFC that ends after November 1, 2015, and before November 2, 2016, if any. (Treas. Reg. §1.965-1(f)(25)). The second cash measurement date of an SFC is the close of the last taxable year of the SFC that ends after November 1, 2016, and before November 2, 2017, if any. (Treas. Reg. §1.965-1(f)(31)). The final cash measurement date of an SFC is the close of the last taxable year of the SFC that begins before January 1, 2018, and ends on or after November 2, 2017, if any. (Treas. Reg. §1.965-1(f)(24)).

Section 965(c)(3)(B) defines a SFC's cash position as the sum of:

> (i) cash held by such foreign corporation,
> (ii) the net accounts receivable of such foreign corporation, plus
> (iii) the fair market value of the following assets held by such corporation:
> (I) Personal property which is of a type that is actively traded and for which there is an established financial market.[4]
> (II) Commercial paper, certificates of deposit, the securities of the Federal government and of any State or foreign government.
> (III) Any foreign currency.
> (IV) Any obligation with a term of less than one year.
> (V) Any asset which the Secretary identifies as being economically equivalent to any asset described in this subparagraph.

Commodities generally fall under the category described in section 965(c)(3)(B)(iii)(I).

In section 965(c)(3)(B), Congress provided an enumerated list of items that make up the cash position and express Secretarial authority to expand, but not to narrow, the list. The legislative history further highlights the items that are specifically included in an SFC's cash position, without suggesting any exceptions or possible narrowing of the categories:

> The cash position of an entity consists of all cash, net accounts receivable, and the fair market value of similarly liquid assets, specifically including personal property that is actively traded on an established financial market, government securities, certificates of deposit, commercial paper, foreign currency, and short-term obligations. In addition, the Secretary may identify other assets that are economically equivalent to the enumerated assets that are included.[5]

As a general matter, then, Congress expressed an intention that "all" property falling within the enumerated listed items be included in the cash position, with that property "specifically including" personal property that is actively traded on an established financial market. In light of this general Congressional intent that all items described in the enumerated list be included in the cash position, and in the absence of a specific

[4] Emphasis added.
[5] H.R. Rep. No. 115–446, 609–10 (2017) (emphasis added); cite also to House Bill, and the Senate Amendment. *See also* H.R. Rep. 115-409, 379 (2017); S. Print. No 115-20, 365 (2017).

grant of authority to the Secretary to narrow the list, any regulatory exceptions to the list should be interpreted narrowly so as to best harmonize with the statutory text.[6] [7]

The proposed regulations under section 965 did not contain any exceptions to section 965(c)(3)(B)(iii)(I).[8] Prop. Treas. Reg. §1.965–1(f)(13) read as follows: "(13) Cash-equivalent asset. The term cash-equivalent asset means any of the following assets – (i) Personal property which if of a type that is actively traded and for which there is an established financial market. In addition, the Secretary may identify other assets that are economically equivalent to the enumerated assets that are treated as cash."[9] The preamble to the proposed regulations, however, noted that "comments requested exceptions for commodities representing inventory or supplies."[10]

The Department of the Treasury ("Treasury Department") and the Internal Revenue Service ("IRS"), in response to taxpayers' comments, included in the final regulations an exception to section 965(c)(3)(B)(iii)(I) for certain commodities that qualify as inventory or supplies (the "specified commodity exception").[11] The preamble to the final regulations described the comments asking for an exception for certain commodities as follows:

> Comments requested that certain products or raw materials held as inventory that are a type of property that may be actively traded on, for example, commodities markets, and forward contracts with respect to those items be excluded from a specified foreign corporation's cash position if the items are part of the corporation's ongoing operations or are disposed of in the normal course of business.[12]

The preamble to the final regulations explicitly stated, twice, that the specified commodity exception is a narrow exception:

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[6] *See e.g.*, Time Warner Entertainment Co., L.P. v. Everest Midwest Licensee, L.L.C., 381 F.3d 1039, 1050 (10th Cir. 2004) (providing that "a regulation must be interpreted in such a way as to not conflict with the objective of its organic statute"), citing Joy Technologies, Inc. v. Sec. of Labor, 99 F.3d 991, 996 (10th Cir. 1996) ("[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.").

