The Proposed Section 367 Regulations and the Temporary Section 482 Regulations

The Government's Response to "Abusive" Outbound Transfers of Intangible Property

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What we will cover

- Some themes in the new regulations
- The relevant statute
- The new proposed and temporary regulations
- Some practical examples
- Tax policy considerations
- Safe harbors and exceptions
- Appendix – some definitions

Some themes in the new regulations

- **Combating BEPS**
  - U.S. MNC have located intangible assets offshore, often in low-tax jurisdictions. There is a perception that the U.S. tax base has been eroded by the outbound transfer of intangible assets for inadequate consideration by exploiting section 367.
  - The preamble to the proposed regulations states that the section 367 regulations have been "abused" because otherwise taxable transfers of intangible assets have been mischaracterized as tax-exempt transfers of foreign goodwill (and other non-section 936 intangibles) and taxpayers have employed inappropriate transfer pricing methods to undervalue the section 936 intangibles transferred.
- **Updating section 367 guidance to address post-1986 developments:**
  - The contraction of the non-recognition provisions of section 367 is consistent with, and back stops, the contraction of non-recognition for transfers to partnerships provided by section 721 in Notice 2015-54.
  - The transfer pricing regulations have continued to evolve since the 367(d) regulation were written 30 years ago. The methods for valuing "platform contribution" in the cost sharing regulations differ from the general methods found in the section 482 regulations that are applicable to transfers described in section 367(d). Some taxpayers prefer to transfer intangible property to a cost sharing participant using section 367(d) rather than making it available as a platform contribution. The proposed regulations would eliminate any advantage provided by section 367(d).
- **Updating the transfer pricing regulations to prevent abuse**
  - Revising the transfer regulations to support a transfer pricing method that values assets in the aggregate (rather than individually) in appropriate cases.
- **Raising revenue**
  - Goodwill (foreign or domestic) is typically a significant portion of the value of many businesses, so taxing foreign goodwill could have a significant revenue effect.

Overview of section 367(a) and (d)

- Section 367 is the gateway for U.S. persons seeking access to the non-recognition rules of subchapter C (sections 332, 351, 354, 356 and 361) for transfers of property to foreign corporations.
- Section 367(a) addresses transfers of property from the United States to a foreign corporation that would otherwise be tax-free under subchapter C's non-recognition rules. Such transfers are taxable unless they meet one of the statutory exceptions:
  - An exception for certain transfers of stock or securities of a corporation (foreign or domestic).
  - An exception for the transfer of assets to be used in the conduct of an active trade or business outside the United States (the "ATB exception").

Overview of section 367(a) and (d)

- Section 367(d) separately addresses the outbound transfer of certain intangible property in a transaction described in section 351 or section 361(a).
  - Such transfers are removed from section 367(a) and taxed under section 367(d).
  - Only “intangible property,” as defined in section 936(h)(3)(B), is subject to section 367(d). The temporary regulations provide a carve-out for foreign goodwill and going concern value and certain self created copyrights, etc.
  - This intangible property is treated as sold for consideration contingent upon the productivity, use or disposition of the property for a period that is the lesser of its useful life or 20 years.
  - Section 482 applies to determine the annual inclusion, which is treated as a foreign-source royalty to the transferor.
  - The included income must be “commensurate with the income attributable to the intangible” (the “CWI” rule).
  - By election, transfers of “operating intangibles” (section 936(h)(3)(B) intangibles not ordinarily licensed to unrelated parties), transfers required by foreign law and certain transfer to a joint venture may be taxed as if sold for FMV in the year of the transfer.
  - An early disposition of the intangible by the transferee (or the shares of the transferee) generally triggers recognition of gain to the transferor with respect to the property.

