**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

**[REG-124064-19]**

**RIN 1545-BP55**

**Section 367(d) Rules for Certain Repatriations of Intangible Property**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations that, in certain cases, would terminate the continued application of certain tax provisions arising from a previous transfer of intangible property to a foreign corporation when the intangible property is repatriated to certain United States persons. The proposed regulations would affect certain United States persons that previously transferred intangible property to a foreign corporation.

**DATES:** Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Requests for a public hearing must be submitted as prescribed in the "**Comments and Requests for a Public Hearing**" section.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at https://www.regulations.gov (indicate IRS and REG-124064-19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (the "Treasury Department") and the IRS will publish for public availability any comments submitted electronically or on paper to its public docket.

Send paper submissions to: CC:PA:LPD:PR (REG-124064-19), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations other than §1.904-4, Chadwick Rowland and L. Ulysses Chatman, (202) 317-6937; concerning §1.904-4, Jeffrey L. Parry, (202) 317-6936; concerning submissions of comments and requests for a public hearing, Vivian Hayes at (202) 317-6901 (not toll-free numbers) or by sending an email to publichearings@irs.gov (preferred).

**SUPPLEMENTARY INFORMATION:**

**Background**

I. Sections 367(d) and 6038B

A. Statute

Section 367(d) of the Internal Revenue Code (the "Code") provides rules for outbound transfers of intangible property (as defined in section 367(d)(4)) by a United States person (a "U.S. person") to a foreign corporation.[1] Section 367(d)(1) provides that, except as provided in regulations, if a U.S. person (a "U.S. transferor") transfers any intangible property to a foreign corporation (the "transferee foreign corporation") in an exchange described in section 351 or 361, section 367(d) (and not section 367(a)) applies to the transfer. Section 367(d)(2)(A) provides that a U.S. transferor that transfers intangible property subject to section 367(d) is treated as having sold the intangible property in exchange for payments that are contingent upon the productivity, use, or disposition of the intangible property.

Specifically, the U.S. transferor is treated as receiving amounts that reasonably reflect the amounts that would have been received annually in the form of such

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[1] For purposes of these regulations, a U.S. person is defined in §1.367(a)-1(d)(1), which defines a U.S. person, in part, by reference to persons described in section 7701(a)(30). Section 7701(a)(30) defines a U.S. person as a citizen or resident of the United States, a domestic partnership, a domestic corporation, and certain estates and trusts.

payments over the useful life of the intangible property (an “annual inclusion”), or, in the case of a direct or indirect disposition of the intangible property following the transfer, at the time of the disposition (a “lump-sum inclusion,” and each inclusion, a “section 367(d) inclusion”). See section 367(d)(2)(A)(ii)(I) and (II). The amounts taken into account by the U.S. transferor must be commensurate with the income attributable to the transferred intangible property. See section 367(d)(2)(A) (flush language). Section 367(d)(2)(B) provides that, for purposes of chapter 1 of subtitle A of the Code, the earnings and profits (“E&P”) of the transferee foreign corporation are reduced by the amount required to be included in the income of the U.S. transferor as a section 367(d) inclusion.

Section 6038B(a)(1)(A) grants the Secretary regulatory authority to require information reporting related to certain outbound transfers of property by a U.S. person to a foreign corporation, including rules related to outbound transfers of intangible property. Section 6038B(c) generally provides rules for failures to furnish the required information.

B. Legislative history

Congress enacted section 367(d) in substantially its present form to address “specific and unique problems” that exist with respect to outbound transfers of intangible property. See S. Rep. No 169, 98th Cong., 2d Sess., at 360 (1984); H.R. Rept. No. 432, 98th Cong., 2d Sess., at 1315 (1984). Congress generally identified the cause of such problems as follows:

> [T]ransferor U.S. companies hope to reduce their U.S. taxable income by deducting substantial research and experimentation expenses associated with the development of the transferred intangible and, by transferring the intangible to a foreign corporation at the point of profitability, to ensure deferral of U.S. tax on the profits generated by the intangible.

Id.

Congress also explained that, after the initial outbound transfer of intangible property, these problems could arise by reason of certain subsequent direct or indirect

dispositions of the intangible property. See S. Rept. No 169, 98th Cong., 2d Sess., at 368 (1984) ("[G]ain on a disposition of stock in a [transferee foreign corporation] will be treated as being attributable, in part, to the transferred intangible . . . ; similarly, upon a disposition of the intangible by the [transferee foreign corporation], the U.S. transferor will be treated as receiving a payment [with respect to that intangible]").

C. Regulations

1. In general

Temporary regulations were published under sections 367(d) and 6038B(a)(1)(A) on May 16, 1986 (51 FR 17936). Proposed regulations were also published under these sections on September 16, 2015 (80 FR 55568), and the related final regulations were published on December 16, 2016 (81 FR 91012) (these final regulations and the temporary regulations, together, the "section 367(d) regulations").

Consistent with section 367(d) and its legislative history, the section 367(d) regulations provide rules for determining a U.S. transferor's section 367(d) inclusion and a transferee foreign corporation's required adjustments for its deemed payment to the U.S. transferor. In general, the U.S. transferor takes into account an annual inclusion over the useful life of the intangible property, as determined in accordance with the provisions of section 482 and regulations thereunder. See §1.367(d)-1T(c)(1). For this purpose, the useful life 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. See §1.367(d)-1(c)(3)(i).

Additionally, for purposes of chapter 1 of subtitle A of the Code, the transferee foreign corporation reduces its E&P by the amount of the deemed payment to the U.S. transferor, and, for purposes of subpart F of part III of subchapter N of chapter 1 ("subpart F"), the transferee foreign corporation may treat the deemed payment as, in relevant part, an expense properly allocated and apportioned to gross income subject to

subpart F in accordance with the provisions of §§1.954-1(c) and 1.861-8. See §1.367(d)-1T(c)(2); see also §1.951A-2(c)(2)(ii) (providing similar treatment for purposes of determining tested income or tested loss of a controlled foreign corporation (as defined in section 957, a "CFC")).

2. Subsequent transfer rules

If the U.S. transferor subsequently transfers the stock of the transferee foreign corporation it received in exchange for the intangible property, or if the transferee foreign corporation subsequently transfers the intangible property it received in exchange for its stock, the section 367(d) regulations provide different rules based on whether the transferee in the subsequent transfer is a U.S. person or a foreign person and whether the transferee is a related person or an unrelated person as to the U.S. transferor. See §1.367(d)-1T(d), (e), and (f); see also Notice 2012-39, 2012-31 I.R.B. 95 (describing regulations that would apply in lieu of §1.367(d)-1T(c), (d), (e), and (g) with respect to certain outbound transfers of intangible property by a domestic corporation to a foreign corporation in an exchange described in section 361(a) or (b)). These subsequent transfer rules treat certain subsequent transfers of the stock of the transferee foreign corporation or the intangible property as a disposition of the intangible property (within the meaning of section 367(d)(2)(A)(ii)(II)) that can accelerate a section 367(d) inclusion, and corresponding adjustments, by reason of the deemed payment. See, for example, §1.367(d)-1T(d).

