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[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9803]

RIN 1545-BL87

Treatment of Certain Transfers of Property to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to certain transfers of property by United States persons to foreign corporations. The final regulations affect United States persons that transfer certain property, including foreign goodwill and going concern value, to foreign corporations in nonrecognition transactions described in section 367 of the Internal Revenue Code (Code). The regulations also combine certain sections of the existing regulations under section 367(a) into a single section. This document also withdraws certain temporary regulations.

DATES: Effective date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For dates of applicability, see §§1.367(a)-1(g)(5), 1.367(a)-2(k), 1.367(a)-4(b), and 1.367(a)-6(j); 1.367(d)-1(j); and 1.6038B-1(g)(7).

FOR FURTHER INFORMATION CONTACT: Ryan A. Bowen, (202) 317-6937 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in the regulations have been submitted for review and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-0026.

The collections of information are in §1.6038B-1(c)(4) and (d)(1). The collections of information are mandatory. The likely respondents are domestic corporations. Burdens associated with these requirements will be reflected in the burden for Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation. Estimates for completing the Form 926 can be located in the form instructions.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number.

Books and records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains final regulations issued under sections 367 and 6038B of the Code. Temporary regulations were published on May 16, 1986 (TD 8087, 51 FR 17936) (the 1986 temporary regulations). Proposed regulations under these sections were published on September 16, 2015 (80 FR 55568) (the proposed regulations). Written comments to the proposed regulations were received, and a public hearing was

held on February 8, 2016. All comments are available at www.regulations.gov or upon request.

The proposed regulations generally provided five substantive changes from the 1986 temporary regulations: (1) eliminating the favorable treatment for foreign goodwill and going concern value by narrowing the scope of the active trade or business exception under section 367(a)(3) (ATB exception) and eliminating the exception under §1.367(d)-1T(b) that provides that foreign goodwill and going concern value is not subject to section 367(d); (2) allowing taxpayers to apply section 367(d) to certain property that otherwise would be subject to section 367(a); (3) removing the twenty-year limitation on useful life for purposes of section 367(d) under §1.367(d)-1T(c)(3); (4) removing the exception under §1.367(a)-5T(d)(2) that permits certain property denominated in foreign currency to qualify for the ATB exception; and (5) changing the valuation rules under §1.367(a)-1T to better coordinate the regulations under sections 367 and 482 (including temporary regulations under section 482 issued with the proposed regulations (see §1.482-1T(f)(2)(i), TD 9738, 80 FR 55538).

Specifically with regard to the ATB exception, the proposed regulations revised the categories of property that are eligible for the ATB exception so that foreign goodwill and going concern value cannot qualify for the exception. Under the 1986 temporary regulations, all property was eligible for the ATB exception, subject only to five narrowly tailored exceptions. In addition to limiting the scope of the ATB exception, the proposed regulations also implemented changes to the ATB exception that were intended to consolidate various provisions and update the 1986 temporary regulations in response to subsequent changes to the Code.

The proposed regulations did not resolve the extent to which property, including foreign goodwill and going concern value, that is not explicitly enumerated in section 936(h)(3)(B)(i) through (v) (enumerated section 936 intangibles) is described in section 936(h)(3)(B) and therefore subject to section 367(d) or instead is subject to section 367(a) and not eligible for the ATB exception. All property that is described in section 936(h)(3)(B) is referred to at times in this preamble as “section 936 intangibles.” Nonetheless, the proposed regulations permitted taxpayers to apply section 367(d) to such property. Under this rule, a taxpayer that has historically taken the position that goodwill and going concern value is not described in section 936(h)(3)(B) could apply section 367(d) to such property.

These regulations generally finalize the proposed regulations, as well as portions of the 1986 temporary regulations, as amended by this Treasury decision. Although minor wording changes have been made to certain aspects of those portions of the 1986 temporary regulations, the final regulations are not intended to be interpreted as making substantive changes to those regulations. Further explanation of the proposed regulations can be found in the Explanation of Provisions section of the preamble to the proposed regulations. That Explanation of Provisions section is hereby incorporated as appropriate into this preamble.

Summary of Comments and Explanation of Revisions

Nineteen sets of comments were received in response to the proposed regulations, and three speakers presented at the public hearing. In drafting the final regulations, the Treasury Department and the IRS carefully considered all of the comments received.

This section of the preamble is comprised of five parts that discuss, in turn, the comments received with respect to (i) the elimination of the favorable treatment of transfers of foreign goodwill and going concern value, (ii) the useful life of property for purposes of applying section 367(d), (iii) the applicability date of the final regulations, (iv) the qualification of property denominated in foreign currency for the ATB exception, and (v) other issues.

I. Foreign Goodwill and Going Concern Value

A. Overview

The Treasury Department and the IRS received a variety of comments in response to the proposed elimination of the favorable treatment of transfers of foreign goodwill and going concern value provided by the 1986 temporary regulations. Two comments supported the treatment of foreign goodwill and going concern value under the proposed regulations. One comment asserted that allowing intangible property to be transferred outbound in a tax-free manner is inconsistent with the policies of section 367. Other comments acknowledged the concerns about tax avoidance described in the preamble to the proposed regulations, but requested specific exceptions for transfers of foreign goodwill and going concern value in situations that the comments asserted were not abusive. Other comments disagreed more fundamentally with the approach taken and stated that the Treasury Department and the IRS should withdraw the proposed regulations entirely. Many of these comments asserted that eliminating the favorable treatment of transfers of foreign goodwill and going concern value would be an invalid exercise of regulatory authority under section 367.

Overall, the comments indicated widely divergent understandings of the nature of foreign goodwill and going concern value. Accordingly, the comments also widely differed in their proffered justifications for an exception for foreign goodwill and going concern value and in the recommended contours of an appropriate exception. The variance in the comments regarding these fundamental issues highlights the difficulty of permitting some form of favorable treatment for foreign goodwill and going concern value while preventing tax avoidance.

As described in greater detail in Part I.B of this Summary of Comments and Explanation of Revisions, and consistent with the proposed regulations, the final regulations eliminate the favorable treatment of foreign goodwill and going concern value contained in the 1986 temporary regulations. The Treasury Department and the IRS have determined that this change is necessary to carry out the tax policy embodied in section 367 in a fair, impartial, and reasonable manner, taking into account the intent of Congress, the realities of relevant transactions, the need for the IRS to administer the rules and monitor compliance, and the overall integrity of the federal tax system. In particular, the final regulations are consistent with the policy and intent of the statute, which does not reference foreign goodwill or going concern value, and with Congress' expectation that the Secretary would exercise the regulatory authority under section 367 to require gain recognition when property is transferred offshore under circumstances that present a potential for tax avoidance.

B. Interpretation of section 367

1. Summary of Comments Challenging Authority

The Treasury Department and the IRS received numerous comments addressing the proposed regulations' treatment of foreign goodwill and going concern value. One comment asserted that the ATB exception must apply to transfers of foreign goodwill and going concern value, because (i) foreign goodwill and going concern value is not a section 936(h)(3)(B) intangible, and so is subject to section 367(a) rather than section 367(d), and (ii) the legislative history indicates that Congress expected that the transfer of such value should be tax-free. The comment further asserted that, because goodwill and going concern value is inextricably linked to the conduct of an active trade or business, the ATB exception necessarily encompasses such transfers. Other comments asserted that finalizing the proposed regulations would represent an unreasonable exercise of regulatory authority because the proposed regulations eliminated the favorable treatment of all transfers of purported foreign goodwill and going concern value, rather than just those transfers that the Treasury Department and the IRS determine are abusive.

Several comments asserted that the proposed regulations are inconsistent with Congressional intent and cited statements from the legislative history to section 367, such as the following:

The committee does not anticipate that the transfer of goodwill or going concern value developed by a foreign branch to a newly organized foreign corporation will result in abuse of the U.S. tax system. . . . The committee contemplates that the transfer of goodwill or going concern value developed by a foreign branch will be treated under [the exception for transfers of property for use in the active conduct of a foreign trade or business] rather than a separate rule applicable to intangibles.

H.R. Rep. No. 98-432, pt. 2, at 1317-19 (1984).

Comments also asserted that it is inappropriate to use regulatory authority under section 367 to address transfer pricing concerns under section 482.

2. Response

The Treasury Department and the IRS do not agree with the foregoing comments. Section 367 generally provides for income recognition on transfers of property to a foreign corporation in certain transactions that otherwise would qualify for nonrecognition. While section 367(a)(3)(A) includes a broad exception to this general rule for property used in the active conduct of a trade or business outside of the United States, grants of rulemaking authority in section 367(a)(3)(A) and (B) authorize the Secretary to exercise administrative discretion in determining the property to which nonrecognition treatment applies under the ATB exception. Moreover, section 367(d) reflects a clear policy that income generally should be recognized with respect to transfers of section 936 intangibles. The 1984 legislative history to section 367 explains that Congress intended for the Secretary to use his “regulatory authority to provide for recognition in cases of transfers involving the *potential* of tax avoidance.” S. Rep. No. 98-169, at 364 (1984) (emphasis added). The Treasury Department and the IRS have determined that the proposed regulations and these final regulations are consistent with that intention and the authority granted to the Secretary under section 367, based on the fact that the statute does not refer to foreign goodwill and going concern value and the determination that, as described in the preamble to the proposed regulations, the favorable treatment of foreign goodwill and going concern value contravenes the policy that income generally should be recognized with respect to transfers of section 936 intangibles. The remainder of this section discusses subsequent changes to the

regulatory, statutory, and market context in which the 1984 legislative history was drafted, in order to reconcile the statements in the 1984 legislative history expressing the expectation that an exception for foreign goodwill and going concern value would not result in abuse with the IRS's contrary experience administering the statute during the intervening years.

a. The 1980s and early 1990s

The Treasury Department and the IRS considered the 1984 legislative history to section 367 in issuing the 1986 temporary regulations. The 1986 temporary regulations gave effect to the statements in the legislative history indicating that Congress anticipated that the transfer of goodwill and going concern value developed by a foreign branch to a newly organized foreign corporation generally would not result in abuse of the U.S. tax system, and, on that basis, that such transfers would benefit from nonrecognition treatment. As a result, the 1986 temporary regulations provide nonrecognition treatment for foreign goodwill and concern value. The 1986 temporary regulations did not provide a conceptual definition of foreign goodwill and going concern value but, in effect, provided a rule for valuing it by describing foreign goodwill and going concern value as the residual value of a business operation conducted outside of the United States after all other tangible and intangible assets have been identified and valued. §1.367(a)-1T(d)(5)(iii).

The Treasury Department and the IRS also took into account the 1984 legislative history in issuing the proposed regulations and these final regulations. In doing so, the Treasury Department and the IRS also considered that, in amending section 367 in 1984, Congress did not choose to statutorily mandate any particular treatment of foreign

goodwill and going concern value and instead delegated broad authority to the Secretary to promulgate regulations under section 367 to carry out its purposes in this complex area. The Treasury Department and the IRS further considered that the legal and factual context in which the 1984 legislative history was drafted has changed significantly over the last 32 years.

Before 1993, goodwill and going concern value was not amortizable. As a result, in 1984, much of the case law and policy debate regarding goodwill and going concern value involved sales of business operations at arm's length between unrelated parties, where the taxpayer attempted to minimize the value of goodwill in order to maximize the value of amortizable intangibles. See, for example, Newark Morning Ledger Co. v. United States, 507 U.S. 546 (1993). In 1989, the General Accounting Office analyzed data with respect to unresolved tax cases involving purchased intangibles and found that, presumably in order to minimize the amount of unamortizable goodwill, taxpayers had identified 175 different types of customer-based intangibles that were distinct from goodwill. See General Accounting Office, Report to the Joint Committee on Taxation: Issues and Policy Proposals Regarding Tax Treatment of Intangible Assets, at 3 (Aug. 1991).

b. Statutory and regulatory changes

In 1993, Congress addressed these valuation disputes between taxpayers and the IRS by enacting section 197, which, similar to the approach taken by the proposed regulations, did not directly address the underlying disagreement about the relative size of goodwill but substantially reduced the stakes of the disagreement. That is, by generally providing for the amortization of goodwill over 15 years, the enactment of

section 197 generally eliminated the incentive that existed in 1984, when Congress enacted section 367(d) in its present form, for taxpayers to argue that goodwill has relatively minor value.

Other law changes since 1984 have increased the relevance of section 367(d) and the incentive for taxpayers to overstate the value attributable to goodwill and going concern value. Before 1997, amounts received under section 367(d) were treated as ordinary income from U.S. sources. In 1997, Congress amended section 367(d)(2)(C) to provide that amounts received under section 367(d) are treated as ordinary income that is sourced in the same manner as a royalty, and thus potentially as from sources outside the United States. Taxpayer Relief Act of 1997, Public Law 105-34, 111 Stat. 788. The 1997 amendments increased the relevance of section 367(d) and the exception for foreign goodwill and going concern value because, before 1997, the consequences under the foreign tax credit limitation of the treatment of section 367(d) deemed royalties as U.S. source income represented a substantial disincentive for taxpayers to structure transactions in a way that would be subject to section 367(d).