Overview of section 367(a) and (d)

- Intangible property, not defined in section 936(h)(3)(B) is:
  - Not subject to section 367(d).
  - Eligible for the ATB exception.
- Alternative views on the treatment of foreign goodwill and going concern value under the temporary regulations:
  - It is intangible property described in section 936(h)(3)(B), but it is exempted from tax under section 367(d) by Reg. § 1.367(d)-1T(b) ("section 367(d) and the rules of this section shall not apply to the transfer of foreign goodwill or going concern value . . .")
  - It is not intangible property described in section 936(h)(3)(B), but it may qualify for the ATB exception of section 367(a)(3).
- For several years, the Obama Administration has asked Congress to pass legislation providing that goodwill and going concern value are intangible property for purposes of section 367(d).
  - "The proposal would provide that the definition of intangible property under section 936(h)(3)(B) (and therefore for purposes of sections 367(d) and 482) also includes workforce in place, goodwill, and going concern value, and any other item owned or controlled by a taxpayer that is not a tangible or financial asset and that has substantial value independent of the services of any individual. The proposal also would clarify that where multiple intangible properties are transferred, the Commissioner may value the intangible properties on an aggregate basis where that achieves a more reliable result." *General Explanations of the Administrations' Fiscal 2016 Revenue Proposals, at 24.*

The proposed changes to the regulations under section 367

- Remove the exception for foreign goodwill and going concern value in the current regulations under section 367(d).
- Narrow the ATB exception to three classes of assets used in the active conduct of a trade or business outside the United States. These assets are referred to as "eligible property" by the proposed regulations. These asset classes are:
  - Tangible property
  - Working interests in oil and gas
  - Cash, securities, commodity positions and notional principal contracts
- Eligible property does not include:
  - Inventory
  - Installment obligations
  - Foreign currency or property denominated in a foreign currency
  - Certain tangible property with respect to which the transferor is the lessor
- U.S. transferors must comply with reporting under section 6038B in order to qualify for nonrecognition treatment.

The proposed changes to the regulations under section 367

- Contrast with the current temporary regulations
  - Generally no tax on the outbound transfer of assets used in a trade or business conducted outside the United States **unless** the asset is one of the types specified in the regulations:
  - Inventory
  - Certain copyrights
  - Installment obligations,
  - Accounts receivable
  - Foreign currency or property denominated in a foreign currency (certain exceptions)
  - Certain tangible leased property

The proposed changes to the regulations under section 367

- Removing the exception for foreign goodwill while narrowing the assets classes eligible for the ATB exception means the following types of assets of a foreign trade or business that were not - or arguably were not - taxed under the temporary regulations would now be taxed:
  - Foreign goodwill
  - Other intangible assets not described in section 936(h)(3)(B), e.g., marketing intangibles, work force in place
  - Foreign currency denominated obligations acquired in the ordinary course

The proposed changes to the regulations under section 367

- Section 367(d) now applies to “intangible property,” which is defined as property defined in section 936(h)(3(B) <u>and property to which a U.S. person elects to apply section 367(d)</u>.
- The IRS does not indicate in the proposed regulations whether foreign goodwill, etc. are described in section 936(h)(3)(B). The taxpayer must decide how to classify the property.
- What is the difference between taxation under section 367(a)(3) and section 367(d)?
  - Under section 367(a)(3), the tax is paid in the year of the transfer, and the IRS has a limited period to challenge the taxpayer’s valuation.
  - Under section 367(d), the tax is paid over time, and the IRS may apply CWI to adjust the income inclusion based on data from post-transfer years, subject to safe-harbor rules that may foreclose an adjustment.
- A taxpayer may wish to elect to apply section 367(d) to avoid a challenge by the IRS on audit that it has misclassified an asset.
  - Does CWI apply to intangible property to which the taxpayer has made the election?

The proposed changes to the regulations under section 367

- The useful life-limit of 20 years in Reg. § 1.367(d)-1T(c)(3) is eliminated. Useful life is defined as “the entire period during which exploitation of the intangible property is reasonably anticipated to occur.” The section 367(d) royalty therefore may continue indefinitely if the taxpayer cannot substantiate a fixed life.
- Regulations under section 6038B are modified and expanded.