[7] Although Congress did not provide the Secretary specific authority to narrow the enumerated list of cash position items, section 965(o) authorizes the Secretary to prescribe regulations as may be necessary or appropriate to carry out the provisions of section 965. Accordingly, while any regulatory exceptions to the enumerated list should be interpreted narrowly to best harmonize with Congressional intent, it was nonetheless within the Secretary's regulatory discretion to provide limited exceptions that were necessary or appropriate.

[8] Guidance Regarding the Transition Tax Under Section 965 and Related Provisions ("Proposed Regulations"), 83 Fed. Reg. 39514, 39546 (August 2018).

[9] Proposed Regulations, 83 Fed. Reg. 39514, 39346 (August 2018)

[10] Preamble to the Proposed Regulations, 83 Fed. Reg. 39514, 39538 (August 2018).

[11] Regulations Regarding the Transition Tax under Section 965 and Related Provisions ("Final Regulations"), 84 Fed. Reg. 1838, 1840 (February 2019).

[12] Preamble to the Final Regulations, 84 Fed. Reg. 1838, 1840 (February 2019).

> The Treasury Department and the IRS have determined that a narrow exemption from the definition of "cash position" is appropriate for certain assets held by a specified foreign corporation in the ordinary course of its trade or business as well as certain privately negotiated contracts to buy or sell such assets. Therefore, in response to comments, the final regulations provide that a commodity that is described in section 1221(a)(1) or 1221(a)(8) in the hands of the specified foreign corporation is excluded from the category of personal property which is of a type that is actively traded and for which there is an established market, except with respect to dealers or traders in commodities.[13]
>
> …
>
> These well-settled delineations of what constitute inventory or supplies are consistent with the statutory definition of and legislative history explaining cash-equivalent assets in section 965(c)(3)(B)(iii). Moreover, the contours of this category have been carefully defined through common law and are generally well-understood by taxpayers. As a result, an exception from cash-equivalent assets for this type of property is well-defined and understood, consistent with statutory intent, and appropriately narrow.[14]

Thus, as published in the final regulations, Treas. Reg. §1.965–1(f)(13) reads as follows:

> (13) Cash-equivalent asset—
>
> (i) In general. The term cash-equivalent asset means any of the following assets— (A) Personal property which is of a type that is actively traded and for which there is an established financial market, other than a specified commodity;
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> . . .
>
> (ii) Specified commodity. The term specified commodity means a commodity held by a specified foreign corporation that, in the hands of the specified foreign corporation, is property described in section 1221(a)(1) or 1221(a)(8). This paragraph (f)(13)(ii) **does not apply with respect to a specified foreign corporation that is a dealer or trader in commodities**.[15]

Two months after the publication of the final regulations, in response to taxpayer's comments, the Treasury Department and the IRS clarified the specified commodity exception through a technical correction.[16] The technical correction revised the specified commodity exception to read as follows:

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[13] *Id.* (emphasis added).
[14] *Id.*, at 1970 (emphasis added).
[15] Final Regulations, 84 Fed. Reg. 1838, 1880 (February 2019) (emphasis added).
[16] Regulations Regarding the Transition Tax Under Section 965 and Related Provisions; Correction ("Technical Correction"), 83 Fed. Reg. 14260 (April 2019).

> The term specified commodity means a commodity held, or, for purposes of paragraph (f)(18) of this section, to be held, by a specified foreign corporation that, in the hands of the specified foreign corporation, is property described in section 1221(a)(1) or 1221(a)(8). This paragraph (f)(13)(ii) **does not apply with respect to commodities held by a specified foreign corporation <u>in its capacity as a dealer or trader in commodities</u>**.[17]

By adding the words "in its capacity as a dealer or trader in commodities," the technical correction clarified that merely being a dealer or trader in commodities does not result in the commodities held by a dealer/trader being included in the SFC's cash position, as there are dealers/traders that also engage in production and manufacturing by processing a commodity into another commodity or property (for example, processing oil into gasoline, or cotton into t-shirts), and, therefore, do not hold the commodity in their capacity as a dealer or trader.