If the U.S. transferor subsequently transfers stock of the transferee foreign corporation to a related U.S. person (a "successor U.S. transferor"), the transfer is not treated as a disposition of the intangible property, and the successor U.S. transferor is treated as receiving a right to receive a proportionate share (determined under §1.367(d)-1T(e)(4)) of the annual inclusion that would otherwise be taken into account by the U.S. transferor under §1.367(d)-1T(c). Therefore, the successor U.S. transferor

is required to take into account that proportionate share of the annual section 367(d) inclusion over the remaining useful life of the intangible property, and the transferee foreign corporation takes into account any adjustments from the successor U.S. transferor's annual section 367(d) inclusion. See §1.367(d)-1T(e)(1) and (2). If the U.S. transferor transfers a portion of the stock of the transferee foreign corporation to one or more successor U.S. transferors and retains a portion of the stock of the transferee foreign corporation, the U.S. transferor continues to take into account the portion of the annual section 367(d) inclusion that is not taken into account by a successor U.S. transferor.[2] See §1.367(d)-1T(c)(1).

Alternatively, if a U.S. transferor subsequently transfers stock of the transferee foreign corporation to an unrelated person (U.S. or foreign), the transfer is treated as an indirect disposition of the transferred intangible property that triggers a lump-sum section 367(d) inclusion. As a result, the U.S. transferor recognizes gain immediately (determined based on the fair market value of the intangible property at the time of the indirect disposition and the U.S. transferor's adjusted basis in the intangible property at the time of the initial section 367(d) transfer), as if the U.S. transferor had sold the intangible property to the unrelated person, and the transferee foreign corporation makes corresponding adjustments. See §1.367(d)-1T(d); see also §1.367(d)-1T(e)(1)(iii) and (e)(2) (providing pro rata rules for cases in which there is a subsequent transfer of stock of the transferee foreign corporation to both an unrelated person(s) and a successor U.S. transferor(s)).

If the transferee foreign corporation subsequently transfers the intangible property to a related person, notwithstanding that such subsequent transfer is a direct

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[2] The section 367(d) regulations apply separately as to each U.S. person treated as a U.S. transferor. Any reference to a "U.S. transferor" in the remainder of this Preamble includes a reference to a "successor U.S. transferor" unless otherwise noted.

disposition of the intangible property, the section 367(d) regulations do not trigger a lump-sum inclusion but rather provide that "the requirement that the U.S. transferor recognize gain under [§1.367(d)-1T(c)(1) or (e)(1)] shall not be affected" by such transfer. See §1.367(d)-1T(f)(3). The regulation does not distinguish between a related U.S. or foreign person and provides further that "for purposes of any required adjustments, and of any accounts receivable created under [§1.367(d)-1T(g)] the related person that receives the intangible property shall be treated as the transferee foreign corporation." See §1.367(d)-1T(f)(3).

Conversely, if the transferee foreign corporation subsequently transfers the intangible property to an unrelated person (U.S. or foreign), the U.S. transferor recognizes gain immediately (in the form of a lump-sum inclusion determined using the U.S. transferor's former adjusted basis in the intangible property immediately before the transfer to the transferee foreign corporation and a partial annual inclusion), and the transferee foreign corporation makes corresponding adjustments. See §1.367(d)-1T(f)(1) and (2).

As described in the preceding paragraphs of this part I.C.2 of the Background, the consequences of a direct or indirect transfer of the intangible property following an initial outbound transfer of that property depend, in relevant part, on whether the transferee in the subsequent transfer is a related or unrelated person. In determining relatedness, the section 367(d) regulations lower certain thresholds that normally apply in determining whether persons are related, to preserve the application of section 367(d) for cases in which a U.S. transferor retains a sufficient nexus to the intangible property after the subsequent transfer. See §1.367(d)-1T(h)(2). Thus, the section 367(d) regulations generally preserve the application of the annual inclusion stream upon a subsequent transfer, but if the transfer sufficiently severs the U.S. transferor's nexus to the intangible property, the transfer is treated as a direct or indirect disposition

of the intangible property, as applicable, and the section 367(d) regulations provide that the U.S. transferor has a lump-sum inclusion and a partial annual inclusion.

II. Application of Section 367(d) to Repatriations of Intangible Property

The Treasury Department and the IRS are aware that some taxpayers are evaluating whether to repatriate to the United States intangible property that was previously transferred to a foreign corporation in a transaction subject to section 367(d).

Because, in relevant part, the section 367(d) regulations do not distinguish between subsequent transfers of intangible property made to a related U.S. or foreign person, as described in part I.C.2 of this Background, there is a concern that, in certain cases, the section 367(d) regulations can inappropriately require the U.S. transferor to continue recognizing an annual section 367(d) inclusion even if the subsequent transfer is to a related U.S. person that will recognize the income derived from the intangible property. Specifically, the section 367(d) regulations do not terminate the required annual section 367(d) inclusion even if the intangible property is transferred to a related U.S. person that is subject to U.S. taxation on income earned from the intangible property. As a result, if the section 367(d) inclusion stream continues, the income earned from the intangible property would be subject to excessive U.S. taxation. Because the continued application of section 367(d) in these situations could result in excessive U.S. taxation and may disincentivize certain repatriations of intangible property, the Treasury Department and the IRS are proposing, in certain cases, to terminate the application of section 367(d) if the intangible property is repatriated to certain U.S. persons that are subject to U.S. taxation with respect to the income derived from the intangible property. The term “repatriation” is, unless otherwise noted, used in this Preamble to generally denote a subsequent transfer of the intangible property to the U.S. transferor or a U.S. person related to the U.S. transferor.

Where the U.S. transferor is a member of a consolidated group, and the intangible property is repatriated to another member of the same consolidated group ("transferee member"), some taxpayers have asked whether the U.S. transferor's annual inclusions could be redetermined to be excluded from gross income under §1.1502-13(c)(6)(ii)(A) (the "Automatic Relief Rule"). For that to occur, the transferee member's corresponding item must be a deduction or loss that is "permanently and explicitly disallowed" under another provision of the Code or regulations. See §1.1502-13(c)(6)(ii)(A). However, the U.S. transferor's annual inclusions may not be excluded under the Automatic Relief Rule, because §1.367(d)-1T(c)(2) does not explicitly disallow the transferee member's deduction for its expense tied to its deemed payment. Rather, in appropriate factual situations, the IRS has ruled that the U.S. transferor's annual inclusions may be excluded from income under the Commissioner's discretionary rule of §1.1502-13(c)(6)(ii)(D).

To address repatriations of intangible property more generally, and not just those where the related U.S. person is a member of the same consolidated group as the U.S. transferor (and to avoid the need to obtain a ruling in such a case), these proposed regulations provide rules that more broadly apply section 367(d) to the repatriation of intangible property, including the circumstances in which the application of section 367(d) is terminated (these rules, collectively, the "section 367(d) repatriation rules").

III. Section 904(d) Foreign Branch Income

Section 904 provides for the application of separate foreign tax credit limitations to certain categories of income under section 904(d). One of those categories is the separate category for foreign branch income under section 904(d)(1)(B). Section 1.904-4(f)(1)(i) provides that foreign branch category income means the gross income of a United States person (as defined in section 7701(a)(30), other than a pass-through

entity) that is attributable to foreign branches (as defined in §1.904-4(f)(3)(vii)) held directly or indirectly through disregarded entities by the United States person.