The new temporary regulations under section 482

- Reg. §1.482-1T(f)(2)(i) “Compensation independent of the form or character of controlled transaction.”
  - All value provided between controlled parties requires arm’s length compensation, regardless of the form or character of transactions, considering the entire arrangement.
  - Amount to be determined under the best method rule of Reg. §1.482-1(c) and “must be consistent with, and must account for all of, the value provided between the parties in the transaction, without regard to the form or character of the transaction.”
  - Combined effect of multiple transactions under different Code sections may need to be valued in aggregate to capture synergies among the transactions.
  - Coordinated best method analysis required.
  - Aggregate value may need to be allocated among the transactions in a way that “provides the most reliable measure of an arm’s length value for each allocated amount.”

Effective dates and retroactivity

- The proposed regulations, if finalized in their current form, will be effective from September 14, 2015.
- The temporary regulations remain in effect.
- **Reliance**
  - The proposed regulations are subject to a comment period. If the comment period is to be meaningful, the Treasury should be open to changing the proposed regulations to reflect the views of the public.
  - If the proposed regulations may be revised, is it reasonable to require them to be followed at this time?
- **Penalties**
  - If a taxpayer makes a transfer of intangible property subject to the proposed regulations after September 14 and files under the final regulations, will the taxpayer be subject to interest and penalties if it later amends its return to follow the proposed regulations once they are finalized?

Applying the proposed regulations: joint ventures

Facts

- USCo operates a hotel chain in the United States.
- USCo's board has approved a plan to expand its business overseas through a joint venture with a foreign investor.
- USCo sets up a new jointly owned foreign holding company in the Netherlands, DutchCo, to own and manage the companies that will own its foreign properties.
- The foreign investor contributes real estate to DutchCo.
- USCo assigns the foreign rights to USCo's tradename to DutchCo. USCo also assigns the right to certain hotel management and quality control processes that it recently acquired for $20M.

Analysis

- Under section 367(d) USCo includes in income annually a deemed royalty with respect to the foreign rights to the USCo name and processes. This royalty may continue indefinitely.
- How does USCo recover basis in the processes contributed to DutchCo?
- No transfer of goodwill (either foreign or domestic) as there has been no transfer of a trade or business.

Applying the proposed regulations: incorporating a foreign branch

Facts

- ApparelCo is in the business of the design, manufacture and distribution of active sportswear. ApparelCo has a profitable U.S. business.
- In 2005 ApparelCo formed a subsidiary in Mexico, MCo, to develop and sell products in the Latin American market.
- MCo elected to be a disregarded entity.
- MCo designs, manufactures and distributes sportswear in Latin America, and it operates independently of ApparelCo.
- On January 2016, MCo will elect to be treated as a corporation for U.S. tax purposes. Using a discounted cash flow analysis, MCo is valued at $ 500M.

MCo's Balance Sheet
12/31/15

Cash and securities	$10	Liabilities	$100
Accounts receivable	$40	Equity	$500
PP&E	$150		
Trademarks and copyrights	$100		
Goodwill	$300		
Total	$600	Total	$600

Applying the proposed regulations: incorporating a foreign branch

Analysis

- The outbound transfers of trademarks, copyrights and goodwill are taxable. The trademarks and copyrights are taxable under section 367(d).
- ApparelCo must decide how to characterize the goodwill. Is it a section 367(a) asset or a section 367(d) asset? If it is an (a) asset, the full value of the goodwill is taxable under section 367(a) in the year of the transfer, unless ApparelCo makes the (d) election. If goodwill is a (d) asset, a deemed royalty is taxed over time under section 367(d).
- If ApparelCo reports the transaction under section 367(d), how is the deemed royalty determined? Do current regulations under section 482 address a license of goodwill? It may not be an asset described in Reg. § 1.482-4. Goodwill is typically not licensed but is sold with a business.
- May the IRS seek to adjust the royalty for goodwill under the CWI principal? Is goodwill an intangible asset described in section 936(h)(3)(B)? How long does goodwill last?