Thus, under Treas. Reg. §1.965–1(f)(13)(ii), which incorporates the technical correction, the specified commodity exception does not apply to the commodities that are held by an SFC in its capacity as a dealer or trader in commodities (the "specified commodity's dealer/trader carve out"). In other words, the specified commodity exception of Treas. Reg. §1.965-1(f)(13) excludes from an SFC's cash position the FMV of commodities only if they are both inventory in the hands of the SFC <u>and</u> not held by the SFC in its capacity as a dealer or trader in commodities. The regulations do not define a "dealer or trader in commodities" or what it means to hold commodities in a capacity as a dealer or trader. Nor do they provide any cross reference to other regulations or code sections for a definition.

V. <u>ANALYSIS</u>

In the absence of a definition or cross reference for a term, a reasonable approach is to look to the relevant definitions within the Code, the case law, and common and ordinary dictionary definitions (common parlance).[18] In considering the term "dealer," this memorandum analyzes a variety of these definitions and addresses whether using these definitions would be reasonable for purposes of section 965(c) and which is best.

A. Definition of a Dealer in Section 864(b) and Regulations Thereunder

[17] *Id.* (emphasis added).

[18] See Sutherland Statutory Construction § 47:27 (7th ed.) ("Usually the words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired a technical meaning or unless a definite meaning is apparent or indicated by the context of the words."), *citing* <u>United States v. Hansen</u>, 599 U.S. 762, 775 (2023); <u>National R.R. Passenger Corp. v. Morgan</u>, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); <u>Asgrow Seed Co. v. Winterboer</u>, 513 U.S. 179, 115 S. Ct. 788, 130 L. Ed. 2d 682 (1995); <u>Smith v. U.S.</u>, 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993).

The regulations under section 864 provide one of the oldest definitions in the international tax context of a type of dealer. Section 864(b)(2)(A)(ii) and (B)(ii) generally provide that if a foreign person who is not a dealer trades in U.S. stocks, securities, or commodities, for their own account, whether through its own employees or through a U.S. agent, the trading activity does not create a U.S. trade or business (this rule is generally known as a trading safe harbor). Section 864(b)(2)'s trading safe harbor and its exclusion for dealers was enacted by the Congress in 1966 to expand the scope of the prior trading safe harbor.

The 1966 expansion was intended to widen the circumstances in which a foreign person could trade in U.S. stocks and commodities without establishing a U.S. trade or business, while limiting those benefits to non-dealers.[19] Thus, the trading safe harbor, similar to the specified commodity exception, has a carve out for dealers. As a result of this carve out, if a foreign non-dealer trades in U.S. stocks, securities, or commodities for its own account, it would benefit from the trading safe harbor and would not be viewed as having a U.S. trade or business. But if a foreign dealer engaged in the same activity, it would have a U.S. trade or business.

Section 864 does not define a dealer. Treas. Reg. §1.864-2(c)(2)(iv)(*a*), which was published in 1967 and has remained substantially the same since, defines a dealer in stocks or securities as a merchant of stocks or securities, with an established place of business, regularly engaged as a merchant in purchasing stocks or securities, and selling them to customers with a view to the gains and profits that may be derived therefrom.[20] In other words, to be a dealer in stocks or securities for purposes of section 864(b)(2)'s trading safe harbor, there are two key elements (1) being a merchant of stocks or securities with an established place of business with a view to the gains and profits derived from buying and selling securities, and (2) regularly engaging as a merchant in purchasing stocks or securities and selling them to customers
The final regulations under section 864, however, do not provide a definition for a "dealer in commodities" or of a "dealer" generally. Treas. Reg. §1.864-2(c)(2)(iv)(a), which limits its definition to that of a "dealer in stock or securities," therefore has limited informative ability when determining what a "dealer in commodities" means for purposes of the specified commodity exception.

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[19] H.R. Rep. No. 89-1450, 55-57 (1966).