In general, §1.904-4(f)(2)(vi)(A) adjusts the attribution of gross income when disregarded payments are made between a foreign branch and a foreign branch owner, or between foreign branches. Disregarded remittances or contributions, however, do not result in the reattribution of gross income. Accordingly, when a disregarded transaction with a foreign branch may be structured as either a remittance or contribution, on the one hand, or as a sale, exchange, or license, on the other hand, the amount of gross income attributed to a foreign branch could be manipulated. This concern is heightened when the property in question is highly mobile and highly valuable, as is generally true of intangible property (and less frequently true of tangible property).

To address these concerns §1.904-4(f)(2)(vi)(D) provides that the amount of gross income attributable to a foreign branch (and the amount of gross income attributable to its foreign branch owner) that is not passive category income must be adjusted to reflect all transactions that are disregarded for U.S. tax purposes in which property described in section 367(d)(4) is transferred to or from a foreign branch or between foreign branches, whether or not a disregarded payment is made in connection with the transfer. In determining the amount of gross income that is attributable to a foreign branch that must be adjusted, the principles of sections 367(d) and 482 apply. For example, if a foreign branch owner transfers property described in section 367(d)(4) to a foreign branch, the principles of section 367(d) are applied by treating the foreign branch as a separate foreign corporation to which the property is transferred in exchange for stock of the corporation in a transaction described in section 351. Similarly, if a foreign branch remits property described in section 367(d)(4) to its foreign branch owner, the foreign branch is treated as having sold the transferred property to

the foreign branch owner in exchange for annual payments contingent on the productivity or use of the property, the amounts of which are determined under the principles of sections 367(d) and 482.

**Explanation of Provisions**

I. Section 367(d) Repatriation Rules

A. In general

As described in part II of the Background of this Preamble, §1.367(d)-1T(f)(3) provides that a subsequent disposition of intangible property by the transferee foreign corporation to a related person does not affect a U.S. transferor's annual inclusion under §1.367(d)-1T(c) or (e). This provision further provides that the related person that receives the intangible property is treated as the new transferee foreign corporation for purposes of any required adjustments and any accounts receivable created under §1.367(d)-1T(g). Accordingly, the section 367(d) regulations require the U.S. transferor to recognize annual inclusions even if the income earned from the intangible property is subject to current U.S. taxation in the hands of the U.S. person holding the intangible property. In addition, the deemed (substituted) transferee foreign corporation is not allowed a deduction that could reduce taxable income, even though that deemed transferee foreign corporation is the U.S. transferor or a related U.S. person.

Continuing to apply section 367(d) in such cases could give rise to excessive U.S. taxation and disincentivize taxpayers from repatriating that property. To address these concerns, proposed §1.367(d)-1(f)(4) generally terminates the application of section 367(d) if the transferee foreign corporation repatriates the intangible property to a "qualified domestic person" and certain reporting requirements are satisfied. See proposed §1.367(d)-1(f)(4)(i). See part I.C of this Explanation of Provisions for a discussion of the definition of a qualified domestic person and part III of this Explanation of Provisions for a discussion of the reporting requirements.

B. Consequences of repatriating intangible property

1. In General

As noted in part I.A of this Explanation of Provisions, the proposed regulations terminate the continued application of section 367(d) when a transferee foreign corporation repatriates intangible property to a qualified domestic person and the U.S. transferor provides the relevant information described in proposed §1.6038B-1(d)(2) and, when those requirements are met, the proposed regulations require the U.S. transferor to include in gross income a partial annual inclusion attributable to the part of its taxable year that the transferee foreign corporation held the intangible property, after which the intangible property is no longer subject to section 367(d) (thus, for example, the annual inclusion stream terminates). See proposed §1.367(d)-1(f)(4)(i). The proposed regulations also require the U.S. transferor to recognize gain (which amount may be zero in certain cases) as a result of the repatriation. See Id. Additionally, the proposed regulations provide a special rule (discussed in part I.D of this Explanation of Provisions) to determine the qualified domestic person's basis in the repatriated intangible property. The transferee foreign corporation, on the other hand, makes the required adjustments currently described in §1.367(d)-1T(c)(2), with minor clarifications, for cases in which the section 367(d) repatriation rules apply (that is, the adjustments with respect to the U.S. transferor's partial annual inclusion for the year of the repatriation). See part I.E of this Explanation of Provisions for a discussion of the modifications made with respect to the required adjustments described in current §1.367(d)-1T(c)(2)(ii) and (e)(2)(ii).

The manner in which the repatriation occurs will determine whether the U.S. transferor must recognize gain in connection with the repatriation transaction, with corresponding adjustments being made as to the transferee foreign corporation. For example, the U.S. transferor would not recognize gain in the case of a repatriation

occurring by reason of a nonrecognition transaction pursuant to which no gain or loss is recognized as to the transferee foreign corporation. See part I.B.2 of this Explanation of Provisions for a discussion of the rules that apply based on the form of the transaction by which the intangible property is repatriated. The proposed regulations, therefore, address the tax consequences under section 367(d) as to the intangible property, but do not otherwise alter the tax treatment of the transaction by which the intangible property is repatriated.

2. Gain Recognition as to the U.S. Transferor

Consistent with section 367(d)(2)(A)(ii)(II), proposed §1.367(d)-1(f)(4)(i)(A) (the "gain recognition rule") requires the U.S. transferor to recognize gain equal to the amount described in proposed §1.367(d)-1(f)(4)(ii). The gain recognition rule, in conjunction with the rules described in parts I.B.3 (Required adjustments for certain gain recognized) and I.D (Qualified domestic person's adjusted basis in repatriated intangible property) of this Explanation of Provisions, generally ensures that a qualified domestic person does not receive a tax-free increase to the adjusted basis in the repatriated intangible property.

Thus, as noted in part I.B.1 of this Explanation of Provisions, whether the U.S. transferor recognizes gain under the gain recognition rule depends on the form of the repatriation transaction. Specifically, the gain recognition rule focuses on whether the intangible property is transferred basis property (as defined in section 7701(a)(43)) by reason of the repatriation, without regard to the application of section 367(d) and the section 367(d) regulations. See proposed §1.367(d)-1(f)(4)(ii). The proposed regulations incorporate the definition of transferred basis property for this purpose, as

opposed to other approaches for distinguishing the form of the repatriation transaction, to ensure the appropriate application of these proposed rules in all circumstances.[3]

If the intangible property is transferred basis property as described in the preceding paragraph, the amount of gain the U.S. transferor will recognize pursuant to the gain recognition rule is the amount of gain the transferee foreign corporation would recognize, if any, upon the repatriation under general subchapter C rules if its adjusted basis in the intangible property were equal to the U.S. transferor's former adjusted basis in the property. See proposed §1.367(d)-1(f)(4)(ii)(A). This amount may be zero in the case of certain repatriations, for example, a repatriation by a transferee foreign corporation of intangible property to the U.S. transferor in a complete liquidation described in sections 332 and 337, in which case the U.S. transferor will not recognize any gain under the gain recognition rule. Alternatively, if, for example, the repatriation occurs in an exchange described in section 351(b) in which the transferee in the exchange is a qualified domestic person (as defined in proposed §1.367(d)-1(f)(4)(iii)), the amount of gain determined under this rule may be greater than zero, even though the intangible property is transferred basis property, because the amount of gain is determined by reference to the gain the transferee foreign corporation would recognize upon the transaction if the adjusted basis in the intangible property were equal to the U.S. transferor's former adjusted basis in the intangible property.