Applying the proposed regulations: cost sharing

Facts

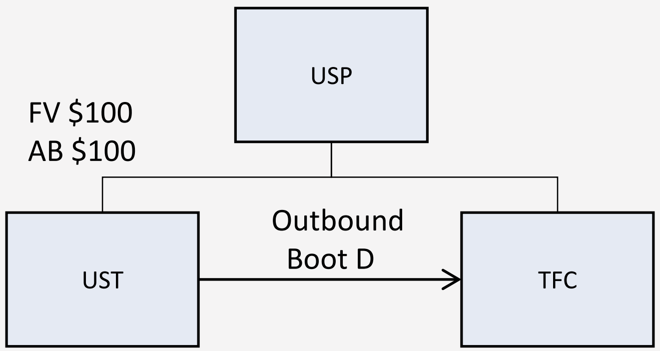
- InstructCo, a U.S. company with no foreign office or subsidiary, offers on-line training to health care professionals using a proprietary technology that allows students to learn more quickly than traditional methods and enhances retention of materials taught.
- InstructCo sells its services to hospitals in the United States and Europe. In order to expand its European business, InstructCo forms a subsidiary in Ireland, IrishCo.
- IrishCo hires management, marketing, finance and programming personnel. IrishCo also enters into a cost sharing arrangement to share the cost of developing the next version of the company's technology.
- InstructCo assigns its foreign customer list and foreign goodwill to IrishCo for $1.
- IrishCo determines its PCT payment due to InstructCo under the cost sharing agreement by separately valuing the foreign platform rights to the current version of its software. IrishCo does not use the income method to value the platform rights.

Applying the proposed regulations: cost sharing

Analysis

- Under the temporary 482 regulations the PCT payment and the foreign goodwill transfer are aggregated.
- Under the proposed 367 regulations, the transfers of the foreign customer list (an asset described in section 936(h)(3)(B)) and the foreign goodwill are taxable.
- Under the temporary 482 regulations, the best method analysis and valuation of the technology, customer list and foreign goodwill transfers must be coordinated.
- An analysis of these transactions in aggregate using an income method applied to the projected income of the IrishCo business may be the best method. If so, the resulting value must be allocated between the PCT, 367(a) and 367(d) transactions.

Outbound asset reorgs - Notice 2012-39



	FV	AB	BIG
Assets	20	5	15
Goodwill	30	0	30
IP	50	0	50

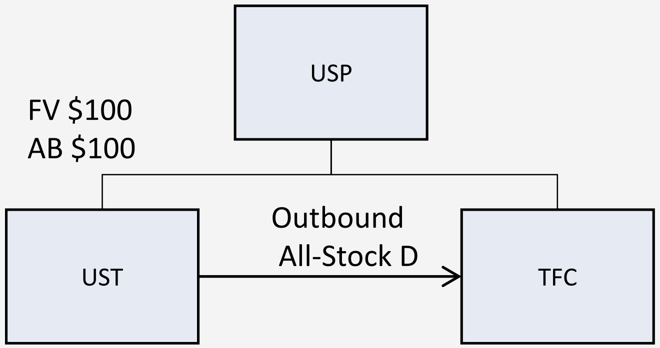
Summary:

- UST has three groups of assets and has no liabilities.
- In a boot D reorganization, UST distributes the US Assets to USP and TFC issues $80 of cash for the remaining UST assets.

Results under Notice 2012-39:

- UST recognizes $15 of gain on the distribution of the US Assets. USP is not taxed on the receipt of the consideration (section 356(a) boot-within-gain rule).
- Prior to the Notice, advisors might have treated goodwill as foreign goodwill that was a section 367(d) asset, but excluded from any deemed income inclusion under Reg. § 1.367(d)-1T(b).
- However, the Notice defines section 367(d) property as "property described in §936(h)(3)(B)." Thus, even if a taxpayer concludes that foreign goodwill is generally excepted from the imputed income treatment under §367(d) (per Reg. § 1.367(d)-1T(b)), it would still be "described in §936(h)(3)(B)," resulting in a section 367(d) % of 100% under the Notice.
- USP received $100 of consideration (which includes the $20 of US Assets) but the $20 of US Assets is a US Transferor Distribution. Thus, there is a prepayment of $80 (100% x $80) and no ability to cash pay future section 367(d) amounts to the extent less than $80.