[20] This definition has been in the regulations since the Notice of the Proposed Rule Making, 32 Fed. Reg. 14848, 14850 (October 1967). ("(iv) Definition of dealer in stocks or securities—(a) in general. For purposes of this subparagraph, a dealer in stocks or securities is a merchant of stocks or securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged as a merchant in purchasing stocks or securities and selling them to customers with a view to the gains and profits that may be derived therefrom. Persons who buy and sell, or hold, stocks or securities for investment or speculation, irrespective of whether such buying or selling constitutes the carrying on of a trade or business, and officers of corporations and members of partnerships who in their individual capacities buy and sell, or hold, stocks or securities for investment or speculation are not dealers in stocks or securities within the meaning of this subparagraph. In determining under this subdivision whether a person is a dealer in stocks or securities such person's transactions in stocks or securities effected both in and outside the United States shall be taken into account.")

B. Definition of a Regular Dealer under Treas. Reg. §1.954-2(a)(4)(iv)

Section 954(c) provides a definition for a "regular dealer" in the context of foreign personal holding company income ("FPHCI"). Congress enacted section 954(c) as part of the 1986 tax reform that significantly expanded the scope of FPHCI. Section 954(c)(1) defines FPHCI to include the excess of gains over losses from the sale or exchange of certain property. Section 954(c)(2)(C) provides an exception from FPHCI from this category of income for "regular dealers."

As a result of section 954(c)'s regular dealer exception, FPHCI does not include income derived by regular dealers from sale of exchange of certain property entered into in the ordinary course of the regular dealer's trade or business. In other words, if a foreign person who is a regular dealer derives certain types of income, that income is not FPHCI. On the other hand, if a person who is not a regular dealer derives the same income, that income is FPHCI. Thus, unlike section 864(b)(2)'s dealer carve-out from the trading safe harbor and Treas. Reg. §1.965–1(f)(13)(ii)'s specified commodities dealer carve out, this exception from FPHCI provides a tax benefit to regular dealers.

Treas. Reg. §1.954-2(a)(4)(iv) defines a "regular dealer," for purposes of FPHCI, as a CFC that "(A) regularly and actively offers to, and in fact does, purchase property from and sell property to customers who are not related persons (as defined in section 954(d)(3)) with respect to the controlled foreign corporation in the ordinary course of a trade or business; or (B) regularly and actively offers to, and in fact does, enter into, assume, offset, assign or otherwise terminate positions in property with customers who are not related persons (as defined in section 954(d)(3)) with respect to the controlled foreign corporation in the ordinary course of a trade or business."[21]

In other words, in relevant part,[22] to be a regular dealer for purposes of section 954(c)(2)(C)'s exception from FPHCI, there are three key elements (1) purchasing and selling property to customers (2) that are unrelated (3) regularly and actively in the ordinary course of business.

Given that (a) Treas. Reg. §1.954-2(a)(4)(iv) defines a "regular" dealer as opposed to a dealer, and (b) the regulation is drafted to reflect the policies of subpart F that an exception from subpart F income be narrow (namely, by providing a definition of "regular dealer" that does not involve related party transactions), using the definition of a regular dealer found in the section 954 regulations for purposes of section 965 is not reasonable. Using a narrow definition of a dealer for purposes of the specified commodity exception would broaden the scope of the exception, which would be contrary to the general legislative intent behind section 965(c) to include in the cash position all property covered by section 965(c)(3)(B)'s enumerated list of items and the

[21] Emphasis added.

[22] The second part of the regular dealer definition that addresses derivatives is not relevant to the fact pattern at hand and hence is not discussed here.

language in the preamble to the final regulations under section 965 to have a "narrow" exception.

C. Definition of a Dealer under Section 199A

Section 199A(a), which was enacted by Congress in 2017, in the same bill that enacted section 965, provides a deduction for certain non-corporate taxpayers, the amount of which depends on having a "qualified trade or business." Section 199A(d)(1) defines a "qualified trade or business" as any trade or business other than a "specified service trade or business." Section 199A(d)(2) defines a "specified service trade or business" as, among others, performance of services that consists of trading or dealing in securities or commodities.