If the intangible property is not transferred basis property by reason of the repatriation, the amount of gain a U.S. transferor will recognize pursuant to the gain recognition rule is the excess, if any, of the fair market value of the intangible property

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[3] For example, if the form of the repatriation transaction were distinguished by reference to whether the repatriation occurred pursuant to a nonrecognition transaction (as described in section 7701(a)(45)), uncertainty could arise in certain cases, such as repatriations that occur pursuant to exchanges involving boot (such as cash). This uncertainty would impact the proposed rules for determining a qualified domestic person's adjusted basis in the repatriated intangible property, which relies on the form of the repatriation as described in this paragraph.

on the date of the repatriation over the U.S. transferor's former adjusted basis in the property. See proposed §1.367(d)-1(f)(2)(ii)(B). For example, if the transferee foreign corporation repatriates the intangible property to the U.S. transferor in a distribution described in section 311, the intangible property is not transferred basis property, and therefore the rule described in this paragraph applies to determine the amount of gain recognized by the U.S. transferor under the gain recognition rule.

3. Required Adjustments Related to Certain Gain Recognized

Current §1.367(d)-1T(f)(2)(i) provides that a transferee foreign corporation's E&P are reduced, in relevant part, by the amount of gain recognized by a U.S. transferor under §1.367(d)-1T(f)(1). Because a U.S. transferor recognizes gain in these cases in the form of a lump-sum inclusion, the corresponding adjustment to the transferee foreign corporation's E&P is generally intended to reduce the E&P that arises for the transferee foreign corporation by reason of the disposition (and, in so doing, the adjustment prevents potential excessive E&P arising from that disposition). To achieve this goal, §1.367(d)-1T(f)(2) necessarily implies a preceding increase to the transferee foreign corporation's E&P by reason of the disposition that is then offset by the corresponding reduction. For example, consider a case in which a U.S. transferor contributed intangible property with an adjusted basis of $0 to a wholly owned transferee foreign corporation in an exchange described in section 351(a) that was subject to section 367(d). In a later year, the transferee foreign corporation disposes of the intangible property to an unrelated person when the fair market value of the intangible property is $100x, which causes the U.S. transferor to recognize $100x of gain under §1.367(d)-1T(f)(1); also, assume the transferee foreign corporation has $50x of other E&P unrelated to the subsequent disposition of the intangible property. Section 1.367(d)-1T(f)(2) does not simply reduce the transferee foreign corporation's E&P by $100x, but rather the corresponding reduction would offset the $100x of E&P that arises

as to the transferee foreign corporation by reason of the disposition, thereby preventing potential excessive E&P and leaving the transferee foreign corporation's other E&P unaffected.

Similarly, and in order to prevent excessive E&P and gross income as to the transferee foreign corporation because of the gain recognition rule or §1.367(d)-1T(f)(1), proposed §1.367(d)-1(f)(2)(i) provides certain adjustments to the transferee foreign corporation's E&P and gross income that arise by reason of any gain the U.S. transferor recognizes under the gain recognition rule or §1.367(d)-1T(f)(1). Specifically, for purposes of chapter 1 of the Code – that is, chapter 1 (relating to normal taxes and surtaxes) of subtitle A (relating to income taxes) of the Code — the transferee foreign corporation reduces (but not below zero) the portion of its E&P and gross income arising from the transaction to take into account the gain recognized by the U.S. transferor. See proposed §1.367(d)-1(f)(2)(i). And, as provided currently under the section 367(d) regulations, any gain so recognized can be received by the U.S. transferor without further U.S. tax consequences pursuant to the account receivable mechanism provided in §1.367(d)-1T(g)(1). See proposed §1.367(d)-1(f)(2)(ii).

Because section 367(d) effectively shifts certain gain a transferee foreign corporation would recognize as to intangible property directly to a U.S. transferor under the gain recognition rule or §1.367(d)-1T(f)(1) (as applicable), these rules are intended to provide appropriate reductions to offset, as to the transferee foreign corporation, the impact of a U.S. transferor's recognition of gain under section 367(d). In most cases, the proper reduction described in proposed §1.367(d)-1(f)(2)(i) will equal the amount of gain recognized by the U.S. transferor under the provisions described in the preceding sentence. But the proper reduction may diverge from the amount of gain recognized by the U.S. transferor in certain cases, depending on the position taken with respect to the transferee foreign corporation's basis in the intangible property during the time the

intangible property is subject to section 367(d). See part I.D of this Explanation of Provisions for additional discussion of this issue.

4. Special Rule for Related Transactions

Proposed §1.367(d)-1(f)(4)(v) provides a special rule that applies if the intangible property is transferred in two or more related transactions. If this special rule applies, whether and how the proposed regulations apply depends on the ultimate recipient of the intangible property. See proposed §1.367(d)-1(f)(6)(ii)(D) and (E) (Examples 4 and 5) for illustrations of this rule.

C. Qualified domestic person

Proposed §1.367(d)-1(f)(4)(iii) defines a qualified domestic person for purposes of the proposed regulations. First, a qualified domestic person includes the U.S. transferor that initially transferred the intangible property subject to section 367(d) that is repatriated (an "initial U.S. transferor") and a U.S. person treated as the U.S. transferor pursuant to §1.367(d)1T(e)(1) as applied with certain limitations (a "qualified successor"). See proposed §1.367(d)-1(f)(4)(iii)(A) and (B). Specifically, these limitations require that a qualified successor must be either an individual or a corporation other than a corporation exempt from tax under section 501(a), a regulated investment company (as defined in section 851(a)), a real estate investment trust (as defined in section 856(a)), a domestic international sales corporation (DISC) (as defined in section 992(a)(1)), or an S corporation (as defined in section 1361(a)) (a domestic corporation meeting these requirements, a "qualified corporation"). Second, a qualified domestic person also includes a U.S. person that is an individual or a qualified corporation related to the U.S. transferor within the meaning of §1.367(d)-1T(h). See proposed §1.367(d)-1(f)(4)(iii)(C) and (D).

The proposed regulations define a qualified domestic person in this manner based on the principle that it is generally appropriate to terminate the continued

application of section 367(d) only when all the income produced by the intangible property, as well as gain recognized on a disposition of the intangible property, will be subject to current tax in the United States as to the qualified domestic person while that person holds the property. It is also appropriate to terminate the continued application of section 367(d) for a repatriation to an initial U.S. transferor because such a transfer merely restores the circumstances that existed at the time of the original outbound transfer subject to section 367(d).

A qualified domestic person, as noted above, also includes certain U.S. persons (individuals and qualified corporations) related to either the initial U.S. transferor or qualified successor, as applicable. See proposed §1.367(d)-1(f)(4)(iii)(C) and (D). This aspect of the definition of qualified domestic person implements the same principle described in the preceding paragraph; that is, to terminate the continued application of section 367(d), all of the income or gain from the intangible property must be subject to current tax in the United States as to the qualified domestic person after the repatriation or the repatriation must restore the circumstances that existed at the time of the original outbound transfer subject to section 367(d).