Additionally, the so-called “check-the-box” regulations of §301.7701-3, published December 18, 1996 (TD 8697, 61 FR 66584), and Congress’s enactment in 2006 of the subpart F “look-thru” rule in section 954(c)(6) (Tax Increase Prevention and Reconciliation Act of 2005, Public Law 109-222, 120 Stat. 345), increased the potential benefit to taxpayers from transferring high-value intangibles offshore by reducing obstacles to redeploying cash earned in overseas operations among foreign affiliates without incurring U.S. tax. Both of these changes also facilitate, in certain

circumstances, the ability of foreign subsidiaries to license transferred intangibles to affiliates without incurring subpart F income.

Finally, on January 5, 2009, the Treasury Department and the IRS issued temporary regulations under section 482 (TD 9441, 74 FR 340) related to cost sharing arrangements (subsequently finalized at TD 9568, 76 FR 80082 (Dec. 22, 2011)). The 2009 cost sharing regulations, in particular the supplemental guidance in §1.482-7T(g) on transfer pricing methods applicable in determining the arm's length price for a platform contribution transaction or PCT (so-called "buy-in payments"), were intended, in part, to address inappropriate income shifting from intangible transfers under the prior cost sharing regulations. Although the prior cost sharing regulations did not provide any favorable treatment for foreign goodwill and going concern value, in the experience of the IRS, taxpayers took positions under those regulations that allowed a domestic cost sharing participant to transfer intangibles to a foreign cost sharing participant for development under a cost sharing arrangement without fully compensating the domestic cost sharing participant for the value of the transferred intangibles. It is also the experience of the IRS that the 2009 cost sharing regulations limited taxpayers' ability to use PCTs in cost sharing arrangements to shift high value intangibles offshore without appropriate compensation, thereby increasing the relative appeal of transferring intangibles in a transaction subject to section 367. Thus, taxpayers began using transactions subject to section 367 to transfer intangibles intended for development under a cost sharing arrangement rather than as part of a PCT.

c. Changing markets for intangibles

Moreover, since Congress enacted section 367(d) in its current form in 1984, the relative importance of intangibles in the economy and in the profitability of business has increased greatly. According to a joint report issued by the Economic and Statistics Administration and the U.S. Patent and Trademark Office, “IP use permeates all aspects of the economy with increasing intensity and extends to all parts of the U.S.” Justin Antonipillai, Economics and Statistics Administration, & Michelle K. Lee, U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy*, at p.30 (2016). This growing importance is reflected in the significant increase in the portion of business values attributable to intangible assets in the years since 1984, with one study indicating that intangibles accounted for only 32 percent of the market value of the S&P 500 in 1985, but accounted for 84 percent by 2015. Annual Study of Intangible Asset Market Value from Ocean Tomo, LLC (Mar. 4, 2015, 12:00AM), <http://www.oceantomo.com/2015/03/04/2015-intangible-asset-market-value-study/>. Growth in the share of business values attributable to section 936 intangibles during this period, together with the statutory and regulatory changes discussed in the preceding paragraphs, have increased the incentives for taxpayers to transfer such valuable intangibles to related offshore affiliates in transactions subject to section 367(d) and to misattribute intangible value from enumerated section 936 intangibles to foreign goodwill and going concern value in the context of such transactions.

d. The potential for abuse

Since 1984, taxpayers have reversed their positions regarding the significance of goodwill and going concern value in response to the enactment of sections 197 and 367(d), and now commonly assert that such value constitutes a large percentage –

even the vast majority – of an enterprise’s value. The IRS’s experience administering section 367(d) has, once again, highlighted the abuse potential that arises from the need to distinguish value attributable to nominally distinct intangibles that are used together in a single trade or business. Specifically, the uncertainty inherent in distinguishing between value attributable to goodwill and going concern value and value attributable to other intangible property makes any exception to income recognition for the outbound transfer of goodwill and going concern value unduly difficult to administer and prone to tax avoidance. Of course, any rule that provides for the tax-free transfer of one type of property, while the transfer of other types of property remains taxable, provides an incentive to improperly allocate value away from the taxable property and onto the tax-free property. This problem is acute, however, in cases involving the offshore reorganization of entire business divisions that include high-value, interrelated intangibles, because goodwill and going concern value are particularly difficult to distinguish (perhaps are even indistinguishable) from the enumerated section 936 intangibles. See, for example, International Multifoods Corp. v. Commissioner, 108 T.C. 25, 42 (1997) (noting that it “is well established that trademarks embody goodwill”). See also Joint Committee on Taxation, Present Law and Background Related to Possible Income Shifting and Transfer Pricing, (JCX-37-10) July 20, 2010, at 110 (noting that unique intangible property is difficult to value because it is rarely, if ever, transferred to third parties).

e. Legislative intent and the broad grant of authority to limit potential abuses

These statutory, regulatory, and market developments since Congress amended section 367(d) in 1984, as well as the experience of the IRS in administering section

367 over that period, inform the manner in which the Treasury Department and the IRS seek to give effect to the intent of Congress in this complex area of law. As a starting point, the Treasury Department and the IRS observe that the statutory grants of authority in section 367(a) and (d), coupled with the absence of any specific statutory protection for transfers of goodwill and going concern value, form the basis for the broad authority of the Treasury Department and the IRS to design the appropriate parameters for the taxation of outbound transfers. The 1984 legislative history expressed an expectation that outbound transfers of foreign goodwill and going concern value would not lead to abuse of the U.S. tax system and, on the basis of that expectation, anticipated that the Secretary would exercise the regulatory authority under section 367 in a manner that would allow taxpayers to transfer foreign goodwill and going concern value outbound without current U.S. tax. The legislative history also explains that Congress expected the Secretary to use the “regulatory authority to provide for recognition in cases of transfers involving the potential of tax avoidance.” Accordingly, the administrative discretion to determine the contours of nonrecognition treatment must be exercised in light of the income recognition objectives of the statute and informed by the IRS’s experience in administering the exception.

The Treasury Department and the IRS have determined that the premise of the expectation noted in the legislative history that an exception to recognition treatment would apply to foreign goodwill and going concern value--namely, that outbound transfers of foreign goodwill and going concern value would not lead to abuse--is inconsistent with the experience of the IRS in administering section 367(d), and consequently no longer supports such an exception. Rather, based on the IRS’s

experience over the past three decades, the Treasury Department and the IRS have determined that the favorable treatment of foreign goodwill and going concern value has interfered with the application of the general rule in section 367(d) that requires income recognition upon the outbound transfer of section 936 intangibles due to the inherent difficulty of distinguishing value attributable to goodwill and going concern value from value attributable to enumerated section 936 intangibles, coupled with taxpayer efforts to maximize the value allocated to goodwill and going concern value.

The Treasury Department and the IRS also observe that the 1984 legislative history explains that the 1984 amendments to section 367(d) were made in response to challenges the IRS faced in administering the prior regime. That regime required a taxpayer to clear its purpose for transferring property offshore with the IRS. See H.R. Rep. 98-432, pt. 2, at 1315. The 1984 reworking of section 367 was intended to promote administrability by making the analysis of outbound transfers more objective. Other passages from the legislative history show that the general purpose of the amendments to section 367 was to close “serious loopholes,” and that the 1984 revisions were intended to strengthen the application of that section. Id.

Accordingly, the Treasury Department and the IRS do not view the legislative history as mandating an exception for transfers of goodwill and going concern value developed by a foreign branch, or as indicating that Congress anticipated, or would have condoned, the extent of the claims regarding foreign goodwill and going concern value that the IRS has in fact encountered. To the contrary, the Treasury Department and the IRS have concluded that the statutory purpose of the income recognition provisions in section 367(d) is incompatible with the favorable treatment of foreign

goodwill and going concern value reflected in the 1986 temporary regulations. In particular, taking into account the statutory, regulatory, and market developments since 1984 and the experience of the IRS in administering section 367(d) under the 1986 temporary regulations, the Treasury Department and the IRS have determined that, at this juncture, the approach most consistent with the intent of Congress in 1984, including the directive to use regulatory authority “to provide for recognition in cases of transfers involving the potential of tax avoidance,” is to remove the favorable treatment for foreign goodwill and going concern value in the 1986 temporary regulations.

The Treasury Department and the IRS also disagree with the notion expressed in comments that the proposed regulations inappropriately attempt to solve section 482 transfer pricing problems under the authority of section 367. Congress made clear in adding the commensurate with income language to both sections 367(d) and 482 in 1986 that the provisions are closely related, and it is within the authority of the Treasury Department and the IRS to consider valuation concerns in administering section 367. Section 1231(e)(1) and (2) of the Tax Reform Act of 1986, Public Law 99-514, 100 Stat. 2085, 2562-3.

For these reasons, the Treasury Department and the IRS disagree with comments asserting that the Treasury Department and the IRS lack the authority to eliminate the favorable treatment that applied to foreign goodwill and going concern value under the 1986 temporary regulations.

C. Other comments suggesting that some favorable treatment for transfers of foreign goodwill and going concern value be maintained

Several comments generally favored retaining both the nonrecognition treatment for foreign goodwill and going concern value and its current measurement as the residual value of a foreign business operation. Other comments, however, acknowledged the problems associated with the residual valuation approach but supported an exception determined on some other basis. Some of these comments included suggestions for other ways to define goodwill and going concern value and for determining the amount that should qualify for nonrecognition. The Treasury Department and the IRS have determined that none of the comments provided a sufficiently administrable approach that would reliably ensure that section 367 applies with respect to the full value of all section 936 intangibles.

1. Local Pressure to Incorporate; Industry-Based Exception

The proposed regulations specifically requested comments on a potential exception that would apply to situations where there is limited potential for abuse. As an example, the comment solicitation posited the incorporation, in response to regulatory pressure or compulsion, of a financial services business that previously had operated as a branch in another country. The Treasury Department and the IRS received several comments in response to this solicitation.

Several comments suggested that the final regulations provide an exception that would continue to permit favorable treatment of transfers of foreign goodwill and going concern value that occur as a result of the incorporation of a branch in a country that exerts regulatory pressure (either implicit or explicit) upon the U.S. transferor to conduct its operations in that country in corporate form. According to these comments, the

incorporation of a branch in these circumstances is not motivated by tax considerations but rather occurs in order to comply with local law or regulations.

The regulations under section 367 provide that certain property is deemed to be transferred for use in the active conduct of a trade or business outside of the United States when the transfer is either legally required by the local foreign government as a necessary condition of doing business or is compelled by a genuine threat of immediate expropriation by the local foreign government. Section 367 and the regulations thereunder do not, however, provide exceptions to the requirement to recognize income or gain when assets that are not eligible for the ATB exception, such as section 936 intangibles and assets described in section 367(a)(3)(B), are transferred in this circumstance. Accordingly, the policy of section 367 and the regulations thereunder is not to expand on the types of assets that are eligible for the ATB exception in this circumstance. Moreover, the mere fact that a taxpayer is compelled or pressured to incorporate its branch does not mean that the taxpayer has any less incentive to reduce the tax consequences of such incorporation by adopting the aggressive valuation positions that the proposed regulations were intended to prevent. Therefore, the final regulations do not provide a special exception to continue the favorable treatment of foreign goodwill and going concern value in this circumstance. Notably, some taxpayers that are pressured to incorporate branch operations in these circumstances can avoid being subject to section 367 by incorporating the branch using an eligible entity described in §301.7701-2 that could elect to be treated as a disregarded entity for U.S. federal income tax purposes.

Several comments recommended an exception for transfers of foreign goodwill and going concern value by taxpayers in certain industries, such as banking and finance, life insurance, and industries that primarily provide services to third parties, asserting that such businesses do not possess the types of highly valuable intangibles about which they believe the Treasury Department and the IRS are concerned. The comments did not provide any basis, however, for the Treasury Department and the IRS to conclude that taxpayers in particular industries consistently lack valuable intangibles of the kind listed in section 936(h)(3)(B), even though the prevalence of specific types of intangibles may differ across industries. Additionally, the ability and incentive to allocate value away from other intangibles, such as trademarks, and toward goodwill or going concern value is not limited to particular industries. As a general matter, the Treasury Department and the IRS attempt, to the extent possible, to avoid issuing guidance based on industry classifications that are not clearly and closely tied to specific tax policy concerns. Accordingly, the final regulations do not provide any industry-specific exceptions.

Based on these comments, the Treasury Department and the IRS considered whether it would be possible to provide an exception for tax-free transfers of foreign goodwill and going concern value developed by a foreign branch that did not possess or otherwise benefit from the use of any highly valuable enumerated section 936 intangibles. If the absence of such highly valuable intangibles could be reliably determined, the concerns regarding the potential to attribute value away from such intangibles and toward goodwill and going concern value would be mitigated. However, such an exception would require the development and administration of standards to

determine whether any enumerated section 936 intangible was highly valuable, an exercise that would be as difficult (and in many circumstance would be no different) than the exercise of distinguishing value attributable to foreign goodwill and going concern value from value attributable to other intangibles transferred together with it. Such an exception also would require a careful examination of the particular facts of a transferor's assets and business as a threshold matter to confirm that valuable enumerated section 936 intangibles are not made available for the benefit of the transferee foreign corporation, either through a separate but related transfer to the foreign corporation or through a service provided to the foreign corporation using such intangibles. Accordingly, the Treasury Department and the IRS did not adopt this potential exception in these final regulations.