Treas. Reg. §1.199A-5(b)(2)(xiii)(B) defines "dealing in commodities," for purposes of section 199A(d)(2), as "regularly purchasing commodities from and selling commodities to customers in the ordinary course of a trade or business or regularly offering to enter into, assume, offset, assign, or otherwise terminate positions in commodities with customers in the ordinary course of a trade or business." An exception, however, is provided with respect to gains and losses from "qualified active sales." Treas. Reg. §1.199A-5(b)(2)(xiii)(1) defines qualified active sales to mean "the sale of commodities in the active conduct of a business as a producer, processor, merchant, or handler of commodities if the trade or business is as an active producer, processor, merchant or handler of commodities." The section 199A regulations, borrowing from the "qualified active sale" definition of Treas. Reg. 1.954-2(f)(2)(iii),[23] provide a relatively low bar for the types of activities required to give rise to a commodities trade or business, including merely blending and drying agricultural commodities, concentrating, refining, mixing, crushing, aerating or milling commodities, or owning and operating facilities for storage or warehousing of commodities.[24]

Stated simply, in relevant part,[25] there are three key elements for being a "dealer" in commodities for purposes of section 199A(d)(2)'s deduction for qualified trade or businesses: (1) purchasing and selling commodities to customers, (2) regularly in the ordinary course of a trade or business, (3) but excluding qualified active sales.

The qualified active sales exception, and therefore Treas. Reg. §1.199A-5(b)(2)(xiii)(B)'s definition of "dealing in commodities" as a whole, is inappropriate for purposes of the specified commodity exception. The minimal level of activity necessary to give rise to a qualified active sale substantially narrows the definition of a dealer, which, in the context of section 965(c), would substantially broaden the specified commodities exception. As discussed, a broad specified commodities exception would

[23] Treas. Reg. § 1.954-2(f) generally includes gains from commodities transactions in foreign personal holding company income, with an exception for gains arising from qualified active sales.
[24] Treasury Regulations Section 1.199A-5(b)(2)(xiii)(4), (5).
[25] The part of the "dealing in commodities" definition that addresses derivatives is not relevant to the fact pattern at hand and hence is not discussed here.

be contrary to the general legislative intent behind section 965 and the language in the preamble to the final regulations to have a "narrow" exception. Further, the qualified active sales definition found in Treas. Reg. §1.954-2(f)(2)(iii) predates both section 199A and section 965. The final regulations under section 965(c) could have easily incorporated the qualified active sales rules in defining a dealer in commodities for purposes of the specified commodity exception but did not do so. The qualified active sale exception was therefore implicitly rejected by the final regulations.

D. Definition of a Dealer in Securities under Section 475(c)

Under section 475(a), which was enacted by the Congress in 1993, dealers in securities must, in the case of any security that is inventory in their hands, include the security in inventory at its fair market value, and in the case of any security which is not inventory in their hands and that is held at the close of any taxable year, recognize gain or loss as if such security were sold for its fair market value on the last business day of such taxable year, taking into account such gain or loss for such taxable year (this is generally known as the mark to market rule). Section 475(c)(1) defines a "dealer in securities" for purposes of section 475 as "a taxpayer who-- (A) regularly purchases securities from or sells securities to customers in the ordinary course of a trade or business; or (B) regularly offers to enter into, assume, offset, assign or otherwise terminate positions in securities with customers in the ordinary course of a trade or business."[26]

In other words, in relevant part,[27] to be a "dealer" in securities for purposes of section 475's mark to market rules, there are two key elements (1) in the ordinary course of business regularly, (2) purchasing or selling securities to customers (disjunctive test).

Given its disjunctive test, the definition of a dealer under section 475(c) is very broad. Using such a broad definition of a dealer for purposes of the specified commodity exception (*i.e*., a broad carve out) narrows the scope of the specified commodity exception to a point where the specified commodity exception would have little or no function. It is therefore not reasonable to use this definition for purposes of Treas. Reg. §1.965–1(f)(13) as having such a broad definition for a dealer would effectively write the specified commodity exception out of the regulations.

E. Definition of a Dealer in Case Law

There is ample case law on the definition of a dealer, mainly focused on distinguishing a dealer from a trader or an investor for purposes of qualification of gain as capital gain.

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[26] Section 475(e) provides that a dealer in commodities may elect to apply section 475 to commodities held by such dealer in the same manner as section 475 applies to securities held by a dealer in securities. A "dealer in commodities" is not specifically defined in section 475.

