



International Tax

United States Tax Alert

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Proposed section 367(a)/(d) regs eliminate tax-free transfers of foreign goodwill and going concern value

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On September 14, 2015, the US Internal Revenue Service (IRS) and Treasury issued proposed regulations under section 367(a) and (d) of the Internal Revenue Code that would eliminate the ability of taxpayers to transfer foreign goodwill or going concern value outbound on a tax-free basis.¹ Once finalized, the proposed regulations would apply *with retroactive effect* to transfers occurring on or after September 14, 2015.²

The proposed regulations would amend the exception for property transferred for use in the active conduct of a trade or business outside the US under section 367(a) and Treas. Reg. §1.367(a)-2 with respect to transfers of foreign goodwill and going concern value, so that such transfers either would be:

- Subject to immediate tax under section 367(a) and the regulations thereunder; *or*
- At the election of the taxpayer, subject to tax over its useful life under section 367(d).³

In addition, the proposed regulations would no longer limit the useful life under section 367(d) to 20 years.

The proposed regulations generally would consolidate the active trade or business regulations into one regulation section without substantive change. However, the regulations do propose to tax the transfer of certain property acquired in the ordinary course of business of the U.S. transferor that will be carried on by the foreign transferee and denominated in the foreign currency of the foreign transferee's country that currently is tax-free under Treas. Reg. §1.367(a)-5T(d)(2).

¹ REG-139483-13.

² The proposed regulations would also apply to transfers occurring before September 14, 2015 resulting from section 7701 entity classification elections filed on or after that date. The preamble to the proposed regulations states that no inference is intended by the proposed regulations regarding the application of current law.

³ The proposed regulations make conforming changes to the section 6038B regulations, accordingly.

The proposed regulations would eliminate the current regulations' approach to valuing foreign goodwill and going concern value. In its place, proposed section 1.367(a)-1(b)(3) explicitly states that in any case where a US transferor's transfer of property to a foreign corporation constitutes a "controlled transaction" under the section 482 regs, the value of the property transferred is determined in accordance with section 482 and the regulations thereunder. (Temporary regulations were issued on September 14, 2015 under section 482 on the arm's length standard and best method rule, and the coordination of these provisions with other provisions, such as section 367.)⁴

Observations

The proposed regulations take a different approach than the Obama administration's FY16 budget, where the administration proposed to amend section 936(h)(3)(B) to "clarify" that foreign goodwill, going concern value and workforce in place are included in that list of intangible property (for prior coverage, see [tax alert dated February 6, 2015](#)). Thus, because the definition of section 936(h)(3)(B) is untouched in the new proposed regulations, the IRS and Treasury have taken no position in this package on the question of whether US goodwill is subject to section 367(a) or installment treatment under section 367(d). The preamble focuses on foreign goodwill and going concern value as the reasons for the change in the regulations but does not address workforce in place. As a result, one may question whether the proposed regulations are intended to affect workforce in place in the same manner as goodwill and going concern value.

⁴ See T.D. 9738.

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