2. Foreign Branch Exception

Several comments suggested maintaining the favorable treatment of foreign goodwill and going concern value in situations in which section 367 applies to the incorporation of a long-standing foreign branch or a branch that conducts an active foreign business operation. The Treasury Department and the IRS acknowledge that conditioning favorable treatment for foreign goodwill and going concern value on the presence of a robust foreign branch would increase the likelihood that the business at issue has substantive foreign operations. However, in situations where the exception would continue to apply, the requirement of a robust foreign branch would not address the potential for tax avoidance that motivated the proposed regulations when value must be allocated between foreign goodwill and going concern value, on the one hand, and enumerated section 936 intangibles, on the other hand. Thus, the final regulations do

not adopt the comments suggesting an exception for goodwill and going concern value developed by a foreign branch that is subsequently incorporated because, when applicable, such an exception would not address the administrative difficulties in identifying and separately valuing the property that is and is not eligible for the exception, and therefore would be insufficient to prevent the potential for tax avoidance.

3. New Rules for Valuing Foreign Goodwill and Going Concern Value

Other comments suggested that the regulations provide new rules for determining foreign goodwill and going concern value, such that an exception for such transfers could be provided that would be less susceptible to the abuses described in the preamble to the proposed regulations. That is, the comments suggested determining goodwill and going concern value using an approach that differs from that in existing §1.367(a)-1T(d)(5)(iii), which treats it as the residual after other intangibles are valued.

Several of these comments suggested determining foreign goodwill and going concern value by classifying intangibles as routine and non-routine and permitting value attributable to routine intangibles to be transferred tax-free under an exception. One comment asserted that goodwill is relatively easy to value as compared to certain enumerated section 936 intangibles but did not explain why or how goodwill is more easily valued or how to reliably allocate value between goodwill and enumerated section 936 intangibles. Another comment asserted that goodwill can be valued based on the premise that it is the kind of asset that enables an existing business to produce “routine” or “normal” operating profits or cash flow during the period that a new business would

be assembling its assets and workforce and attracting a customer base, but the comment did not explain how to determine “routine” or “normal” operating profits.

Another comment recommended determining foreign goodwill and going concern value using a formulaic approach based on sales and general and administrative expenses, asserting that routine expenses for operational costs and compensation are closely associated with the business activities that give rise to goodwill and going concern value. The comment did not provide any support for this premise. As a general matter, cost-based methods (in comparison with market-based and income-based methods) are not a reliable means of valuing intangible property because the value of intangible property does not necessarily bear any predictable relationship to the costs of developing the property. The comment suggesting a cost-based approach did not demonstrate that determining goodwill and going concern value in the section 367(d) context is a situation where costs are a reliable measure of value (regardless of whether goodwill and going concern value are section 936(h)(3)(B) intangibles). Accordingly, the Treasury Department and the IRS have determined that a rule that determined foreign goodwill and going concern value based on certain expenses would be inappropriate.

Another comment proposed, for branches incorporated in a jurisdiction with which the United States has an income tax treaty in effect, using the earnings before interest, taxes, depreciation, and amortization of the branch as reported to foreign tax authorities as reliable data on which to base a valuation. An exception based on information reported to a foreign country’s tax authority, which may be based on that jurisdiction’s generally accepted accounting standards, does not address the concerns

expressed by the Treasury Department and the IRS in the preamble to the proposed regulations. Most significantly, the comment does not explain how this information would be useful in determining the value of foreign goodwill and going concern value or distinguishing value attributable to enumerated section 936 intangibles from that of other property, nor have the Treasury Department and the IRS been able to identify how it would be useful. Accordingly, this recommendation has not been adopted.

In summary, none of the proposed approaches for more directly valuing foreign goodwill and going concern value offer a principled and administrable basis for allocating value between foreign goodwill and going concern value that would be subject to an exception and other intangibles that would not. The Treasury Department and the IRS therefore concluded that the proposed approaches would not provide a meaningful improvement over the residual value approach in the 1986 temporary regulations as a conceptual or administrative matter.

4. Formulaic Caps on Foreign Goodwill and Going Concern Value

Several comments suggested that the favorable treatment for transfers of foreign goodwill and going concern value could be maintained while addressing the concerns that prompted the issuance of the proposed regulations by capping the amount that can qualify for the exception, either on a non-rebuttable basis or in the absence of a ruling. For example, one comment suggested that the excepted amount should not exceed 25 percent of the branch's net enterprise value, unless a ruling is obtained from the IRS. The comment asserted that 25 percent represents a modest portion of a branch's value that is likely to be attributable to branch goodwill and going concern value. Another comment suggested that the excepted amount should not exceed 50 percent of the total

value of the assets transferred to the foreign corporation. Although such formulaic caps would limit the potential tax avoidance from improperly attributing value from enumerated section 936 intangibles to foreign goodwill and going concern value that is eligible for an exception, the amount excepted under such an approach would still potentially reflect value properly attributable to enumerated section 936 intangibles. That is, with respect to amounts claimed below the cap, a formulaic cap would not relieve the IRS of the need to distinguish foreign goodwill and going concern value from enumerated section 936 intangibles, a key challenge that motivated the approach of the proposed regulations. Moreover, the Treasury Department and the IRS have determined that the discretionary ruling practice proposed by one comment would require an onerous commitment of IRS resources (which the comment acknowledged are constrained), and, without detailed procedures for both identifying and valuing foreign goodwill and going concern value, would simply accelerate the disputes that occur under the 1986 temporary regulations. As a result, the final regulations do not adopt the recommendations to use a formulaic cap to limit the amount of foreign goodwill and going concern value.

5. Professional Services Exception

One comment stated that U.S. citizens may conduct professional services outside the United States as sole practitioners, or in partnership with other practitioners, and observed that the incorporation of such a business would entail a section 351 contribution subject to section 367 (assuming the transferee entity was classified as a corporation for U.S. federal income tax purposes). According to the comment, because any goodwill in such a scenario would relate to foreign customers and a foreign

business or professional license, there could be no abuse warranting taxation under section 367.

The Treasury Department and the IRS do not agree that the outbound transfer of value developed in such cases will necessarily not result in abuse of the U.S. tax system. The potential for abuse in a transfer subject to section 367 arises not just from the possibility that value associated with U.S. customers would be denominated as foreign goodwill, but also from the fundamental difficulty in reliably distinguishing value attributable to enumerated section 936 intangibles from value attributable to other intangibles, an issue that is no different in the professional services context. Therefore, the final regulations do not adopt this comment.

6. Joint Venture Exception

One comment proposed maintaining the favorable treatment of foreign goodwill and going concern value for transfers to joint venture companies, particularly cases in which the U.S. transferor is going into business with one or more unrelated foreign parties (third parties) and in which the U.S. transferor's interest in the joint venture is equal to or less than 50 percent. According to the comment, the U.S. transferor in this situation has a financial incentive to segregate its intangibles contributed to the joint venture from its other property. The presence of a third party, however, would not necessarily reduce the U.S. transferor's incentive to attribute value to foreign goodwill and going concern value, rather than to enumerated section 936 intangibles, in order to minimize the tax consequences of the transfer, since such a distinction may be irrelevant to the third party. Accordingly, the final regulations do not adopt this proposal.

D. Classifying foreign goodwill and going concern value as subject to section 367(a) or (d)

Several comments requested that the Treasury Department and the IRS address whether goodwill and going concern value should be characterized as a section 936(h)(3)(B) intangible, and thus subject to section 367(d), or instead as property subject to section 367(a). Comments also requested that the regulations provide certainty to taxpayers that have taken the position that goodwill and going concern value is not described in section 936(h)(3)(B) by providing that such taxpayers will be permitted to treat goodwill and going concern value as property subject to section 367(a) rather than section 367(d).

As discussed in the preamble to the proposed regulations, the Treasury Department and the IRS acknowledge that taxpayers have taken different positions regarding the scope of section 936(h)(3)(B) and that the issue is more significant following the elimination of the favorable treatment for foreign goodwill and going concern value. Any enumerated section 936 intangible, and any item similar to such specifically enumerated intangibles, is subject to the regime provided by section 367(d). The Treasury Department and the IRS have determined that it would be inconsistent with the policy underlying section 367(d) to permit intangible property that is described in section 936(h)(3)(B) to be subject to section 367(a). Accordingly, the Treasury Department and the IRS have determined that it is appropriate to retain the approach provided in the proposed regulations, which allows taxpayers to apply section 367(d) to certain property that otherwise would be taxed under section 367(a) but which continues to require taxpayers to apply section 367(d) to all property described in section

936(h)(3)(B). Because the identification of items that are neither explicitly listed in section 936(h)(3)(B)(i) through (v) nor explicitly listed as potentially qualifying for the ATB exception generally will require a case-by-case functional and factual analysis, the final regulations do not address the characterization of such items as similar items (within the meaning of section 936(h)(3)(B)(vi)) or as something else. In general, potential rules under section 367 for identifying and valuing transferred property are beyond the scope of these final regulations.

II. Useful Life

The proposed regulations eliminated the 20-year limitation on useful life for intangible property subject to section 367(d) that was included in §1.367(d)-1T(c)(3), because of concerns that the limitation results in less than all of the income attributable to transferred intangible property being taken into account by the U.S. transferor. In the preamble to the proposed regulations, the Treasury Department and the IRS solicited comments on how to simplify the administration of section 367(d) inclusions for property with a very long useful life in the absence of the 20-year limitation. In response to this comment solicitation, several comments requested that the final regulations restore the 20-year limitation on useful life because it promotes administrability for both taxpayers and the IRS.

After considering the comments received, the Treasury Department and the IRS agree that a 20-year limitation on inclusions may promote administrability for both taxpayers and the IRS in cases where the useful life of the transferred property is indefinite or is reasonably anticipated to exceed twenty years. Accordingly, in such cases, the final regulations provide that taxpayers may, in the year of transfer, choose

to take into account section 367(d) inclusions only during the 20-year period beginning with the first year in which the U.S transferor takes into account income pursuant to section 367(d). However, the Treasury Department and the IRS have determined that this optional limitation should not affect the present value of all amounts included by the taxpayer under section 367(d). Accordingly, the final regulations specifically require a taxpayer that chooses to limit section 367(d) inclusions to a 20-year period to include, during that period, amounts that reasonably reflect amounts that, in the absence of the limitation, would be required to be included over the useful life of the transferred property following the end of the 20-year period. This requirement is consistent with the requirement in section 367(d) to include amounts that are commensurate with the income attributable to the transferred intangible during its full useful life, without limitation. The requirement of the final regulations that inclusions during the limited 20-year period begin in the first year in which in which the U.S transferor takes into account income pursuant to section 367(d) reflects the possibility of delays between the year the intangible property is transferred and the first year in which exploitation of the transferred property results in taxable income being earned by the transferee and included under section 367(d) by the transferor.

One comment also suggested that the IRS be precluded from making commensurate-with-income adjustments for taxable years beginning more than 20 years after the outbound transfer. In response to this comment, the final regulations provide that, if a taxpayer chooses to limit inclusions under section 367(d) to a 20-year period, no adjustments will be made for taxable years beginning after the conclusion of the 20-year period. Thus, after the statute of limitations expires for taxable years during

the 20-year period, a taxpayer will have no further section 367(d) inclusions as a result of the Commissioner's examination of taxable years that begin after the end of the 20-year period. However, consistent with the commensurate-with-income principle, for purposes of determining whether income inclusions during the 20-year period are commensurate with the income attributable to the transferred property, and whether adjustments should be made for taxable years during that period while the statute of limitations for such taxable years is open, the Commissioner may take into account information with respect to taxable years after that period, such as the income attributable to the transferred property during those later years.

The final regulations revise the definition of useful life to provide that useful life includes the entire period during which exploitation of the transferred intangible property is reasonably anticipated to affect the determination of taxable income, in order to appropriately account for the fact that exploitation of intangible property can result in both revenue increases and cost decreases. A comment asserted that including use in subsequently developed intangibles within the useful life of the transferred intangible property would be too difficult to administer and was not consistent with the arm's length standard. The Treasury Department and the IRS disagree with this comment. The value of many types of intangible property is derived not only from use of the intangible property in its present form, but also from its use in further development of the next generation of that intangible and other property. For example, if a software developer were to sell all of its copyright rights in its software to an unrelated party, and the copyright rights are expected to derive value both from the exclusive right to use the current generation computer code to make and sell current generation software

products and from the exclusive right to use the current generation code in the development of other versions of the software, which will then be used to make and sell future generation software products, the software developer would expect to be compensated for the latter right. That is, if the software has value in developing a future generation of products, the software developer would not ignore the value of the use of the software in future research and development and hand over those rights free of charge, and an uncontrolled purchaser would be willing to compensate the developer to obtain such rights.

III. Applicability Date

Several comments requested that the final regulations apply to transfers occurring after their date of publication, and not relate back to the date the proposed regulations were issued. These comments asserted that the proposed regulations change long-standing law in a way that would prejudice taxpayers that had arranged their business operations based on the 1986 temporary regulations. Others speculated that the final regulations might deviate from the proposed regulations to such an extent that substantial confusion would result for taxpayers attempting to determine their tax results in the interim period before the final regulations were published. Finally, one comment asserted that an applicability date relating back to the proposed regulations would violate the Administrative Procedure Act (APA), specifically 5 U.S.C. § 553, which provides that the effective date of certain final regulations must be at least 30 days after their date of publication.