In the case of a domestic partnership, §1.367(d)-1T(h) defines a related person for purposes of the section 367(d) regulations by reference to certain relationships described in section 267 or 707(b)(1). Thus, if a U.S. transferor owns more than 50 percent of the capital or profits interest in a domestic partnership, the U.S. transferor and the domestic partnership are related within the meaning of section 707(b)(1) and, therefore, the U.S. transferor and the domestic partnership are related for purposes of §1.367(d)-1T(h), even if the domestic partnership has one or more foreign partners. The proposed regulations, however, do not treat the domestic partnership as a qualified domestic person. The Treasury Department and the IRS considered addressing such cases by including rules in the proposed regulations treating a partnership as an

aggregate of its partners (an "aggregate approach"), with the analysis for qualified domestic person status occurring under such an aggregate approach. See, for example, §§1.367(a)-1T(c)(3)(i) and 1.367(d)-1T(a) for similar rules that apply to certain transfers of intangible property by a partnership to a foreign corporation. The proposed regulations do not adopt an aggregate approach because that approach could allow taxpayers to circumvent the purposes of these proposed regulations and other related regulations following a repatriation to a domestic partnership. This could occur if, for example, partnership allocations are changed after the repatriation or if the transferee foreign corporation (or a related foreign corporation) has liquidation rights to the intangible property following the transfer. Additionally, in the case of a partnership with one or more partners that are qualified domestic persons and one or more partners that are not, an aggregate approach would necessitate rules to measure the extent to which proposed §1.367(d)-1(f)(4)(i) applies by reason of a repatriation (and, by extension, the extent to which the annual inclusion stream under section 367(d) should continue to apply after the repatriation). To address this concern, the Treasury Department and the IRS also considered including, as part of an aggregate approach in the proposed regulations, rules like those provided in §§1.367(a)-3 and 1.367(a)-8 regarding gain recognition agreements to ensure that, to the extent the relief provided in proposed §1.367(d)-1(f)(4)(i) applies as to a repatriation, a corresponding amount of income from the intangible property would be, and would continue to be, subject to tax in the United States. After consideration, however, the Treasury Department and the IRS are not proposing such an approach, because it would be unworkable due to the compliance and administrative burden.

D. Qualified domestic person's adjusted basis in repatriated intangible property

Proposed §1.367(d)-1(f)(4)(iv) provides rules regarding a qualified domestic person's basis in the intangible property it receives in a repatriation. Specifically, the

proposed regulations provide that, in the case of repatriation pursuant to which the intangible property qualifies as transferred basis property, a qualified domestic person's adjusted basis in the intangible property will equal, subject to any applicable limitations that may apply under the Code, the lesser of the U.S. transferor's former adjusted basis in the intangible property or the transferee foreign corporation's adjusted basis in that property (immediately before the repatriation), increased by the greater of the amount of gain recognized by the U.S. transferor under the proposed regulations upon the repatriation (if any) or the amount of gain recognized by the transferee foreign corporation upon the repatriation (if any). See §1.367(d)-1(f)(4)(v)(A). The result in most cases will track the result that would occur under generally applicable rules, like section 334(b) or 362, while appropriately accounting for situations in which the gain a U.S. transferor recognizes under the gain recognition rule differs from the gain the transferee foreign corporation recognizes by reason of the repatriation. Alternatively, if the intangible property does not qualify as transferred basis property, a qualified domestic person's adjusted basis in the intangible property will equal the fair market value of the intangible property as of the date of the subsequent disposition. See proposed §1.367(d)-1(f)(4)(iv)(B).

The Treasury Department and the IRS are aware of the uncertainty regarding the treatment of adjusted basis in intangible property subject to section 367(d) while section 367(d) applies, particularly when the U.S. transferor's former adjusted basis is greater than zero. The proposed regulations are intended to address basis consequences solely when intangible property is repatriated in a transaction that eliminates the continued application of section 367(d). In this manner, the effect of proposed §1.367(d)-1(f)(4)(iv) is prospective insofar as it provides for a qualified domestic person's adjusted basis in the intangible property after the property is no longer subject to section 367(d). Thus, the proposed regulations do not address, nor is any implication

intended as to, the appropriate treatment of adjusted basis as to the transferee foreign corporation in intangible property subject to section 367(d) while section 367(d) applies; instead, the Treasury Department and the IRS will address general basis rules under section 367(d) in future rulemaking. Until such general rules are issued, proposed §1.367(d)-1(f)(4)(iv) would operate in a manner intended to reach an appropriate result regarding a qualified domestic person's basis in repatriated intangible property. See proposed §1.367(d)-1(f)(6)(ii)(C) (Example 3) for an illustration of this rule.

E. Required adjustments related to an annual section 367(d) inclusion

As noted in part I.A of this Explanation of Provisions, the transferee foreign corporation makes the required adjustments currently described in §1.367(d)-1T(c)(2) for cases in which the section 367(d) repatriation rules apply (that is, the adjustments with respect to the U.S. transferor's partial annual inclusion for the year of the repatriation). Current §1.367(d)-1T(c)(2)(ii) provides that, as to a U.S. transferor's annual inclusion, the transferee foreign corporation may treat that deemed payment as an expense (whether or not paid) properly allocated and apportioned against gross income subject to subpart F, in accordance with §§1.954-1(c) and 1.861-8.

The proposed regulations provide that the deemed payment by the transferee foreign corporation is treated as an allowable deduction that must be allocated and apportioned to such corporation's classes of gross income in accordance with §§1.882-4(b)(1), 1.954-1(c), and 1.960-1(c) and (d) (as appropriate). See proposed §1.367(d)-1(c)(2)(ii). Proposed §1.367(d)-1(c)(2)(ii) thus clarifies that the allowable deduction is allocated and apportioned under the provisions cited in the previous sentence potentially to any class (or classes) of gross income (as appropriate) rather than solely to gross income subject to subpart F in all circumstances. The proposed regulations make identical clarifications in proposed §1.367(d)-1(e)(2)(ii) (required adjustments in the case of a subsequent transfer of stock of the transferee foreign corporation to a

successor U.S. transferor). The proposed regulations change the reference to "expense" in the current regulations to "allowable deduction" for clarity; this modification is not intended to be a substantive change.

F. Multiple U.S. transferors

As noted in part I.C of the Background section of this Preamble, there may be multiple U.S. transferors with respect to the same intangible property, which may occur, for example, if a U.S. transferor subsequently transfers a portion of its stock in the transferee foreign corporation to a successor U.S. transferor. In these cases, because the section 367(d) regulations apply separately as to each U.S. transferor, the requirements of proposed §1.367(d)-1(f)(4)(i) also apply separately with respect to each U.S. transferor. That is, to terminate the continued application of section 367(d) with respect to a particular U.S. transferor, the recipient of the transferred intangible property must be a qualified domestic person with respect to that U.S. transferor and the information described in proposed §1.6038B-1(d)(2)(iv) must be provided.

To illustrate, assume that a transferee foreign corporation ("TFC") holds intangible property that is subject to section 367(d), and TFC repatriates that intangible property on date X. Also assume that two domestic corporations ("US1" and "US2") are treated as U.S. transferors under the section 367(d) regulations by reason of owning stock of TFC (US1 was the original U.S. transferor and US2 is a successor U.S. transferor by reason of its acquisition of a portion of the stock of TFC from US1). Therefore, if the recipient of the transferred intangible property on date X is a qualified domestic person (for example, a related domestic corporation) with respect to US1, but is an unrelated person with respect to US2, the following occurs: proposed §1.367(d)-1(f)(4)(i) would apply with respect to US1, if the information described in proposed §1.6038B-1(d)(2)(iv) is provided, and US2 would recognize gain under §1.367(d)-1T(f)(1) by reason of the transaction.