Outbound asset reorgs - the proposed regulations



	FV	AB	BIG
Foreign Assets	20	5	15
Goodwill	30	0	30
IP	50	0	50

Summary:

- UST has three groups of assets and has no liabilities.
- In an all-stock D reorganization, UST transfers all its assets to TFC in exchange for $100 of TCFC stock. (UST then liquidates).

Results under the Proposed Regulations:

- UST recognizes $15 of gain on the transfer of the Foreign Assets, unless any assets are “eligible property” used in active foreign trade or business. See Prop. Reg. § 1.367(a)-2(a)(2).
- The Proposed Regs, similar to the Notice, do not provide guidance on whether goodwill is subject to sections 367(a) or (d). Instead, they provide that foreign goodwill will either be subject to gain recognition under section 367(a) or deemed income under section 367(d). See Prop. Reg. § 1.367(d)-1(b)(2) (which removes exception for foreign goodwill that currently exists under section 367(d)).
- As before, the transfer of the IP would be subject to section 367(d).

Applying the new regulations: change of business

Facts

- MNCo sells widgets in the United States and abroad. Widget A is manufactured in the United States and sold to distributors in the United States and Europe by one of MNCo's U.S. subsidiaries, DSub-1. Widget A also is manufactured and sold in Europe and Asia by one of MNCo's foreign subs, CFC-1. In connection with the introduction of a new and improved Widget A, Parent instructs DSub-1 to discontinue selling into the European market and contributes $10M to CFC-1 to expand and update its manufacturing facility.

Analysis

- Has MNCo caused DSub-1 to make a transfer of goodwill to CFC-1? Is the transfer taxable?
- There has been no transfer of goodwill because there has been no outbound transfer of a trade or business. See, e.g., *Peerless Investment Co*., 58 TC 892 (1972). An opportunity to negotiate and enter into a contract is not an asset for purposes of section 367(a). *Hospital Corporation of America*, 81 T.C.520 (1983)

Development of section 367(d)

- The definition of intangible in section 482 has its roots in section 936(h), which was added to the Code in 1982 along with section 367(d).
- Sections 936(h) and 367(d) were enacted in response to the possibility of the outbound transfer of individual intangible assets by section 936 companies. See, *Eli Lilly*, 84 TC 996 (1985). In 1984, section 367(d) was expanded to include transfers by any U.S. company.
- Congress was concerned with allowing a deduction to a U.S. taxpayer for intangible development expenses followed by deferral of the associated income in a foreign corporation. Thus, the statute contains a comparatively narrow definition of intangible asset (see section 936(h)(3)(B)) when compared to the broader definition in section 197.
- Regulations under section 367(d) were issued in May 1986.

Goodwill and going concern value

- "**Goodwill** is the value of a trade or business attributable to the expectancy of continued customer patronage. This expectancy may be due to the name or reputation of a trade or business or any other factor." Reg. § 1.197-2(b)(1). See also, *Newark Morning Ledger*, 507 U.S. 546 (1993).

- **Going concern value** is the additional value that attaches to property because of its existence as an integral part of an ongoing business activity. Going concern value includes the value attributable to the ability of a trade or business (or a part of a trade or business) to continue functioning or generating income without interruption notwithstanding a change in ownership. It also includes the value that is attributable to the immediate use or availability of an acquired trade or business, such as, for example, the use of the revenues or net earnings that otherwise would not be received during any period if the acquired trade or business were not available or operational. Reg. §1.1060-1(b)(2(ii). Compare Reg. § 1.197-2(b)(2).

Goodwill and going concern value

- **Financial accounting goodwill**
  - Arises solely as a result of an acquisition.
  - It is computed as total asset value less identified asset value. Typically intangible assets are separately identified and valued (trademark and trade name, customer relationships, developed technology, in-process R&D) subject to recognition criteria.
- **Narrow v. broad definition of goodwill** (TAM 200907024.)
  - The IRS argues that the section 367(d) regulations use a “narrow” definition of goodwill that excludes customer-based intangibles.
  - Traditional definitions of goodwill derived from *Newark Morning Ledger* are labeled “too broad.”
- **Platform contributions in a cost sharing arrangement**
  - Tax goodwill and going concern value generally are not a “resource, capability or right” and so not a platform contribution. Reg. § 1.482-7(c)(1).
  - However, the cost sharing regulations include an example stating that financial accounting goodwill resulting from an acquisition may be economically attributable to other intangible assets that typically would be included in a platform contribution. See Reg. § 1.482-7(g)(2)(7)(B), Example 1.
  - The income method in the cost sharing regulations, which may be used to determine PCT payments, also can capture the return to the goodwill of the foreign participant in the cost sharing arrangement.