After considering these comments, the Treasury Department and the IRS have determined that the proposed applicability date, under which the final regulations would

apply to transfers occurring on or after September 14, 2015, should be retained. The proposed regulations were issued to curtail the potential for abuse that exists under the 1986 temporary regulations from treating value that should be attributed to enumerated section 936 intangibles instead as exempt foreign goodwill or going concern value. The proposed effective date was intended to prevent taxpayers from using the time while the proposed regulations were pending to accelerate transfers subject to section 367 in order to take abusive positions under the 1986 temporary regulations before the finalization of the proposed regulations.

The Treasury Department and the IRS have statutory authority to issue regulations applicable at least as of the date the proposed regulations were filed with the Federal Register. The pre-1996 version of section 7805(b)--which governs regulations related to statutory provisions enacted before July 30, 1996, such as section 367--provides express retroactive rulemaking authority by stating that the Secretary may prescribe the extent, if any, to which any ruling or regulation shall be applied without retroactive effect. Section 7805(b) (1995). Because section 7805(b) is the more specific statute, it controls over the general notice requirements of 5 U.S.C. § 553. See, for example, Redhouse v. Commissioner, 728 F.2d 1249, 1253 (9th Cir. 1984); Wing v. Commissioner, 81 T.C. 17, 28-30 & n.17 (1983).

Finally, the Treasury Department and the IRS disagree with the comment that differences between the proposed and final regulations may create confusion. The final regulations are a logical outgrowth of the proposed regulations in light of the comments received and their consideration by the Treasury Department and the IRS. In particular, the final regulations do not differ from the proposed regulations with respect to the

elimination of the favorable treatment for transfers of foreign goodwill and going concern value. Furthermore, a transfer of property that is subject to recognition treatment under section 367 under the final regulations would also have been subject to such treatment under section 367 under the proposed regulations.

For these reasons, the final regulations generally apply to transfers occurring on or after September 14, 2015, the date the proposed regulations were filed with the Federal Register, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-2 that are filed on or after September 14, 2015.

IV. Qualification of Property Denominated in Foreign Currency for the ATB Exception

Although section 367(a)(3)(B)(iii) provides that the ATB exception does not apply, and therefore that section 367(a)(1) applies, to foreign currency or other property denominated in foreign currency, current §1.367(a)-5T(d)(2) generally provides that section 367(a)(1) nonetheless does not apply to certain transfers of property denominated in the currency of the country in which the transferee foreign corporation is organized. The proposed regulations eliminated this regulatory exception from the general rule in section 367(a)(3)(B)(iii) that turns off the ATB exception for such property. One comment recommended clarifying the regulations under section 367(a) by adopting the language and concepts reflected in the changes to the foreign currency rules in subpart J that were made after the publication of the 1986 temporary regulations. In response to this comment, §1.367(a)-2(c)(3) of the final regulations, which corresponds to existing §1.367(a)-5T(d)(2), reflects amendments that increase consistency with the rules in sections 987 and 988. In particular, the terms “foreign

currency” and “property denominated in foreign currency” are no longer used. Rather, proposed §1.367(a)-2(c)(3) is revised to refer to nonfunctional currency and other property that gives rise to a section 988 transaction of the taxpayer described in section 988(c)(1)(B), or that would give rise to such a section 988 transaction if it were acquired, accrued, or entered into directly by the taxpayer. The Treasury Department and the IRS consider that these modifications do not substantially change the scope of property subject to the rule at §1.367(a)-5T(d)(2).

V. Other Issues

Other comments suggested that regulations address many outstanding issues in the context of section 367 that were not addressed in the proposed regulations. These suggestions include guidance to address the following topics: (i) the valuation of intangibles subject to section 367(d) and the forms that deemed payments should take, including guidance providing parity with the section 482 form-of-payment rules; (ii) whether a receivable is created upon an audit-related adjustment; (iii) the tax basis consequences under section 367(d), including how section 367(d) applies to intangibles subject to the section 197 anti-churning rules; (iv) coordination of the general rules and disposition rules in section 367(d); (v) issues raised in connection with Notice 2012-39 (2012-31 IRB 95); (vi) the definition of “property” for purposes of section 367; and (vii) the subsequent transfer rules under the ATB exception.

The Treasury Department and the IRS generally agree that additional guidance under section 367(a) and (d) is desirable and would benefit both taxpayers and the government. However, these issues are beyond the scope of this project. For example, while the Treasury Department and the IRS are aware that there is uncertainty

regarding the application of the subsequent transfer rules to transactions involving hybrid partnerships, the Treasury Department and the IRS have determined that transactions involving partnerships merit a more holistic consideration and that this regulation package is not the appropriate vehicle to address the issue. Consequently, the regulations finalize the subsequent transfer rules in §1.367(a)-2T(c) (located in §1.367(a)-2(g) of these final regulations), but the Treasury Department and the IRS expect those rules will be amended after a more detailed consideration of transactions involving partnerships.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It is hereby certified that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required. This certification is based on the fact that the regulations under section 367(a) and (d) simplify existing regulations, and the regulations under section 6038B make relatively minor changes to existing information reporting requirements. Moreover, these regulations primarily will affect large domestic corporations filing consolidated returns. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business. No comments were received.

Drafting information

The principal author of these regulations is Ryan Bowen, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.367(d)-1 also issued under 26 U.S.C. 367(d). * * *
* * * * *

Par. 2. Section 1.367(a)-0 is added to read as follows:

§1.367(a)-0 Table of contents.

This section lists the paragraphs contained in §§1.367(a)-1 through 1.367(a)-8.

§1.367(a)-1 Transfers to foreign corporations subject to section 367(a): In general.

- (a) Scope.
- (b) General rules.
 - (1) Foreign corporation not considered a corporation for purposes of certain transfers.
 - (2) Cases in which foreign corporate status is not disregarded.
 - (3) Determination of value.
 - (4) In general.
 - (5) Treatment of certain property as subject to section 367(d).
- (c) [Reserved].
- (d) Definitions.
 - (1) United States person.
 - (2) Foreign corporation.
 - (3) Transfer.
 - (4) Property.

- (5) Intangible property.
- (6) Operating intangibles.
- (e) Close of taxable year in certain section 368(a)(1)(F) reorganizations.
- (f) Exchanges under sections 354(a) and 361(a) in certain section 368(a)(1)(F) reorganizations.
 - (1) Rule
 - (2) Rule applies regardless of whether a continuance under applicable law.
 - (g) Effective/applicability dates.

§1.367(a)-2 Exceptions for transfers of property for use in the active conduct of a trade or business.

- (a) Scope and general rule.
 - (1) Scope.
 - (2) General rule.
- (b) Eligible property.
- (c) Exception for certain property.
 - (1) Inventory.
 - (2) Installment obligations, etc.
 - (3) Nonfunctional currency, etc.
 - (4) Certain leased tangible property.
- (d) Active conduct of a trade or business outside the United States.
 - (1) In general.
 - (2) Trade or business.
 - (3) Active conduct.
 - (4) Outside of the United States.
 - (5) Use in the trade or business.
 - (6) Active leasing and licensing.
- (e) Special rules for certain property to be leased.
 - (1) Leasing business of the foreign corporation.
 - (2) De minimis leasing by the foreign corporation.
 - (3) Aircraft and vessels leased in foreign commerce.
- (f) Special rules for oil and gas working interests.
 - (1) In general.
 - (2) Active use of working interest.
 - (3) Start-up operations.
 - (4) Other applicable rules.
- (g) Property retransferred by the foreign corporation.
 - (1) General rule.
 - (2) Exception.
- (h) Compulsory transfers of property.
- (i) [Reserved].
- (j) Failure to comply with reporting requirements of section 6038B.
 - (1) Failure to comply.
 - (2) Relief for certain failures to comply that are not willful.
- (k) Effective/applicability dates.

- (1) In general.
- (2) Foreign currency exception.

§1.367(a)-3 Treatment of transfers of stock or securities to foreign corporations.

- (a) In general.
 - (1) Overview.
 - (2) Exceptions for certain exchanges of stock or securities.
 - (3) Cross-references.
- (b) Transfers of stock or securities of foreign corporations.
 - (1) General rule.
 - (2) Certain transfers subject to sections 367(a) and (b).
- (c) Transfers of stock or securities of domestic corporations.
 - (1) General rule.
 - (2) Ownership presumption.
 - (3) Active trade or business test.
 - (4) Special rules.
 - (5) Definitions.
 - (6) Reporting requirements of U.S. target company.
 - (7) Ownership statements.
 - (8) Certain transfers in connection with performance of services.
 - (9) Private letter ruling option.
 - (10) Examples.
 - (11) Effective date.
- (d) Indirect stock transfers in certain nonrecognition transfers.
 - (1) In general.
 - (2) Special rules for indirect transfers.
 - (3) Examples.
- (e) [Reserved].
- (f) Failure to file statements.
 - (1) Failure to file.
 - (2) Relief for certain failures to file that are not willful.
- (g) Effective/applicability dates.
 - (1) Rules of applicability.
 - (2) Election.
- (h) Former 10-year gain recognition agreements.
- (i) [Reserved].
- (j) Transition rules regarding certain transfers of domestic or foreign stock or securities after December 16, 1987, and prior to July 20, 1998.
 - (1) Scope.
 - (2) Transfers of domestic or foreign stock or securities: additional substantive rules.
- (k) [Reserved].

§1.367(a)-4 Special rule applicable to U.S. depreciated property.

- (a) Depreciated property used in the United States.
 - (1) In general.

- (2) U.S. depreciated property.
- (3) Property used within and without the United States.
- (b) Effective/applicability dates.

§1.367(a)-5 [Reserved].

§1.367(a)-6 Transfer of foreign branch with previously deducted losses.

- (a) through (b)(1) [Reserved].
- (2) No active conduct exception.
- (c)(1) [Reserved].
- (2) Gain limitation.
- (3) [Reserved].
- (4) Transfers of certain intangible property.
- (d) through (i) [Reserved].
- (j) Effective/applicability dates.

§1.367(a)-7 Outbound transfers of property described in section 361(a) or (b).

- (a) Scope and purpose.
- (b) General rule.
 - (1) Nonrecognition exchanges enumerated in section 367(a)(1).
 - (2) Nonrecognition exchanges not enumerated in section 367(a)(1).
- (c) Elective exception.
 - (1) Control.
 - (2) Gain recognition.
 - (3) Basis adjustments required for control group members.
 - (4) Agreement to amend or file a U.S. income tax return.
 - (5) Election and reporting requirements.
- (d) Section 361 exchange followed by successive distributions to which section 355 applies.
- (e) Other rules.
 - (1) Section 367(a) property with respect to which gain is recognized.
 - (2) Relief for certain failures to comply that are not willful.
 - (3) Anti-abuse rule.
 - (4) Certain income inclusions under §1.367(b)-4.
 - (5) Certain gain under §1.367(a)-6.
- (f) Definitions.
- (g) Examples.
- (h) Applicable cross-references.
- (i) [Reserved].
- (j) Effective/applicability dates.
 - (1) In general.
 - (2) Section 367(d) property.

§1.367(a)-8 Gain recognition agreement requirements.

- (a) Scope.

- (b) Definitions and special rules.
 - (1) Definitions.
 - (2) Special rules.
- (c) Gain recognition agreement.
 - (1) Terms of agreement.
 - (2) Content of gain recognition agreement.
 - (3) Description of transferred stock or securities and other information.
 - (4) Basis adjustments for gain recognized.
 - (5) Terms and conditions of a new gain recognition agreement.
 - (6) Cross-reference.
- (d) Filing requirements.
 - (1) General rule.
 - (2) Special requirements.
 - (3) Common parent as agent for U.S. transferor.
- (e) Signatory.
 - (1) General rule.
 - (2) Signature requirement.
- (f) Extension of period of limitations on assessments of tax.
 - (1) General rule.
 - (2) New gain recognition agreement.
- (g) Annual certification.
- (h) Use of security.
- (i) [Reserved].
- (j) Triggering events.
 - (1) Disposition of transferred stock or securities.
 - (2) Disposition of substantially all of the assets of the transferred corporation.
 - (3) Disposition of certain partnership interests.
 - (4) Disposition of stock of the transferee foreign corporation.
 - (5) Deconsolidation.
 - (6) Consolidation.
 - (7) Death of an individual; trust or estate ceases to exist.
 - (8) Failure to comply.
 - (9) Gain recognition agreement filed in connection with indirect stock transfers and certain triangular asset reorganizations.
 - (10) Gain recognition agreement filed pursuant to paragraph (k)(14) of this section.
- (k) Triggering event exceptions.
 - (1) Transfers of stock of the transferee foreign corporation to a corporation or partnership.
 - (2) Complete liquidation of U.S. transferor under sections 332 and 337.
 - (3) Transfers of transferred stock or securities to a corporation or partnership.
 - (4) Transfers of substantially all of the assets of the transferred corporation.
 - (5) Recapitalizations and section 1036 exchanges.
 - (6) Certain asset reorganizations.
 - (7) Certain triangular reorganizations.
 - (8) Complete liquidation of transferred corporation.