[27] The second part of the dealer definition that addresses derivatives is not relevant to the fact pattern at hand and hence is not discussed here.

One of the seminal cases in this regard is Kemon v. Commissioner.[28] In this case, the Tax Court described dealers as follows:

> Those who sell 'to customers' are comparable to a merchant in that they purchase their stock in trade, in this case securities, with the expectation of reselling at a profit, not because of a rise in value during the interval of time between purchase and resale, but merely because they have or hope to find a market of buyers who will purchase from them at a price in excess of their cost. This excess or mark-up represents remuneration for their labors as a middle man bringing together buyer and seller, and performing the usual services of retailer or wholesaler of goods. ... Such sellers are known as 'dealers.'[29]

This definition of a dealer in Kemon has been cited as the key definition of a dealer by other courts in different circuits.[30]

Thus, to be a "dealer" under case law, there are two key elements (1) purchase and sale of the same property to customers, (2) with the expectation of reselling at a profit that represents remuneration for their labors as a middleman bringing together buyer and seller. Similar to certain statutory definitions discussed above, the case law definition of a dealer requires a dealer to buy and sell (conjunctive test).

In defining a "dealer," the case law emphasizes the characteristics that distinguish a dealer from a trader. In the context of the specified commodity exception, these distinctions are of less immediate relevance because bother dealers in commodities and traders in commodities are excluded from the exception. Nonetheless, the case law's emphasis that a dealer derives its profits from acting as a middleman is informative of the nature of a dealer and ultimately consistent with the common parlance understanding of a dealer discussed below.

F. Definition of a Dealer in the Common Parlance

When a term is not defined in a statute, as is the case here, courts turn to its ordinary and contemporary dictionary meaning.[31] "Usually the words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired a technical meaning or unless a definite meaning is apparent or indicated by

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[28] Kemon v. Commissioner, 16 T.C. 1026 (T.C. 1951).
[29] Kemon, 16 T.C. at 1032-33. (internal citations omitted).
[30] *See e.g.*, Martin v. Commissioner, 147 F.3d 147, 151 (2d Cir. 1998); United States v. Diamond, 788 F.2d 1025, 1027 (4th Cir.1986); Mirro–Dynamics Corp. v. U.S., 374 F.2d 14, 16 (9th Cir.1967); U.S. v. Wood, 943 F.2d 1048, 1051 (9th Cir.1991); Frank v. Commissioner, 321 F.2d 143, 150-151 (8th Cir. 1963); Bielfeldt v. Commissioner, T.C. Memo. 1998-394 (T.C. 1998); MacAdam v. Commissioner, T.C. Memo. 1991-410 (T.C. 1991); King v. Commissioner, 89 T.C. 445, 458 (1987).
[31] Garland v. Cargill, 602 U.S. 402, 415-416 (2024); Sutherland Statutory Construction § 66:3 (8th ed.), citing Wisconsin Central Ltd. v. U.S., 138 S. Ct. 2067 (2018).

the context of the words."[32] As shown above, the definitions of "dealer" in the Code and regulations exist in their own distinct contexts and, for varyious reasons, do not provide an appropriate meaning of "dealer in commodities" for purposes of the specified commodity exception. Hence, it is appropriate to turn to the ordinary dictionary definitions of the term "dealer" to determine its meaning in common parlance. Here, the meaning of a term in a regulation is at issue, but the same inquiry into the ordinary and common meaning is appropriate given the lack of definition in the regulations.[33]

Webster's Third New International Dictionary defines a dealer as "a person who makes a business of buying and selling goods especially without altering their condition,"[34] and that is typical of other dictionary definitions.[35]
The ordinary dictionary definition therefore supports a common parlance understanding of "dealers" as referring to persons that conduct a business of buying and selling property (conjunctive test) in a relevant market without adding value by converting the purchased property into different property.[36] A dealer in commodities is therefore a person that conducts a business of buying and selling a given commodity in a relevant market without adding value by converting the commodity into different property.

This understanding is consistent with the case law understanding of a dealer discussed above.

