



International Tax

## United States Tax Alert

September 15, 2015

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

#### Contacts

Gretchen Sierra  
gretchensierra@deloitte.com

Harrison Cohen  
harrisoncohen@deloitte.com

Jeremy Sina  
jesina@deloitte.com

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.<sup>1</sup> Once finalized, the proposed regulations would apply *with retroactive effect* to transfers occurring on or after September 14, 2015.<sup>2</sup>

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).<sup>3</sup>

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).

<sup>1</sup> REG-139483-13.

<sup>2</sup> 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.

<sup>3</sup> 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.)<sup>4</sup>

## 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.

---

<sup>4</sup> See T.D. 9738.

---

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see [www.deloitte.com/about](http://www.deloitte.com/about) for a more detailed description of DTTL and its member firms. Certain services are not available to attest clients under the rules and regulations of public accounting.

Deloitte provides audit, consulting, financial advisory, risk management, tax and related services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries and territories, Deloitte brings world-class capabilities and high-quality service to clients, delivering the insights they need to address their most complex business challenges. Deloitte’s more than 210,000 professionals are committed to becoming the standard of excellence.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte network”) is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2015. For information, contact Deloitte Touche Tohmatsu Limited.