- (9) Death of U.S. transferor.
- (10) Deconsolidation.
- (11) Consolidation.
- (12) Intercompany transactions.
- (13) Deemed asset sales pursuant to section 338(g) elections.
- (14) Other dispositions or events.
- (l) [Reserved].
- (m) Receipt of boot in nonrecognition transactions.
 - (1) Dispositions of transferred stock or securities.
 - (2) Dispositions of assets of transferred corporation.
- (n) Special rules for distributions with respect to stock.
 - (1) Certain dividend equivalent redemptions treated as dispositions.
 - (2) Gain recognized under section 301(c)(3).
- (o) Dispositions or other events that terminate or reduce the amount of gain subject to the gain recognition agreement.
 - (1) Taxable disposition of stock of the transferee foreign corporation.
 - (2) Gain recognized in connection with certain nonrecognition transactions.
 - (3) Gain recognized under section 301(c)(3).
 - (4) Dispositions of substantially all of the assets of a domestic transferred corporation.
 - (5) Certain distributions or transfers of transferred stock or securities to U.S. persons.
 - (6) Dispositions or other event following certain intercompany transactions.
 - (7) Expropriations under foreign law.
- (p) Relief for certain failures to file or failures to comply that are not willful.
 - (1) In general.
 - (2) Procedures for establishing that a failure to file or failure to comply was not willful.
 - (3) Examples.
- (q) Examples.
 - (1) Presumed facts and references.
 - (2) Examples.
- (r) Effective/applicability date.
 - (1) General rule.
 - (2) Applicability to transfers occurring before March 13, 2009.
 - (3) Applicability to requests for relief submitted before November 19, 2014.

Par. 3. Section 1.367(a)-1 is revised to read as follows:

§1.367(a)-1 Transfers to foreign corporations subject to section 367(a): In general.

(a) Scope. Section 367(a)(1) provides the general rule concerning certain transfers of property by a United States person (referred to at times in this section as the “U.S. person” or “U.S. transferor”) to a foreign corporation. Paragraph (b) of this section provides general rules explaining the effect of section 367(a)(1). Paragraph (c)

of this section describes transfers of property that are described in section 367(a)(1). Paragraph (d) of this section provides definitions that apply for purposes of sections 367(a) and (d) and the regulations thereunder. Paragraphs (e) and (f) of this section provide rules that apply to certain reorganizations described in section 368(a)(1)(F). Paragraph (g) of this section provides dates of applicability. For rules concerning the reporting requirements under section 6038B for certain transfers of property to a foreign corporation, see §1.6038B-1.

(b) General rules--(1) Foreign corporation not considered a corporation for purposes of certain transfers. If a U.S. person transfers property to a foreign corporation in connection with an exchange described in section 351, 354, 356, or 361, then, pursuant to section 367(a)(1), the foreign corporation will not be considered to be a corporation for purposes of determining the extent to which gain is recognized on the transfer. Section 367(a)(1) denies nonrecognition treatment only to transfers of items of property on which gain is realized. Thus, the amount of gain recognized because of section 367(a)(1) is unaffected by the transfer of items of property on which loss is realized (but not recognized).

(2) Cases in which foreign corporate status is not disregarded. For circumstances in which section 367(a)(1) does not apply to a U.S. transferor's transfer of property to a foreign corporation, and thus the foreign corporation is considered to be a corporation, see §§1.367(a)-2, 1.367(a)-3, and 1.367(a)-7.

(3) Determination of value. In cases in which a U.S. transferor's transfer of property to a foreign corporation constitutes a controlled transaction as defined in

§1.482-1(i)(8), the value of the property transferred is determined in accordance with section 482 and the regulations thereunder.

(4) Character, source, and adjustments--(i) In general. If a U.S. person is required to recognize gain under section 367 upon a transfer of property to a foreign corporation, then --

(A) The character and source of such gain are determined as if the property had been disposed of in a taxable exchange with the transferee foreign corporation (unless otherwise provided by regulation); and

(B) Appropriate adjustments to earnings and profits, basis, and other affected items will be made according to otherwise applicable rules, taking into account the gain recognized under section 367(a)(1). For purposes of applying section 362, the foreign corporation's basis in the property received is increased by the amount of gain recognized by the U.S. transferor under section 367(a) and the regulations issued pursuant to that section. To the extent the regulations provide that the U.S. transferor recognizes gain with respect to a particular item of property, the foreign corporation increases its basis in that item of property by the amount of such gain recognized. For example, §§1.367(a)-2, 1.367(a)-3, and 1.367(a)-4 provide that gain is recognized with respect to particular items of property. To the extent the regulations do not provide that gain recognized by the U.S. transferor is with respect to a particular item of property, such gain is treated as recognized with respect to items of property subject to section 367(a) in proportion to the U.S. transferor's gain realized in such property, after taking into account gain recognized with respect to particular items of property transferred under any other provision of section 367(a). For example, §1.367(a)-6 provides that

branch losses must be recaptured by the recognition of gain realized on the transfer but does not associate the gain with particular items of property. See also §1.367(a)-1(c)(3) for rules concerning transfers by partnerships or of partnership interests.

(C) The transfer will not be recharacterized for U.S. Federal tax purposes solely because the U.S. person recognizes gain in connection with the transfer under section 367(a)(1). For example, if a U.S. person transfers appreciated stock or securities to a foreign corporation in an exchange described in section 351, the transfer is not recharacterized as other than an exchange described in section 351 solely because the U.S. person recognizes gain in the transfer under section 367(a)(1).

(ii) Example. The rules of this paragraph (b)(4) are illustrated by the following example.

Example. Domestic corporation DC transfers inventory with a fair market value of \$ 1 million and adjusted basis of \$ 800,000 to foreign corporation FC in exchange for stock of FC that is described in section 351(a). Title passes within the United States. Pursuant to section 367(a), DC is required to recognize gain of \$200,000 upon the transfer. Under the rule of this paragraph (b)(4), the gain is treated as ordinary income (sections 1201 and 1221) from sources within the United States (section 861) arising from a taxable exchange with FC. Appropriate adjustments to earnings and profits, basis, etc., will be made as if the transfer were subject to section 351. Thus, for example, DC's basis in the FC stock received, and FC's basis in the transferred inventory, will each be increased by the \$200,000 gain recognized by DC, pursuant to sections 358(a)(1) and 362(a), respectively.

(5) Treatment of certain property as subject to section 367(d). A U.S. transferor may apply section 367(d) and §1.367(d)-1, rather than section 367(a) and the regulations thereunder, to a transfer of property to a foreign corporation that otherwise would be subject to section 367(a), provided that the property is not eligible property, as defined in §1.367(a)-2(b) but determined without regard to §1.367(a)-2(c). A U.S. transferor and any other U.S. transferor that is related (within the meaning of section

267(b) or 707(b)(1)) to the U.S. transferor must consistently apply this paragraph (b)(5) to all property described in this paragraph (b)(5) that is transferred to one or more foreign corporations pursuant to a plan. A U.S. transferor applies the provisions of this paragraph (b)(5) in the form and manner set forth in §1.6038B-1(d)(1)(iv) and (v).

(c)(1) through (c)(3)(i) reserved. For further guidance, see §1.367(a)-1T(c)(1) through (c)(3)(i).

(ii) Transfer of partnership interest treated as transfer of proportionate share of assets--(A) In general. If a U.S. person transfers an interest as a partner in a partnership (whether foreign or domestic) in an exchange described in section 367(a)(1), then that person is treated as having transferred a proportionate share of the property of the partnership in an exchange described in section 367(a)(1). Accordingly, the applicability of the exception to section 367(a)(1) provided in §1.367(a)-2 is determined with reference to the property of the partnership rather than the partnership interest itself. A U.S. person's proportionate share of partnership property is determined under the rules and principles of sections 701 through 761 and the regulations thereunder.

(c)(3)(i)(A) Example through (7) reserved. For further guidance, see §1.367(a)-1T(c)(3)(i)(A) Example through (7).

(d) Definitions. The following definitions apply for purposes of sections 367(a) and (d) and the regulations thereunder.

(1) United States person. The term "United States person" includes those persons described in section 7701(a)(30). The term includes a citizen or resident of the United States, a domestic partnership, a domestic corporation, and any estate or trust

other than a foreign estate or trust. (For definitions of these terms, see section 7701 and the regulations thereunder.) For purposes of this section, an individual with respect to whom an election has been made under section 6013(g) or (h) is considered to be a resident of the United States while such election is in effect. A nonresident alien or a foreign corporation will not be considered a United States person because of its actual or deemed conduct of a trade or business within the United States during a taxable year.

(2) Foreign corporation. The term "foreign corporation" has the meaning set forth in section 7701(a)(3) and (5) and §301.7701-5.

(3) *Transfer*. For purposes of section 367 and regulations thereunder, the term "transfer" means any transaction that constitutes a transfer for purposes of section 332, 351, 354, 355, 356, or 361, as applicable. A person's entering into a cost sharing arrangement under §1.482-7 or acquiring rights to intangible property under such an arrangement shall not be considered a transfer of property described in section 367(a)(1). See §1.6038B-1T(b)(4) for the date on which the transfer is considered to be made.

(4) Property. For purposes of section 367 and the regulations thereunder, the term "property" means any item that constitutes property for purposes of section 351, 354, 355, 356, or 361, as applicable.

(5) Intangible property. The term "intangible property" means either property described in section 936(h)(3)(B) or property to which a U.S. person applies section 367(d) pursuant to paragraph (b)(5) of this section, but does not include property described in section 1221(a)(3) or a working interest in oil and gas property.

(6) Operating intangibles. An operating intangible is any property described in section 936(h)(3)(B) of a type not ordinarily licensed or otherwise transferred in transactions between unrelated parties for consideration contingent upon the licensee's or transferee's use of the property. Examples of operating intangibles may include long-term purchase or supply contracts, surveys, studies, and customer lists.

(f) *Exchanges under sections 354(a) and 361(a) in certain section 368(a)(1)(F) reorganizations—(1) Rule*. In every reorganization under section 368(a)(1)(F), where the transferor corporation is a domestic corporation, and the acquiring corporation is a foreign corporation, there is considered to exist—

(i) A transfer of assets by the transferor corporation to the acquiring corporation under section 361(a) in exchange for stock (or stock and securities) of the acquiring corporation and the assumption by the acquiring corporation of the transferor corporation's liabilities;

(ii) A distribution of the stock (or stock and securities) of the acquiring corporation by the transferor corporation to the shareholders (or shareholders and security holders) of the transferor corporation; and

(iii) An exchange by the transferor corporation's shareholders (or shareholders and security holders) of their stock (or stock and securities) of the transferor corporation for stock (or stock and securities) of the acquiring corporation under section 354(a).

(2) *Rule applies regardless of whether a continuance under applicable law.* For purposes of paragraph (f)(1) of this section, it shall be immaterial that the applicable foreign or domestic law treats the acquiring corporation as a continuance of the transferor corporation.

(g) Effective/applicability dates. (1) through (3) [Reserved]. For further guidance, see §1.367(a)-1T(g)(1) through (3).

(4) The rules in paragraphs (b)(4)(i)(B) and (b)(4)(i)(C) of this section apply to transfers occurring on or after April 18, 2013. For guidance with respect to paragraph (b)(4)(i)(B) of this section before April 18, 2013, see 26 CFR part 1 revised as of April 1, 2012. The rules in paragraph (e) of this section apply to transactions occurring on or after March 31, 1987. The rules in paragraph (f) of this section apply to transactions occurring on or after January 1, 1985.

(5) Paragraphs (a), (b)(1) through (b)(4)(i)(B), (b)(4)(ii) through (b)(5), (c)(3)(ii)(A), (d) introductory text through (d)(2), (d)(4) through (d)(6) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-1 and 1.367(a)-1T as contained in 26 CFR part 1 revised as of April 1, 2016.

§1.367(a)-1T [Amended]

Par. 4. Section 1.367(a)-1T is amended by removing and reserving paragraphs (a), (b)(1), (b)(2), (b)(3), (b)(4)(i)(A), (b)(4)(ii), (c)(3)(ii)(A), (d) introductory text, (d)(1), (d)(2), (d)(4), and (d)(5), and adding and reserving new paragraphs (b)(5) and (d)(6).

Par. 5. Section 1.367(a)-2 is revised to read as follows:

§1.367(a)-2 Exceptions for transfers of property for use in the active conduct of a trade or business.

(a) Scope and general rule--(1) Scope. Paragraph (a)(2) of this section provides the general exception to section 367(a)(1) for certain property transferred for use in the active conduct of a trade or business. Paragraph (b) of this section describes property that is eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (c) of this section describes property that is not eligible for the exception provided in paragraph (a)(2) of this section. Paragraph (d) of this section provides general rules, and paragraphs (e) through (h) of this section provide special rules, for determining whether property is used in the active conduct of a trade or business outside of the United States. Paragraph (i) of this section is reserved. Paragraph (j) of this section provides relief for certain failures to comply with the reporting requirements under paragraph (a)(2)(iii) of this section that are not willful. Paragraph (k) of this section provides dates of applicability. The rules of this section do not apply to a transfer of stock or securities in an exchange subject to §1.367(a)-3.