G. Other modifications

The proposed regulations update the references to section 936(h)(3)(B) that appear in the applicable regulations under section 367 with references to section 367(d)(4), which was added as part of the Consolidated Appropriations Act in 2018. See Public Law 115-141 and §§1.367(a)-1(d)(5) and (6) and 1.367(e)-2(b)(2)(i)(B). The proposed regulations do not update all references to section 936(h)(3)(B) that appear in regulations issued under other sections of the Code, but such an update will be included as part of future rulemaking.

The proposed regulations provide that proposed §1.367(d)-1(f)(3) would not apply as to a repatriation meeting the requirements of proposed §1.367(d)-1(f)(4)(i)(B); instead, proposed §1.367(d)-1(f)(4)(i) applies, and, thereafter, the intangible property is no longer subject to section 367(d). The language in proposed §1.367(d)-1(f)(3) also reflects minor editorial differences from the language currently in §1.367(d)-1T(f)(3) that are not intended to be substantive. See proposed §1.367(d)-1(f)(3).

The proposed regulations fix a longstanding typographical error by replacing the reference to "section 267(d)" in current §1.367(d)-1T(h)(2)(ii) with a reference to "267(f)."

Finally, the proposed regulations eliminate §1.951A-2(c)(2)(ii), which provides that deductions taken into account in determining a CFC's tested income and tested loss under section 951A include the amount of a deemed payment under section 367(d)(2)(A). This rule is no longer necessary because the proposed regulations provide that such deemed payments are treated as allowable deductions in accordance with, in relevant part, §1.951A-2(c)(3). See proposed §1.367(d)-1(c)(2)(ii) and (e)(2)(i).

II. Section 904(d) Foreign Branch Income Rules

As noted in part III of the Background section of this Preamble, the provisions in §1.904-4(f)(2)(vi)(D) provide that, in relevant part, the principles of section 367(d) apply

for determining the amount of gross income that is attributable to a foreign branch that must be adjusted under §1.904-4(f)(2)(vi)(D). But those provisions do not elaborate on how the principles of section 367(d) apply for that purpose; in particular, there is no mention of how or whether current §1.367(d)-1T(f) applies in the foreign branch income context.

The Treasury Department and the IRS believe that due to the differing scopes and purposes of section 367(d) and §1.904-4(f)(2)(vi)(D), the consequences of a subsequent transfer for purposes of determining a U.S. transferor's section 367(d) inclusion do not necessarily inform the appropriate treatment for purposes of the section 904(d) branch income rules. Section 367(d), as a threshold matter, applies only in the case of certain outbound transfers of intangible property by a U.S. person to a foreign corporation, whereas §1.904-4(f)(2)(vi)(D) applies to outbound transfers by a U.S. foreign branch owner to a foreign branch, inbound transfers by a foreign branch to a U.S. foreign branch owner, as well as transfers between foreign branches with the same U.S. foreign branch owner. If there are multiple transfers of an item of intangible property over time, each transfer must be separately evaluated and could result in differing amounts of deemed annual payments depending on any interim changes in the value of the intangible property between successive transfers. Accordingly, these proposed regulations provide that each successive transfer to which §1.904-4(f)(2)(vi)(D) applies is considered independently from any other preceding or subsequent transfers. See proposed §1.904-(f)(2)(vi)(D)(4). Therefore, the subsequent transfer rules in the regulations under section 367(d), including the rule for repatriations provided in these proposed regulations, do not apply in the context of determining gross income attributable to the foreign branch income category and each successive transfer is separately subject to the provisions of §1.904-(f)(2)(vi)(D)(1) and will not terminate or

otherwise impact the application of §1.904-(f)(2)(vi)(D)(1) to a prior transfer described in that paragraph.

III. Reporting

A. Reporting requirements for subsequent transfers of intangible property

As described in part I.A of this Explanation of Provisions, proposed §1.367(d)-1(f)(4)(i) requires a U.S. transferor to provide the information described in proposed §1.6038B-1(d)(2)(iv) with respect to the repatriation. In general, §§1.6038B-1 and 1.6038B-1T provide information reporting rules that apply with respect to transfers of property to foreign corporations, including transfers of property described in sections 367(a) and (d). See §1.6038B-1(c) and (d). Section 1.6038B-1T(d) provides specific information reporting rules for transfers subject to section 367(d), including rules that apply to subsequent transfers. See §1.6038B-1T(d)(2).

These proposed regulations make two conforming changes to the reporting requirements for subsequent transfers under §1.6038B-1T(d)(2) (the "proposed information reporting rules"). The first change provides that, to the extent a qualified domestic person receives intangible property in a subsequent transfer, the subsequent transfer information described in proposed §1.6038B-1(d)(2)(iv) instead of the subsequent transfer information described in §1.6038B-1T(d)(2)(iii) must be provided.

The second change adds information reporting requirements for a subsequent transfer of intangible property to a qualified domestic person. See proposed §1.6038B-1(d)(2)(iv). These reporting rules request information that is necessary to ensure that proposed §1.367(d)-1(f)(4) is appropriately applied to the subsequent transfer.

B. Relief for certain failures to provide required information

In general, as a condition for terminating the application of section 367(d) with respect to the transferred intangible property, proposed §1.367(d)-1(f)(4)(i)(B) requires a U.S. transferor to provide the information described in proposed §1.6038B-1(d)(2)(iv). If

a U.S. transferor fails to provide that information, the repatriation is subject to proposed §1.367(d)-1(f)(3) such that the section 367(d) regulations, including the requirement to take an annual inclusion into account over the useful life of the intangible property, continue to apply. However, a U.S. transferor is eligible for relief under the proposed regulations if proposed §1.367(d)-1(f)(4)(i)(B) would have applied to the subsequent transfer of intangible property but for the fact that the required information was not provided and the U.S. transferor, upon becoming aware of the failure, promptly provides the required information and explains its failure to comply. See proposed §1.367(d)-1(f)(5). When it applies, proposed §1.367(d)-1(f)(5) treats the requirements of proposed §1.367(d)-1(f)(4)(i)(B) as satisfied as of the date of the transfer of intangible property to the qualified domestic person.

IV. Applicability Dates

The proposed regulations generally apply to subsequent dispositions of intangible property occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. See proposed §§1.367(d)-1(j)(2)), 1.904-4(q)(3), and 1.6038B-1(g). Proposed §1.951A-2(c)(2) applies to taxable years of foreign corporations ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**, and to taxable years of United States shareholders in which or with which such taxable years end. See proposed §1.951A-7(e).

**Special Analyses**

I. Regulatory Planning and Review -- Economic Analysis

The Administrator of the Office of Information and Regulatory Affairs ("OIRA"), Office of Management and Budget ("OMB"), has determined that this proposed rule is not a significant regulatory action, as that term is defined in section 3(f) of Executive Order 12866. Therefore, OIRA has not reviewed this proposed rule pursuant to section

6(a)(3)(A) of Executive Order 12866 and the April 11, 2018, Memorandum of Agreement between the Treasury Department and OMB.

II. Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to OMB for review in accordance with the Paperwork Reduction Act under control number 1545-0026. Commenters are strongly encouraged to submit public comments electronically. Written comments and recommendations for the proposed information collection should be sent to https://www.reginfo.gov/public/do/PRAMain, with copies to the Internal Revenue Service. Find this particular information collection by selecting "Currently under Review - Open for Public Comments" then by using the search function. Submit electronic submissions for the proposed information collection to the IRS via email at omb.unit@irs.gov (indicate “REG-124064-19 (1545-0026)” on the Subject line). Comments on the collection of information should be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in §1.6038B-1(d)(2)(iv). This information is necessary to ensure that proposed §1.367(d)-1(f)(4) is appropriately applied to the subsequent transfer.

The collection of information is required to comply with section 367(d). 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*.

Estimated change in annual reporting burden: 1601 hours.

Estimated increase in annual burden per respondent: 2.4 hours.

Estimated number of respondents: 667.

Estimated frequency of responses: annually.

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 assigned by the Office of Management and Budget.

III. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6) ("RFA") requires the agency "to prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on small entities." See 5 U.S.C. 603(a). Section 605 of the RFA provides an exception to this requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. A small entity is defined as a small business, small nonprofit organization, or small governmental jurisdiction. See 5 U.S.C. 601(3) through (6).

The Treasury Department and the IRS do not have detailed data readily available to assess the exact number of small entities potentially affected by the proposed regulations. Based on the limited data available, it is estimated that there will be less than 700 taxpayers potentially affected by the proposed regulations. But, among those taxpayers, an even smaller portion will likely be affected by the proposed regulations as these rules apply to a specific type of transaction – repatriations of intangible property subject to section 367(d). Moreover, the entities potentially affected by these proposed regulations are generally not small entities, because of the resources and investment necessary to develop intangible property and, once so developed, transfer the intangible property to a foreign corporation. Therefore, the Treasury Department and the IRS certify that the proposed regulations will not have a significant economic impact on a substantial number of small entities. The IRS invites the public to comment on the impact of these regulations on small entities.

IV. Section 7805(f)

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications, does not impose substantial direct compliance costs on State and local governments, and does not preempt State law within the meaning of the Executive order.

**Comments and Requests for Public Hearing**

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the Preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

**Statement of Availability of IRS Documents**

IRS Revenue Procedures, Revenue Rulings, and Notices cited in this Preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at https://www.irs.gov.

**Drafting Information**

The principal authors of these regulations are Chadwick Rowland and L. Ulysses Chatman, 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.

**Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

**PART 1--INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

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

* * * * *

**§1.367(a)-1 [Amended]**

**Par. 2.** Section 1.367(a)-1 is amended by removing the language “section 936(h)(3)(B)” in paragraphs (d)(5) and (6) and adding the language “section 367(d)(4)” in its place.

**Par. 3.** Section 1.367(d)-1 is amended by:

1. Removing reserved paragraphs (c)(1) through (2).
2. Adding a heading to paragraph (c) and adding paragraphs (c)(1) and (2).
3. Removing reserved paragraphs (c)(4) through (g)(2) (introductory text).
4. Adding paragraphs (c)(4), (d), (e), and (f).
5. Adding a heading to paragraph (g) and adding paragraphs (g)(1) and (g)(2) introductory text.
6. Removing reserved paragraphs (g)(2)(ii) through (g)(2)(iii)(D).

7. Adding paragraph (g)(2)(ii) and reserved paragraphs (g)(2)(iii) introductory text and (g)(2)(iii)(A) through (D).
8. Removing reserved paragraphs (g)(4) through (i).
9. Adding paragraphs (g)(4), (h), and (i).
10. Revising paragraph (j).

The additions and revision read as follows:

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

* * * * *

(c) Deemed payments upon transfer of intangible property to foreign corporation--(1) In general. For further guidance, see §1.367(d)-1T(c)(1).

(2) Required adjustments. For further guidance, see §1.367(d)-1T(c)(2) introductory text and (c)(2)(i).

(i) [Reserved]

(ii) The deemed payment is treated as an allowable deduction (whether or not that amount is paid) of the transferee foreign corporation properly allocated and apportioned to the appropriate classes of gross income in accordance with §§1.882-4(b)(1), 1.951A-2(c)(3), 1.954-1(c), 1.960-1(c), and 1.960-1(d), as applicable.

* * * * *

(4) Blocked income. For further guidance, see §1.367(d)-1T(c)(4).

(d) Subsequent transfer of stock of transferee corporation to unrelated person. For further guidance, see §1.367(d)-1T(d).

(e) Subsequent transfer of stock of transferee foreign corporation to related person--(1) Transfer to related U.S. person treated as disposition of intangible property. For further guidance, see §1. 367(d)-1T(e)(1).

(2) Required adjustments. For further guidance, see §1.367(d)-1T(e)(2) introductory text and (e)(2)(i).

(i) [Reserved]

(ii) The deemed payment is treated as an allowable deduction (whether or not that amount is paid) of the transferee foreign corporation properly allocated and apportioned to the appropriate classes of gross income in accordance with §§1.882-4(b)(1), 1.951A-2(c)(3), 1.954-1(c), 1.960-1(c), and 1.960-1(d), as applicable.

(iii) For further guidance, see §1.367(d)-1T(e)(2)(iii) through (e)(4).

(iv) [Reserved]

(3) through (4) [Reserved]

(f) Subsequent disposition of transferred intangible property by transferee foreign corporation--(1) In general. For further guidance, see §1.367(d)-1T(f)(1).

(2) Required adjustments. If a U.S. transferor is required to recognize gain under paragraph (f)(4)(i)(A) of this section or §1.367(d)-1T(f)(1), then, in addition to the adjustments described in paragraph (c)(2)(ii) of this section and §1.367(d)-1T(c)(2) with respect to the deemed payment described in §1.367(d)-1T(f)(1)(ii)--

(i) For purposes of chapter 1 of the Code, the transferee foreign corporation reduces (but not below zero) the portion of its earnings and profits and gross income arising by reason of the subsequent disposition of the intangible property by the amount of gain recognized by the U.S. transferor under paragraph (f)(4)(i)(A) of this section or §1.367(d)-1T(f)(1); and

(ii) The U.S. transferor may establish an account receivable from the transferee foreign corporation equal to the amount of gain recognized under paragraph (f)(4)(i)(A) of this section or §1.367(d)-1T(f)(1) in accordance with §1.367(d)-1T(g)(1).

(3) Subsequent transfer of intangible property to related person. Except as provided in paragraph (f)(4)(i)(B) of this section, a U.S. person’s requirement to

recognize income under §1.367(d)-1T(c) or (e) is not affected by the transferee foreign corporation's subsequent disposition of the transferred intangible property to a related person. For purposes of any required adjustments, and of any accounts receivable created under §1.367(d)-1T(g)(1), the related person that receives the intangible property is treated as the transferee foreign corporation.

(4) Subsequent transfer of intangible property to qualified domestic person--(i) In general. Except as provided in paragraph (f)(4)(v) of this section, if a U.S. person transfers intangible property subject to section 367(d) and the rules of this section and §1.367(d)-1T to a foreign corporation in an exchange described in section 351 or 361 and, within the useful life of the intangible property, that transferee foreign corporation subsequently disposes of the intangible property to a qualified domestic person, then--

(A) The U.S. transferor of the intangible property (or any person treated as such pursuant to §1.367(d)-1T(e)(1)) is required to recognize gain, as applicable, equal to the amount described in paragraph (f)(4)(ii) of this section; and

(B) If the U.S. transferor provides the information described in §1.6038B-1(d)(2)(iv), then--

(1) The U.S. transferor is required to recognize a deemed payment as provided in §1.367(d)-1T(f)(1)(ii); and

(2) The intangible property is no longer subject to section 367(d), this section, and §1.367(d)-1T after applying paragraphs (f)(4)(i)(A) and (f)(4)(i)(B)(1) of this section.