VI. CONCLUSION

As discussed above, the common parlance meaning of a dealer in commodities refers to a person that conducts a business of buying and selling a given commodity in a relevant market without converting it into another property. In the absence of a definition in the final section 965(c) regulations or any cross-reference to other definitions of a "dealer" provided by the Code, the specified commodity exception should be understood as adopting this common parlance understanding.

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[32] Sutherland Statutory Construction § 47:27 (7th ed.), *citing* United States v. Hansen, 599 U.S. 762, 775 (2023); National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 115 S. Ct. 788, 130 L. Ed. 2d 682 (1995); Smith v. U.S., 508 U.S. 223, 113 S. Ct. 2050, 124 L. Ed. 2d 138 (1993).

[33] *See e.g.*, Mitchell v. Commissioner, 775 F.3d 1243, 1249 (10th Cir. 2015) (providing that in interpreting regulations, "we apply the same rules we use to interpret statutes" and "[w]e begin by examining the plain language of the text, giving each word its ordinary and customary meaning.").

[34] *Dealer*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d. ed. 1986).

[35] Black's Law Dictionary defines a dealer as "someone who purchases goods or property for sale to others; a retailer;" or "a person or firm that buys and sells securities for its own account as a principal, and then sells to a customer." *Dealer*, Black's Law Dictionary (11th ed. 2019). The Concise Oxford English Dictionary defines a dealer as "a person who buys and sells goods" or "a person who buys and sells shares or other financial assets as a principal (rather than as a broker or agent)." *Dealer*, CONCISE OXFORD ENGLISH DICTIONARY (12th ed. 2011).

[36] While the Webster's definition *expressly* emphasizes the absence of converting or altering the property that is bought and sold (Webster's Third New International Dictionary), the Black's Law Dictionary and Concise Oxford English Dictionary definitions listed in n. 35 imply as much by referring to the purchasing and selling of "goods" or "property," without any suggestion that the "goods" or "property" sold are different than the "goods" or "property" purchased.

Further, in contrast with definitions of "dealer" provided elsewhere in the Code or regulations, this common parlance meaning is consistent with both the legislative intent behind section 965(c) and the Treasury Department's objective to create a narrow exception from including the value of commodities in an SFC's cash position. The common parlance meaning is also consistent with the case law's understanding of a dealer.

Thus, under the common parlance understanding of a dealer and for purposes of the specified commodity exception:

1. Category 1 SFCs that purchase commodities from related or unrelated parties and sell the same commodities to related or unrelated parties are dealers.

2. Category 2 SFCs that purchase commodities from related or unrelated parties, process the commodities into other commodities, and sell the processed[37] commodities to related or unrelated parties are not dealers.

3. Category 3 SFCs that purchase commodities from related or unrelated parties, process a portion of the commodities into other commodities, and sell the processed commodities and unprocessed commodities to related or unrelated parties are dealers with respect to the portion of the commodities that are sold without processing but are not dealers with respect to the portion of the commodities that are sold after processing.

VII. DISCLOSURE

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

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[37] Processing in this context means manufacturing, producing, or constructing. Storing, handling, shipping, or transporting do not constitute processing. As discussed above, the common parlance understanding of a dealer is of a person that buys and resells the same product in a relevant market. Thus, by definition, a dealer engages in manufacturing, production, or construction, by changing the form of the underling property, is not holding that product in its capacity as a dealer. Section 965 and its regulations do not define the term dealer. Nor do they define the term production, which is indirectly related to the definition of the term dealer. However, Treas. Reg. 1.954-3(a)(1)(ii)(a) specifically provides that "the term 'processing' shall be deemed not to include handling, packing, packaging, grading, storing, transporting, slaughtering, and harvesting." *See also*, Garnac Grain v. Commissioner, 95 T.C. 7 (T.C. 1990) (wherein the Tax Court disagreed with the taxpayer, a global grain merchant, that its use of grain elevators that stored grain (the storage included drying, cleaning, aerating, blending, and fumigating grains) rose to the level of manufacturing or productions for purposes of section 993 (the regulations under section 993 offer a similar definition of production as in section 954) and found for the IRS that the grain storage activities provided by the grain elevators did not rise to the level of production.).

Please call (202) 317-6934 if you have any further questions.