(2) General rule. Except as otherwise provided in §§1.367(a)-4, 1.367(a)-6, and 1.367(a)-7, section 367(a)(1) does not apply to property transferred by a United States person (U.S. transferor) to a foreign corporation if--

(i) The property constitutes eligible property;

(ii) The property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, as determined under paragraph (d), (e), (f), (g), or (h) of this section, as applicable; and

(iii) The U.S. transferor complies with the reporting requirements of section 6038B and the regulations thereunder.

(b) Eligible property. Except as provided in paragraph (c) of this section, eligible property means--

(1) Tangible property;

(2) A working interest in oil and gas property; and

(3) A financial asset. For purposes of this section, a financial asset is--

(i) A cash equivalent;

(ii) A security within the meaning of section 475(c)(2), without regard to the last sentence of section 475(c)(2) (referencing section 1256) and without regard to section 475(c)(4), but excluding an interest in a partnership;

(iii) A commodities position described in section 475(e)(2)(B), 475(e)(2)(C), or 475(e)(2)(D); and

(iv) A notional principal contract described in §1.446-3(c)(1).

(c) Exception for certain property. Notwithstanding paragraph (b) of this section, property described in paragraph (c)(1), (2), (3), or (4) of this section does not constitute eligible property.

(1) Inventory. Stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the

ordinary course of its trade or business (including raw materials and supplies, partially completed goods, and finished products).

(2) Installment obligations, etc. Installment obligations, accounts receivable, or similar property, but only to the extent that the principal amount of any such obligation has not previously been included by the taxpayer in its taxable income.

(3) Nonfunctional currency, etc.--(i) In general. Property that gives rise to a section 988 transaction of the taxpayer described in section 988(c)(1)(A) through (C), without regard to section 988(c)(1)(D) and (E), or that would give rise to such a section 988 transaction if it were acquired, accrued, entered into, or disposed of directly by the taxpayer.

(ii) Limitation of gain required to be recognized. If section 367(a)(1) applies to a transfer of property described in paragraph (c)(3)(i) of this section, then the gain required to be recognized is limited to the gain realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section, less any loss realized as part of the same transaction upon the transfer of property described in paragraph (c)(3)(i) of this section. This limitation applies in lieu of the rule in §1.367(a)-1(b)(1). No loss is recognized with respect to property described in this paragraph (c)(3).

(4) Certain leased tangible property. Tangible property with respect to which the transferor is a lessor at the time of the transfer, unless either the foreign corporation is the lessee at the time of the transfer or the foreign corporation will lease the property to third persons.

(d) Active conduct of a trade or business outside the United States--(1) In general. Except as provided in paragraphs (e), (f), (g), and (h) of this section, to determine whether property is transferred for use by the foreign corporation in the active conduct of a trade or business outside of the United States, four factual determinations must be made:

(i) What is the trade or business of the foreign corporation (see paragraph (d)(2) of this section);

(ii) Do the activities of the foreign corporation constitute the active conduct of that trade or business (see paragraph (d)(3) of this section);

(iii) Is the trade or business conducted outside of the United States (see paragraph (d)(4) of this section); and

(iv) Is the transferred property used or held for use in the trade or business (see paragraph (d)(5) of this section)?

(2) Trade or business. Whether the activities of the foreign corporation constitute a trade or business is determined based on all the facts and circumstances. In general, a trade or business is a specific unified group of activities that constitute (or could constitute) an independent economic enterprise carried on for profit. For example, the activities of a foreign selling subsidiary could constitute a trade or business if they could be independently carried on for profit, even though the subsidiary acts exclusively on behalf of, and has operations fully integrated with, its parent corporation. To constitute a trade or business, a group of activities must ordinarily include every operation which forms a part of, or a step in, a process by which an enterprise may earn income or profit. In this regard, one or more of such activities may be carried on by independent

contractors under the direct control of the foreign corporation. (However, see paragraph (d)(3) of this section.) The group of activities must ordinarily include the collection of income and the payment of expenses. If the activities of the foreign corporation do not constitute a trade or business, then the exception provided by this section does not apply, regardless of the level of activities carried on by the corporation. The following activities are not considered to constitute by themselves a trade or business for purposes of this section:

(i) Any activity giving rise to expenses that would be deductible only under section 212 if the activities were carried on by an individual; or

(ii) The holding for one's own account of investments in stock, securities, land, or other property, including casual sales thereof.

(3) Active conduct. Whether a trade or business is actively conducted by the foreign corporation is determined based on all the facts and circumstances. In general, a corporation actively conducts a trade or business only if the officers and employees of the corporation carry out substantial managerial and operational activities. A corporation may be engaged in the active conduct of a trade or business even though incidental activities of the trade or business are carried out on behalf of the corporation by independent contractors. In determining whether the officers and employees of the corporation carry out substantial managerial and operational activities, however, the activities of independent contractors are disregarded. On the other hand, the officers and employees of the corporation are considered to include the officers and employees of related entities who are made available to and supervised on a day-to-day basis by, and whose salaries are paid by (or reimbursed to the lending related entity by), the

foreign corporation. See paragraph (d)(6) of this section for the standard that applies to determine whether a trade or business that produces rents or royalties is actively conducted. The rule of this paragraph (d)(3) is illustrated by the following example.

Example. X, a domestic corporation, and Y, a foreign corporation not related to X, transfer property to Z, a newly formed foreign corporation organized for the purpose of combining the research activities of X and Y. Z contracts all of its operational and research activities to Y for an arm's-length fee. Z's activities do not constitute the active conduct of a trade or business.

(4) Outside of the United States. Whether the foreign corporation conducts a trade or business outside of the United States is determined based on all the facts and circumstances. Generally, the primary managerial and operational activities of the trade or business must be conducted outside the United States and immediately after the transfer the transferred assets must be located outside the United States. Thus, the exception provided by this section would not apply to the transfer of the assets of a domestic business to a foreign corporation if the domestic business continued to operate in the United States after the transfer. In such a case, the primary operational activities of the business would continue to be conducted in the United States. Moreover, the transferred assets would be located in the United States. However, it is not necessary that every item of property transferred be used outside of the United States. As long as the primary managerial and operational activities of the trade or business are conducted outside of the United States and substantially all of the transferred assets are located outside the United States, incidental items of transferred property located in the United States may be considered to have been transferred for use in the active conduct of a trade or business outside of the United States.

(5) Use in the trade or business. Whether property is used or held for use by the foreign corporation in a trade or business is determined based on all the facts and circumstances. In general, property is used or held for use in the foreign corporation's trade or business if it is--

(i) Held for the principal purpose of promoting the present conduct of the trade or business;

(ii) Acquired and held in the ordinary course of the trade or business; or

(iii) Otherwise held in a direct relationship to the trade or business. Property is considered held in a direct relationship to a trade or business if it is held to meet the present needs of that trade or business and not its anticipated future needs. Thus, property will not be considered to be held in a direct relationship to a trade or business if it is held for the purpose of providing for future diversification into a new trade or business, future expansion of trade or business activities, future plant replacement, or future business contingencies.

(6) Active leasing and licensing. For purposes of paragraph (d)(3) of this section, whether a trade or business that produces rents or royalties is actively conducted is determined under the principles of section 954(c)(2)(A) and the regulations thereunder, but without regard to whether the rents or royalties are received from an unrelated party. See §§1.954-2(c) and (d).

(e) Special rules for certain property to be leased--(1) Leasing business of the foreign corporation. Except as otherwise provided in this paragraph (e), tangible property that will be leased to another person by the foreign corporation will be

considered to be transferred for use by the foreign corporation in an active trade or business outside the United States only if--

(i) The foreign corporation's leasing of the property constitutes the active conduct of a leasing business, as determined under paragraph (d)(6) of this section;

(ii) The lessee of the property is not expected to, and does not, use the property in the United States; and

(iii) The foreign corporation has a need for substantial investment in assets of the type transferred.

(2) De minimis leasing by the foreign corporation. Tangible property that will be leased to another person by the foreign corporation but that does not satisfy the conditions of paragraph (e)(1) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if either--

(i) The property transferred will be used by the foreign corporation in the active conduct of a trade or business but will be leased during occasional brief periods when the property would otherwise be idle, such as an airplane leased during periods of excess capacity; or

(ii) The property transferred is real property located outside the United States and--

(A) The property will be used primarily in the active conduct of a trade or business of the foreign corporation; and

(B) Not more than ten percent of the square footage of the property will be leased to others.

(3) Aircraft and vessels leased in foreign commerce. For purposes of satisfying paragraph (e)(1) of this section, an aircraft or vessel, including component parts such as an engine leased separately from the aircraft or vessel, that will be leased to another person by the foreign corporation will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The employees of the foreign corporation perform substantial managerial and operational activities of leasing aircraft or vessels outside the United States; and

(ii) The leased property is predominantly used outside the United States, as determined under §1.954-2(c)(2)(v).

(f) Special rules for oil and gas working interests--(1) In general. A working interest in oil and gas property will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The transfer satisfies the conditions of paragraph (f)(2) or (f)(3) of this section;

(ii) At the time of the transfer, the foreign corporation has no intention to farm out or otherwise transfer any part of the transferred working interest; and

(iii) During the first three years after the transfer there are no farmouts or other transfers of any part of the transferred working interest as a result of which the foreign corporation retains less than a 50-percent share of the transferred working interest.

(2) Active use of working interest. A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section will be considered to be transferred for use in the active conduct of a trade or business if--

(i) The U.S. transferor is regularly and substantially engaged in exploration for and extraction of minerals, either directly or through working interests in joint ventures, other than by reason of the property that is transferred;

(ii) The terms of the working interest transferred were actively negotiated among the joint venturers;

(iii) The working interest transferred constitutes at least a five percent working interest;

(iv) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively engaged in--

(A) Operating the working interest, or

(B) Analyzing technical data relating to the activities of the venture;

(v) Before and at the time of the transfer, through its own employees or officers, the U.S. transferor was regularly and actively involved in decision making with respect to the operations of the venture, including decisions relating to exploration, development, production, and marketing; and

(vi) After the transfer, the foreign corporation will for the foreseeable future satisfy the requirements of subparagraphs (iv) and (v) of this paragraph (f)(2).

(3) Start-up operations. A working interest in oil and gas property that satisfies the conditions in paragraphs (f)(1)(ii) and (iii) of this section but that does not satisfy all the requirements of paragraph (f)(2) of this section will, nevertheless, be considered to be transferred for use in the active conduct of a trade or business if--

(i) The working interest was acquired by the U.S. transferor immediately before the transfer and for the specific purpose of transferring it to the foreign corporation;

(ii) The requirements of paragraphs (f)(2)(ii) and (iii) of this section are satisfied;
and

(iii) The foreign corporation will for the foreseeable future satisfy the requirements of paragraph (f)(2)(iv) and (v) of this section.

(4) Other applicable rules. A working interest in oil and gas property that is not described in paragraph (f)(1) of this section may nonetheless qualify for the exception to section 367(a)(1) contained in this section depending upon the facts and circumstances.

(g) Property retransferred by the foreign corporation--(1) General rule. Property will not be considered to be transferred for use in the active conduct of a trade or business outside of the United States if--

(i) At the time of the transfer, it is reasonable to believe that, in the reasonably foreseeable future, the foreign corporation will sell or otherwise dispose of any material portion of the property other than in the ordinary course of business; or

(ii) Except as provided in paragraph (g)(2) of this section, the foreign corporation receives the property in an exchange described in section 367(a)(1), and, as part of the same transaction, transfers the property to another person. For purposes of the preceding sentence, a subsequent transfer within six months of the initial transfer will be considered to be part of the same transaction, and a subsequent transfer more than six months after the initial transfer may be considered to be part of the same transaction under step-transaction principles.

(2) Exception. Notwithstanding paragraph (g)(1) of this section, the active conduct exception provided by this section shall apply to the initial transfer if--

(i) The initial transfer is followed by one or more subsequent transfers described in section 351 or 721; and

(ii) Each subsequent transferee is either a partnership in which the preceding transferor is a general partner or a corporation in which the preceding transferor owns common stock; and

(iii) The ultimate transferee uses the property in the active conduct of a trade or business outside the United States.

(h) Compulsory transfers of property. Property is presumed to be transferred for use in the active conduct of a trade or business outside of the United States, if--

(1) The property was previously in use in the country in which the foreign corporation is organized; and

(2) The transfer is either:

(i) Legally required by the foreign government as a necessary condition of doing business; or

(ii) Compelled by a genuine threat of immediate expropriation by the foreign government.

(i) [Reserved].

(j) Failure to comply with reporting requirements of section 6038B--(1) Failure to comply. For purposes of the exception to the application of section 367(a)(1) provided in paragraph (a)(2) of this section, a failure to comply with the reporting requirements of section 6038B and the regulations thereunder (failure to comply) has the meaning set forth in §1.6038B-1(f)(2).