Foreign goodwill

- "**Foreign goodwill or going concern value** is the residual value of a business operation conducted outside the United States after all other tangible and intangible assets have been identified and valued." Reg. § 1.367(a)-1T(d)(5).
- **Congress presumes that foreign goodwill can be identified**.
  - Section 865(d)(3) provides: "To the extent this section applies to the sale of goodwill, payments in consideration of such sale shall be treated as from sources in the country in which such goodwill was generated."
- **The current definition of foreign goodwill suffers from vagueness**.
  - The NYSBA wrote a report on section 367(d) in 2010 recommending that the definition of foreign goodwill be made more precise.
    - "We also note that methodologies for differentiating foreign goodwill from domestic goodwill would benefit from greater articulation. In this regard, the report suggests that segregation of foreign goodwill either by apportionment based on gross revenues (as is used for interest allocation purposes) or by a three factor formulas (e.g., salaries, property and sales), should be adopted as a default rule."
  - Consider a definition that ties the source of goodwill to the location of a business's "significant people functions." See OECD Report on the Attribution of Profits to a Permanent Establishment (2010).

Tax policy issues: the abuses

- The preamble to the proposed regulations identifies two types of abuse that justify the changes to the regulations:
- **Transfer Pricing Abuse:** Taxpayers use transfer pricing methods that improperly allocate value away from taxable high-value intangibles to tax-exempt foreign goodwill.
  - Taxpayers employ an item-by-item analysis when an aggregate analysis would be more reliable
  - Taxpayer do not properly perform a “full factual and functional analysis of the business.”
- Example of transfer pricing abuse
  - A taxpayer owns a group of valuable patents necessary for a profitable activity. The patents are split into two group, neither of which has significant valuable without the other. One group is transferred to a CFC in a section 367(d) transaction. The other group is made available to the same CFC in a cost sharing arrangement as a PCT. The taxpayer does not aggregate the two groups of patents when determining their value.

Tax policy issues: the abuses

- **Definitional Abuse:** Taxpayers employ too broad a definition of foreign goodwill. Taxpayers take the position:
  - Goodwill is foreign as long as customers are outside the United States
  - Value created through customer facing activities in the United States creates foreign goodwill.
- Example of Definitional Abuse
  - TAM 200907024 (*First Data Corp. v. Commission*, Docket No. 7042-09). In connection with the overseas growth of its business, USCo entered into contracts with numerous foreign agents to transact with foreign customers.
  - USCo sought to transfer these contracts (and other assets) to a CFC. Taxpayer argued the contracts should be valued individually and had limited value.
  - The bulk of the business value (97%) was ascribed to foreign goodwill. The IRS argued that the group of contracts was a “network” that was a section 936 intangible that should be valued on an aggregate basis.
  - The case was settled.

Tax policy issues

- **Has Congress "directly spoken to the precise question at issue"? *Chevron*, Step 1**
- **The statute:** Section 367(a)(3)(A) provides Treasury with authority to remove property from nonrecognition under section 367(a)(3) "Except as provided in regulations, paragraph (1) shall not apply . . . ." There is no delegation of authority under section 367(d), however.
- Consider the legislative history of section 367(d):
  - "The committee contemplates that, ordinarily, no gain will be recognized on the transfer of goodwill and going concern value for use in an active trade or business. Similarly, it is expected that regulations will provide that gain will not be recognized on a transfer of marketing intangibles (such as trademarks or trade names) in appropriate cases." *Senate Committee Report on the Tax Reform Act of 1984.*
  - "Except in the case of an incorporation of a foreign loss branch, the Congress did not believe that the transfer of goodwill; going concern value, or certain marketing intangibles should be subject to tax. Goodwill and going concern value are generated by earning income not incurring deductions. Thus, ordinarily the transfer of these (or similar intangibles) does not result in avoidance of Federal income taxes." *JCT Explanation of the Tax Reform Act of 1984*
- **Does the legislative history limit the Treasury's authority under section 367(a)(3)(A) or section 7805(a) to make transfers of foreign goodwill taxable?**

Tax policy issues

- **Is the "reasoned decision making" standard of *State Farm* satisfied?**
- **Has the Treasury shown a connection between the facts found and the choice made? *State Farm.***
  - "To engage in reasoned decision making, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962))." *Altera v. Commissioner*, 145 TC No. 3 (July 27, 2015).
- **How could the Treasury better document abuse?**
  - Examine taxpayers' Forms 926 (Return by a U.S. Transferor of Property to a Foreign Corporation) Do some/many/all of them show large amounts of foreign goodwill? See Form 926, line 15(b) (foreign goodwill).
  - Examine the associated Schedules UTP of companies filing Form 926. Do the Schedules UTP support the view that companies have created reserves for their foreign goodwill positions?
  - On balance, does the quantum of "abuse" warrant elimination of the foreign goodwill exception for all taxpayers?

Tax policy issues

- **Is there a “rational connection” between the abuse and elimination of the exception for foreign goodwill?**
- **Could the identified “abuses” have been addressed in a manner compatible with the legislative history?**
  - Revise the definition of foreign goodwill, which is vague and open to more than one interpretation. See the NYSBA Tax Section Report on Section 367(d) (2010).
- What are the advantage and disadvantages of the broader approach of the proposed regulations?

Safe harbors and exceptions

- **When should transfers of foreign goodwill not be taxed because the risk of “abuse” is low?**
- The preamble to the proposed regulations requests comments on cases that should be carved out of the general recognition rule.
  - Incorporation of a branch is required by a regulator is offered as an example.
- Other possible exceptions
  - The value of the branch’s intangible property is relatively small.
  - The branch satisfies a safe harbor based on the relative value of its foreign goodwill to the value of its section 936 intangibles.
  - The taxpayer receives an advance ruling that it has not abused the definition of foreign goodwill. The legislative history of section 367(d) states that taxpayers may continue to request rulings on section 367 transactions and that the IRS may grant a ruling in its discretion. *Senate Committee Report on the Tax Reform Act of 1984.*

Appendix – Some Definitions

Definition of intangible property in section 936(h)(3)(B)

The term “intangible property” means any—

(i) patent, invention, formula, process, design, pattern, or know-how;

(ii) copyright, literary, musical, or artistic composition;

(iii) trademark, trade name, or brand name;

(iv) franchise, license, or contract;

(v) method, program, system, procedure, campaign, survey, study, forecast, estimate, customer list, or technical data; or

(vi) any similar item,

which has substantial value independent of the services of any individual.

Definition of “section 197 intangible”

Section 197(d)(1): Except as otherwise provided in this section, the term “section 197 intangible” means—

(A) goodwill,

(B) going concern value,

(C) any of the following intangible items:

(i) workforce in place including its composition and terms and conditions (contractual or otherwise) of its employment,

(ii) business books and records, operating systems, or any other information base (including lists or other information with respect to current or prospective customers),

(iii) any patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item,

(iv) any customer-based intangible,

(v) any supplier-based intangible, and

(vi) any other similar item,

(D) any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof,

(E) any covenant not to compete (or other arrangement to the extent such arrangement has substantially the same effect as a covenant not to compete) entered into in connection with an acquisition (directly or indirectly) of an interest in a trade or business or substantial portion thereof, and

(F) any franchise, trademark, or trade name.

Definition of “platform contribution”

A platform contribution is any resource, capability, or right that a controlled participant has developed, maintained, or acquired externally to the intangible development activity (whether prior to or during the course of the CSA) that is reasonably anticipated to contribute to developing cost shared intangibles. The determination whether a resource, capability, or right is reasonably anticipated to contribute to developing cost shared intangibles is ongoing and based on the best available information . . . Reg. § 1.482-7(c)(1).