(2) Relief for certain failures to comply that are not willful--(i) In general. A failure to comply described in paragraph (j)(1) of this section will be deemed not to have occurred for purposes of satisfying the requirements of this section if the taxpayer demonstrates that the failure was not willful using the procedure set forth in this paragraph (j)(2). For this purpose, willful is to be interpreted consistent with the meaning of that term in the context of other civil penalties, which would include a failure due to gross negligence, reckless disregard, or willful neglect. Whether a failure to comply was a willful failure will be determined by the Director of Field Operations, Cross Border Activities Practice Area, Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) based on all the facts and circumstances. The taxpayer must submit a request for relief and an explanation as provided in paragraph (j)(2)(ii)(A) of this section. Although a taxpayer whose failure to comply is determined not to be willful will not be subject to gain recognition under this section, the taxpayer will be subject to a penalty under section 6038B if the taxpayer fails to demonstrate that the failure was due to reasonable cause and not willful neglect. See §1.6038B-1(b)(1) and (f). The determination of whether the failure to comply was willful under this section has no effect on any request for relief made under §1.6038B-1(f).

(ii) *Procedures for establishing that a failure to comply was not willful*—(A) *Time and manner of submission*. A taxpayer's statement that the failure to comply was not willful will be considered only if, promptly after the taxpayer becomes aware of the failure, an amended return is filed for the taxable year to which the failure relates that includes the information that should have been included with the original return for such

taxable year or that otherwise complies with the rules of this section, and that includes a written statement explaining the reasons for the failure to comply. The amended return must be filed with the Internal Revenue Service at the location where the taxpayer filed its original return. The taxpayer may submit a request for relief from the penalty under section 6038B as part of the same submission. See §1.6038B-1(f).

(B) Notice requirement. In addition to the requirements of paragraph (j)(2)(ii)(A) of this section, the taxpayer must comply with the notice requirements of this paragraph (j)(2)(ii)(B). If any taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Internal Revenue Service personnel conducting the examination. If no taxable year of the taxpayer is under examination when the amended return is filed, a copy of the amended return and any information required to be included with such return must be delivered to the Director.

(3) For illustrations of the application of the willfulness standard of this paragraph (j), see the examples in §1.367(a)-8(p)(3).

(4) Paragraph (j) applies to requests for relief submitted on or after November 19, 2014.

(k) Effective/applicability dates--(1) In general. Except as provided in paragraphs (j)(4) and (k)(2) of this section, the rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see

§§1.367(a)-2, -2T, -4, -4T, -5, and -5T as contained in 26 CFR part 1 revised as of April 1, 2016.

(2) Foreign currency exception. Notwithstanding paragraph (c)(3)(i) of this section, §1.367(a)-5T(d)(2) as contained in 26 CFR part 1 revised as of April 1, 2016, applies to transfers of property denominated in a foreign currency occurring before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, other than transfers occurring before that date resulting from entity classification elections made under §301.7701-3 that are filed on or after that date.

§1.367(a)-2T [Removed]

Par. 6. Section 1.367(a)-2T is removed.

§1.367(a)-3 [Amended]

Par. 7. For each section listed in the following the table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-3(a)(3), first sentence	§1.367(a)-1T(c)	§1.367(a)-1(c)
§1.367(a)-3(c)(3)(i)(A)	§1.367(a)-2T(b)(2) and (3)	§1.367(a)-2(d)(2), (3), and (4)
§1.367(a)-3(c)(3)(ii)(B), last sentence	§1.367(a)-2T(b)(2) and (3)	§1.367(a)-2(d)(2) and (3)
§1.367(a)-3(c)(4)(i), last sentence	§1.367(a)-1T(c)(3)	§1.367(a)-1(c)(3)
§1.367(a)-3(c)(5)(iv), first sentence	§1.367(a)-1T(d)(1)	§1.367(a)-1(d)(1)
§1.367(a)-3(d)(3) <u>Example 7A(ii)</u> , penultimate sentence	§1.367(a)-2T(a)(2)	§1.367(a)-2(a)(2)(iii)
§1.367(a)-3(d)(3) <u>Example 13(i)</u> , penultimate sentence	§1.367(a)-2T(c)(2)	§1.367(a)-2(g)(2)

Par. 8. Section 1.367(a)-4 is revised to read as follows:

§1.367(a)-4 Special rule applicable to U.S. depreciated property.

(a) Depreciated property used in the United States--(1) In general. A U.S. person that transfers U.S. depreciated property (as defined in paragraph (a)(2) of this section) to a foreign corporation in an exchange described in section 367(a)(1), must include in its gross income for the taxable year in which the transfer occurs ordinary income equal to the gain realized that would have been includible in the transferor's gross income as ordinary income under section 617(d)(1), 1245(a), 1250(a), 1252(a), 1254(a), or 1255(a), whichever is applicable, if at the time of the transfer the U.S. person had sold the property at its fair market value. Recapture of depreciation under this paragraph (a) is required regardless of whether the exception to section 367(a)(1) provided by §1.367(a)-2(a)(2) applies to the transfer of the U.S. depreciated property. However, the transfer of the U.S. depreciated property may qualify for the exception with respect to realized gain that is not included in ordinary income pursuant to this paragraph (a).

(2) U.S. depreciated property. U.S. depreciated property subject to the rules of this paragraph (a) is any property that--

(i) Is either mining property (as defined in section 617(f)(2)), section 1245 property (as defined in section 1245(a)(3)), section 1250 property (as defined in section 1250(c)), farm land (as defined in section 1252(a)(2)), section 1254 property (as defined in section 1254(a)(3)), or section 126 property (as defined in section 1255(a)(2)); and

(ii) Has been used in the United States or has been described in section 168(g)(4) before its transfer.

(3) Property used within and without the United States. (i) If U.S. depreciated property has been used partly within and partly without the United States, then the

amount required to be included in ordinary income pursuant to this paragraph (a) is reduced to an amount determined in accordance with the following formula:

$$\text{Full recapture amount} \quad \times \quad \frac{\text{U.S use}}{\text{Total use}}$$

(ii) For purposes of the fraction in paragraph (a)(3)(i) of this section, the “full recapture amount” is the amount that would otherwise be included in the transferor's income under paragraph (a)(1) of this section. “U.S. use” is the number of months that the property either was used within the United States or has been described in section 168(g)(4), and was subject to depreciation by the transferor or a related person. “Total use” is the total number of months that the property was used (or available for use), and subject to depreciation, by the transferor or a related person. For purposes of this paragraph (a)(3), property is not considered to have been in use outside of the United States during any period in which such property was, for purposes of section 168, treated as property not used predominantly outside the United States pursuant to section 168(g)(4). For purposes of this paragraph (a)(3), the term “related person” has the meaning set forth in §1.367(d)-1(h).

(b) Effective/applicability dates. The rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §§1.367(a)-4 and 1.367(a)-4T as contained in 26 CFR part 1 revised as of April 1, 2016.

§1.367(a)-4T [Removed]

Par. 9. §1.367(a)-4T is removed.

§1.367(a)-5 [Removed and Reserved]

Par. 10. Section 1.367(a)-5 is removed and reserved.

§1.367(a)-5T [Removed]

Par. 11. §1.367(a)-5T is removed.

Par. 12. Section 1.367(a)-6 is revised to read as follows:

§1.367(a)-6 Transfer of foreign branch with previously deducted losses.

(a) through (b)(1) [Reserved]. For further guidance, see §1.367(a)-6T(a) through (b)(1).

(b)(2) No active conduct exception. The rules of this paragraph (b) apply regardless of whether any of the assets of the foreign branch satisfy the active trade or business exception of §1.367(a)-2(a)(2).

(c)(1) [Reserved]. For further guidance, see §1.367(a)-6T(c)(1).

(2) Gain limitation. The gain required to be recognized under paragraph (b)(1) of this section will not exceed the aggregate amount of gain realized on the transfer of all branch assets (without regard to the transfer of any assets on which loss is realized but not recognized).

(3) [Reserved].

(4) Transfers of certain intangible property. Gain realized on the transfer of intangible property (computed with reference to the fair market value of the intangible property as of the date of the transfer) that is an asset of a foreign branch is taken into account in computing the limitation on loss recapture under paragraph (c)(2) of this

section. For rules relating to the crediting of gain recognized under this section against income deemed to arise by operation of section 367(d), see §1.367(d)-1(g)(3).

(d) through (i) [Reserved]. For further guidance, see §1.367(a)-6T(d) through (i).

(j) Effective/applicability dates. The rules of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §1.367(a)-6T as contained in 26 CFR part 1 revised as of April 1, 2016.

§1.367(a)-6T [Amended]

Par. 13. Section 1.367(a)-6T is amended by

1. Removing and reserving paragraphs (b)(2), (c)(2), and (c)(4).
2. Adding and reserving paragraph (j).

Par. 14. Section 1.367(a)-7 is amended by:

1. Revising paragraph (f)(11).
2. Redesignating paragraph (j) as (j)(1) and revising the first sentence, and adding paragraph (j)(2).

The revision and addition read as follows:

§1.367(a)-7 Outbound transfers of property described in section 361(a) or (b).

* * * * *

(f) * * *

(11) Section 367(d) property is intangible property as defined in §1.367(a)-1(d)(5).

* * * * *

(j) Effective/applicability dates--(1) In general. Except for paragraph (e)(2) of this section, and as provided in paragraph (j)(2) of this section, this section applies to transfers occurring on or after April 18, 2013. * * *

(2) Section 367(d) property. The definition provided in paragraph (f)(11) of this section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §1.367(a)-7 as contained in 26 CFR part 1 revised as of April 1, 2016.

§1.367(a)-7 [Amended]

Par. 15. For each section listed in the following table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-7(a), sixth sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c), second sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(c), second sentence	§1.367(a)-4T, 1.367(a)-5T	§1.367(a)-4
§1.367(a)-7(c), second sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c)(2)(i)(B)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(c)(2)(ii)(A)(2)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(1), third sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(e)(1), third sentence	§1.367(a)-4T, 1.367(a)-5T	§1.367(a)-4
§1.367(a)-7(e)(1), third sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(1), last sentence	§1.367(a)-1T(b)(4) and §1.367(a)-1(b)(4)(i)(B)	§1.367(a)-1(b)(4)
§1.367(a)-7(e)(2)(i), third	Director of Field Operations	Director of Field

sentence	International, Large Business & International	Operations, Cross Border Activities Practice Area of Large Business & International
§1.367(a)-7(e)(4)(ii), first and second sentences	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5), heading	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5)(i), first sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(e)(5)(ii), first sentence	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(f)(4)(ii)	§1.367(a)-6T	§1.367(a)-6
§1.367(a)-7(g), last sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(g), <u>Example 1 (ii)(A)</u> , last sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(g), <u>Example 2 (ii)(A)</u> , last sentence	§1.367(a)-2T	§1.367(a)-2
§1.367(a)-7(h), first sentence	§1.367(a)-1(b)(4)(i)(B) and §1.367(a)-1T(b)(4)	§1.367(a)-1(b)(4)

§1.367(a)-8 [Amended]

Par. 16. For each section listed in the following table, remove the language in the “Remove” column and add in its place the language in the “Add” column.

<u>Section</u>	<u>Remove</u>	<u>Add</u>
§1.367(a)-8(b)(1)(xvii), first sentence	§1.367(a)-1T(d)(1)	§1.367(a)-1(d)(1)
§1.367(a)-8(b)(1)(xvii), second sentence	§1.367(a)-1T(c)(3)(i)	§1.367(a)-1(c)(3)(i)
§1.367(a)-8(c)(3)(viii)	§1.367(a)-1T(c)(3)(i)	§1.367(a)-1(c)(3)(i)
§1.367(a)-8(c)(3)(viii)	§1.367(a)-1T(c)(3)(ii)	§1.367(a)-1(c)(3)(ii)
§1.367(a)-8(c)(4)(iv), second sentence	§1.367(a)-1T(b)(4)	§1.367(a)-1(b)(4)
§1.367(a)-8(j)(3)	§1.367(a)-1T(c)(3)(ii)	§1.367(a)-1(c)(3)(ii)
§1.367(a)-8(j)(8), second sentence	Director of Field Operations International, Large Business & International	Director of Field Operations, Cross Border Activities Practice Area of Large Business & International

Par. 17. Section 1.367(d)-1 is added to read as follows:

§1.367(d)-1 Transfers of intangible property to foreign corporations.

(a) [Reserved]. For further guidance, see §1.367(d)-1T(a).

(b) Property subject to section 367(d). Section 367(d) and the rules of this section apply to the transfer of intangible property, as defined in §1.367(a)-1(d)(5), by a U.S. person to a foreign corporation in an exchange described in section 351 or 361. See section 367(a) and the regulations thereunder for the rules that apply to the transfer of any property other than intangible property.

(c)(1) through (2) [Reserved]. For further guidance, see §1.367(d)-1T(c)(1) and (2).

(3) Useful life--(i) In general. For purposes of determining the period of inclusions for deemed payments under §1.367(d)-1T(c)(1), the useful life of intangible property is the entire period during which exploitation of the intangible property is reasonably anticipated to affect the determination of taxable income, as of the time of transfer. Exploitation of intangible property includes any direct or indirect use or transfer of the intangible property, including use without further development, use in the further development of the intangible property itself (and any exploitation of the further developed intangible property), and use in the development of other intangible property (and any exploitation of the other developed intangible property).

(ii) Procedure to limit inclusions to 20 years. In cases where the useful life of the transferred property is indefinite or is reasonably anticipated to exceed twenty years, taxpayers may, in lieu of including amounts during the entire useful life of the intangible property, choose in the year of transfer to increase annual inclusions during the 20-year

period beginning with the first year in which the U.S transferor takes into account income pursuant to section 367(d), to reflect amounts that, but for this paragraph (c)(3)(ii), would have been required to be included following the end of the 20-year period. See §1.6038B-1(d)(1)(iv) for guidance on reporting this choice of method. If the taxpayer applies this method during the 20-year period, no adjustments will be made for taxable years beginning after the conclusion of the 20-year period. However, for purposes of determining whether amounts included during the 20-year period are commensurate with the income attributable to the transferred intangible property, the Commissioner may take into account information with respect to taxable years after that period, such as the income attributable to the transferred property during those later years. The application of this paragraph (c)(3)(ii) must be reflected in a statement (titled “Application of 20-Year Inclusion Period to Section 367(d) Transfers”) attached to a timely filed original federal income tax return (including extensions) for the year of the transfer. An increase to the deemed payment rate made pursuant to this paragraph (c)(3)(ii) will be irrevocable, and a failure to timely file the statement under this paragraph (c)(3)(ii) may not be remedied.

(iii) Example. Property subject to section 367(d) is transferred from USP, a domestic corporation, to FA, a foreign corporation wholly owned by USP. The useful life of the transferred property, inclusive of derivative works, at the time of transfer is indefinite but is reasonably anticipated to exceed 20 years. In the first five years following the transfer, sales related to the property are expected to be \$100x, \$130x, \$160x, \$180x and \$187.2x, respectively. Thereafter, for the remainder of the property’s useful life, sales are expected to grow by four percent annually. In the first five years following the transfer, operating profits attributable to the property are expected to be \$5x, \$8x, \$11x, \$12.5x, and \$13x, respectively. Thereafter, for the remainder of the property’s useful life, operating profits are expected to grow by four percent annually. It is determined that the appropriate discount rate for sales and operating profits is 10 percent. The present value of operating profits through the property’s indefinite useful life is \$185x. The present value of sales through the property’s indefinite useful life is

\$2698x. Accordingly, the sales based royalty rate during the property's useful life is 6.8 percent (\$185x/\$2698x). The taxpayer may choose to take income inclusions into account over a 20-year period. The present value of sales through the 20-year period is \$1787x. Accordingly, the sales based royalty rate under the 20-year option is increased to 10.3 percent (\$185x/\$1787x).

(c)(4) through (g)(2) (introductory text) [Reserved]. For further guidance, see §1.367(d)-1T(c)(4) through (g)(2) (introductory text).

(g)(2)(i) The intangible property transferred constitutes an operating intangible, as defined in §1.367(a)-1(d)(6).

(g)(2)(ii) through (iii)(D) [Reserved]. For further guidance, see §1.367(d)-1T(g)(2)(ii) through (iii)(D).

(E) The transferred intangible property will be used in the active conduct of a trade or business outside of the United States within the meaning of §1.367(a)-2 and will not be used in connection with the manufacture or sale of products in or for use or consumption in the United States.

(g)(2)(iii) undesignated concluding paragraph [Reserved]. For further guidance, see §1.367(d)-1T(g)(2)(iii) undesignated concluding paragraph.

(3) Intangible property transferred from branch with previously deducted losses.

(i) If income is required to be recognized under section 904(f)(3) and the regulations thereunder or under §1.367(a)-6 upon the transfer of intangible property of a foreign branch that had previously deducted losses, then the income recognized under those sections with respect to that property is credited against amounts that would otherwise be required to be recognized with respect to that same property under paragraphs (c) through (f) of this section in either the current or future taxable years. The amount

recognized under section 904(f)(3) or §1.367(a)-6 with respect to the transferred intangible property is determined in accordance with the following formula:

$$\text{Loss recapture income} \quad \times \quad \frac{\text{gain from intangible property}}{\text{gain from all branch assets}}$$

(ii) For purposes of the formula in paragraph (g)(3)(i) of this section, the “loss recapture income” is the total amount required to be recognized by the U.S. transferor pursuant to section 904(f)(3) or §1.367(a)-6. The “gain from intangible property” is the total amount of gain realized by the U.S. transferor pursuant to section 904(f)(3) and §1.367(a)-6 upon the transfer of items of property that are subject to section 367(d). “Gain from intangible property” does not include gain realized with respect to intangible property by reason of an election under paragraph (g)(2) of this section. The “gain from all branch assets” is the total amount of gain realized by the transferor upon the transfer of items of property of the branch for which gain is realized.

(g)(4) through (i) [Reserved]. For further guidance, see §1.367(d)-1T(g)(4) through (i).

(j) Effective/applicability dates. This section applies to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For transfers occurring before this section is applicable, see §1.367(d)-1T as contained in 26 CFR part 1 revised as of April 1, 2016.

§1.367(d)-1T [Amended]

Par. 18. Section 1.367(d)-1T is amended by removing and reserving paragraphs (b), (c)(3), and (g)(2)(i), (g)(2)(iii)(E), and (g)(3).

Par. 19. Section 1.367(e)-2 is amended by

1. Revising paragraph (b)(3)(iii).
2. Revising paragraph (e)(4)(ii)(B).

The revisions read as follows.

§1.367(e)-2 Distributions described in section 367(e)(2).

* * * * *

(b) * * *

(3) * * *

(iii) Other rules. For other rules that may apply, see sections 381, 897, 1248, and §1.482-1(f)(2)(i)(C).

* * * * *

(e) * * *

(4) * * *

(ii) * * *

(B) The period of limitations on assessment of tax for the taxable year in which gain is required to be reported will be extended until the close of the third full taxable year ending after the date on which the domestic liquidating corporation, foreign distributee corporation, or foreign liquidating corporation, as applicable, furnishes to the Director of Field Operations, Cross Border Activities Practice Area of Large Business & International (or any successor to the roles and responsibilities of such position, as appropriate) (Director) the information that should have been provided under this section.

* * * * *

§1.884-5 [Amended]

Par. 20. Section 1.884-5 is amended in paragraph (e)(3)(ii)(A) by removing the citation “§ 1.367(a)-2T(b)(5),” and adding the citation “§ 1.367(a)-2(d)(5)” in its place.

§1.1248-8 [Amended]

Par. 21. Section 1.1248-8 is amended in paragraph (b)(2)(iv)(B)(1)(ii) by removing the citation “§§ 1.367(a)-6T,” and adding the citation “§ 1.367(a)-6” in its place.

§1.1248(f)-2 [Amended]

Par. 22. Section 1.1248(f)-2 is amended in the last sentence of paragraph (e) by removing the citation “§ 1.367(a)-2T,” and adding the citation “§ 1.367(a)-2” in its place.

Par. 23. Section 1.6038B-1 is amended by:

1. Removing the citation “§ 1.367(a)-1T(c),” in the fourth sentence of paragraph (b)(1)(i) and adding the citation “§ 1.367(a)-1(c)” in its place.
2. Revising paragraphs (c)(1) through (5) and (d).
3. Revising the first sentence of paragraph (g)(1).
4. Adding paragraph (g)(7).

The additions and revision read as follows:

§1.6038B-1 Reporting of certain transfers to foreign corporations.

* * * * *

(c) * * *

(1) through (4) introductory text [Reserved]. For further guidance, see §1.6038B-1T(c)(1) through (4) introductory text.

(i) Active business property. Describe any transferred property that qualifies under §1.367(a)-2(a)(2). Provide here a general description of the business conducted (or to be conducted) by the transferee, including the location of the business, the number of its employees, the nature of the business, and copies of the most recently prepared balance sheet and profit and loss statement. Property listed within this category may be identified by general type. For example, upon the transfer of the assets of a manufacturing operation, a reasonable description of the property to be used in the business might include the categories of office equipment and supplies, computers and related equipment, motor vehicles, and several major categories of manufacturing equipment. However, any property that is includible in both paragraphs (c)(4)(i) and (iii) of this section (property subject to depreciation recapture under §1.367(a)-4(a)) must be identified in the manner required in paragraph (c)(4)(iii) of this section. If property is considered to be transferred for use in the active conduct of a trade or business under a special rule in paragraph (e), (f), or (g) of §1.367(a)-2, specify the applicable rule and provide information supporting the application of the rule.

(ii) Stock or securities. Describe any transferred stock or securities, including the class or type, amount, and characteristics of the transferred stock or securities, as well as the name, address, place of incorporation, and general description of the corporation issuing the stock or securities.

(iii) Depreciated property. Describe any property that is subject to depreciation recapture under §1.367(a)-4(a). Property within this category must be separately identified to the same extent as was required for purposes of the previously claimed depreciation deduction. Specify with respect to each such asset the relevant recapture provision, the number of months that such property was in use within the United States, the total number of months the property was in use, the fair market value of the property, a schedule of the depreciation deduction taken with respect to the property, and a calculation of the amount of depreciation required to be recaptured.

(iv) Property not transferred for use in the active conduct of a trade or business. Describe any property that is eligible property, as defined in §1.367(a)-2(b) taking into account the application of §1.367(a)-2(c), that was transferred to the foreign corporation but not for use in the active conduct of a trade or business outside the United States (and was therefore not listed under paragraph (c)(4)(i) of this section).

(v) Property transferred under compulsion. If property qualifies for the exception of §1.367(a)-2(a)(2) under the rules of paragraph (h) of that section, provide information supporting the claimed application of such exception.

(vi) Certain ineligible property. Describe any property that is described in §1.367(a)-2(c) and that therefore cannot qualify under §1.367(a)-2(a)(2) regardless of its use in the active conduct of a trade or business outside of the United States. The description must be divided into the relevant categories, as follows:

(A) Inventory, etc. Property described in §1.367(a)-2(c)(1);

(B) Installment obligations, etc. Property described in §1.367(a)-2(c)(2);

(C) Foreign currency, etc. Property described in §1.367(a)-2(c)(3); and

(D) Leased property. Property described in §1.367(a)-2(c)(4).

(vii) Other property that is ineligible property. Describe any property, other than property described in §1.367(a)-2(c), that cannot qualify under §1.367(a)-2(a)(2) regardless of its use in the active conduct of a trade or business outside of the United States and that is not subject to the rules of section 367(d) under §1.367(a)-1(b)(5) (treatment of certain property as subject to section 367(d)). Each item of property must be separately identified.

(viii) [Reserved]. For further guidance, see §1.6038B-1T(c)(4)(viii).

(5) Transfer of foreign branch with previously deducted losses. If the property transferred is property of a foreign branch with previously deducted losses subject to §§1.367(a)-6 and -6T, provide the following information:

(i) through (iv) [Reserved]. For further information, see §1.6038B-1T(c)(5)(i) through (iv).

* * * * *

(d)(1) through (1)(iii) [Reserved]. For further guidance, see §1.6038B-1T(d)(1) through (1)(iii).

(iv) Intangible property transferred. Provide a description of the intangible property transferred, including its adjusted basis. Generally, each item of intangible property must be separately identified, including intangible property described in §1.367(d)-1(g)(2)(i). Identify all property that is subject to the rules of section 367(d) under §1.367(a)-1(b)(5) (treatment of certain property as subject to section 367(d)).

Describe any property for which the income required to be taken into account under section 367(d) and the regulations thereunder will be recognized over a 20-year period pursuant to §1.367(d)-1(c)(3)(ii). Estimate the anticipated income or cost reductions attributable to the intangible property's use beyond the 20-year period.

(v)–(vi) [Reserved]. For further guidance, see §1.6038B-1T(d)(1)(v) through (1)(vi).

(vii) Coordination with loss rules. List any intangible property subject to section 367(d) the transfer of which also gives rise to the recognition of gain under section 904(f)(3) or §§1.367(a)-6 or -6T. Provide a calculation of the gain required to be recognized with respect to such property, in accordance with the provisions of §1.367(d)-1(g)(3).

(d)(1)(viii) through (d)(2) [Reserved]. For further guidance, see §1.6038B-1T(d)(1)(viii) through (d)(2).

* * * * *

(g) Effective/applicability dates. (1) This section applies to transfers occurring on or after July 20, 1998, except as provided in paragraphs (g)(2) through (g)(7) of this section, and except for transfers of cash made in tax years beginning on or before February 5, 1999 (which are not required to be reported under section 6038B), and transfers described in paragraph (e) of this section (which applies to transfers that are subject to §§1.367(e)-1(f) and 1.367(e)-2(e)). * * *

* * * * *

(7) Paragraphs (c)(4)(i) through (vii), (c)(5), and (d)(1)(iv) and (vii) of this section apply to transfers occurring on or after September 14, 2015, and to transfers occurring before September 14, 2015, resulting from entity classification elections made under §301.7701-3 that are filed on or after September 14, 2015. For guidance with respect to paragraphs (c)(4), (c)(5), and (d)(1) of this section before this section is applicable, see §§1.6038B-1 and 1.6038B-1T as contained in 26 CFR part 1 revised as of April 1, 2016.

Par. 24. Section 1.6038B-1T is amended by removing and reserving paragraphs (c)(4)(i) through (c)(5) introductory text, and (d)(1)(iv) and (vii).

John Dalrymple

Deputy Commissioner for Services and Enforcement.

Approved: November 23, 2016

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

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