(ii) Gain recognition for U.S. transferor. The amount of gain a U.S. transferor must recognize under paragraph (f)(4)(i)(A) of this section is determined as follows—

(A) If the intangible property is transferred basis property (as defined in section 7701(a)(43)) by reason of the subsequent disposition (determined without regard to section 367(d), this section, and §1.367(d)-1T), the amount of gain, if any, the

transferee foreign corporation would recognize if its adjusted basis in the intangible property were equal to the U.S. transferor's former adjusted basis in the property; or

(B) If the intangible property is not transferred basis property by reason of the subsequent disposition (determined without regard to section 367(d), this section, and §1.367(d)-1T), the excess, if any, of the fair market value of the intangible property on the date of the subsequent disposition and the U.S. transferor's former adjusted basis in that property.

(iii) Qualified domestic person. For purposes of paragraph (f)(4) of this section, a qualified domestic person means--

(A) The U.S. transferor that initially transferred intangible property subject to section 367(d);

(B) A U.S. person treated as a U.S. transferor under §1.367(d)-1T(e)(1), provided such person is an individual or a corporation other than a corporation exempt from tax under section 501(a), a regulated investment company (as defined in section 851(a)), a real estate investment trust (as defined in section 856(a)), a domestic international sales corporation (DISC) (as defined in section 992(a)(1)), or an S corporation (as defined in section 1361(a));

(C) A U.S. person that is an individual related, within the meaning of paragraph (h)(2)(ii) of this section and §1.367(d)-1T(h), to the person described in paragraph (f)(4)(iii)(A) or (B) of this section; or

(D) A U.S. person that is a corporation related, within the meaning of paragraph (h)(2)(ii) of this section and §1.367(d)-1T(h), to the person described in paragraph (f)(4)(iii)(A) or (B) of this section, other than a corporation exempt from tax under section 501(a), a regulated investment company (as defined in section 851(a)), a real estate investment trust (as defined in section 856(a)), a DISC (as defined in section 992(a)(1)), or an S corporation (as defined in section 1361(a)).

(iv) Qualified domestic person's basis in the intangible property. The qualified domestic person's adjusted basis in the intangible property is--

(A) In the case of a subsequent disposition of intangible property described in paragraph (f)(4)(ii)(A) of this section, and subject to any applicable limitations that may apply under the Code, the lesser of the U.S. transferor's former adjusted basis in the intangible property or the transferee foreign corporation's adjusted basis in the intangible property (as determined immediately before the subsequent disposition), in each case increased by the greater of the amount of gain (if any) described in paragraph (f)(4)(ii)(A) of this section and recognized by the U.S. transferor or the amount of gain (if any) recognized by the transferee foreign corporation as to the intangible property by reason of the subsequent disposition; or

(B) In the case of a subsequent disposition of intangible property described in paragraph (f)(4)(ii)(B) of this section, the fair market value of the intangible property (as determined on the date of the subsequent disposition).

(v) Special rule for related transactions. If the transferee foreign corporation subsequently disposes of the transferred intangible property to a person that would, absent this paragraph (f)(4)(v), be a qualified domestic person (initial transferee) and, as part of a series of related transactions, the intangible property is subsequently disposed of to any other person, including by reason of multiple dispositions, then the initial transferee is treated as a qualified domestic person only if the ultimate recipient of the intangible property is a qualified domestic person. See paragraphs (f)(6)(ii)(D) and (E) of this section (Examples 4 and 5), for illustrations of the application of this paragraph (f)(4)(v).

(5) Relief for certain failures to comply. This paragraph (f)(5) provides relief if paragraph (f)(4)(i)(B)(2) of this section would apply but for the U.S. transferor's failure to provide the information required by paragraph (f)(4)(i)(B) of this section (a "failure to

comply”). When a failure to comply occurs, the subsequent disposition of the transferred intangible property is generally subject to paragraphs (f)(3) and (f)(4)(i)(A) of this section, and not paragraph (f)(4)(i)(B)(2) of this section. Nevertheless, a failure to comply is deemed not to have occurred (regardless of whether the U.S. transferor continued to include amounts in gross income under §1.367(d)-1T(c) or (e) after the subsequent disposition), and the requirements of paragraph (f)(4)(i)(B) of this section are treated as satisfied as of the date of the subsequent disposition if, promptly after the U.S. transferor becomes aware of the failure, the U.S. transferor provides such information and provides a reasonable explanation for its failure to comply 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). Additionally, the U.S. transferor must timely file an amended return for the taxable year in which the subsequent disposition occurred (and, if applicable, for each taxable year starting with the taxable year immediately after the taxable year in which the subsequent disposition occurred and ending with the taxable year in which the U.S. transferor seeks relief under this paragraph (f)(5)) that includes the information required by paragraph (f)(4)(i)(B) of this section. If any taxable year of the U.S. transferor is under examination when an amended return is filed, a copy of the amended return (or, if applicable, amended returns) must be provided to the Internal Revenue Service personnel conducting the examination.

(6) Examples--(i) Assumed facts. For purposes of the examples in paragraph (f)(6)(ii) of this section, and except where otherwise indicated, the following facts are assumed.

(A) USP and USS are domestic corporations that each use a calendar taxable year.

(B) TFC is a foreign corporation whose functional currency is the U.S. dollar.

(C) In year 1, USP transfers intangible property, as defined in section 367(d)(4), with a $0 adjusted basis, to TFC in a section 351 exchange (the "transferred IP"), and such transfer is subject to section 367(d).

(D) Each annual inclusion (including any amount described in §1.367(d)-1T(f)(1)(ii)) is taken into account under section 367(d)(2)(A)(ii)(I) and §1.367(d)-1T(c)(1).

(E) Any subsequent transfer or disposition of stock of TFC or the transferred IP occurs within the useful life of the transferred IP.

(F) All transactions are respected under general principles of tax law.

(ii) Examples. The following examples illustrate the application of paragraph (f)(4) of this section and other paragraphs of this section that relate to paragraph (f)(4).

(A) Example 1: Complete liquidation of transferee foreign corporation into a qualified domestic person--(1) Facts. In year 2, USP transfers all the stock of TFC to USS, a related person within the meaning of §1.367(d)-1T(h) and paragraph (h)(2)(ii) of this section, in a section 351 exchange to which §1.367(d)-1T(e)(1) applies (the "year 2 transfer"). In year 3, TFC distributes all its property (including the transferred IP) to USS pursuant to a complete liquidation to which sections 332 and 337 apply (the "year 3 liquidation"). The all earnings and profits amount determined under §1.367(b)-2(d) with respect to the stock of TFC held by USS is $0. The information described in §1.6038B-1(d)(2) is provided by USS for the taxable year in which the year 3 liquidation occurs.

(2) Analysis--(i) The year 2 transfer. Because the year 2 transfer involves a transfer of all the stock of TFC by USP (the initial U.S. transferor) to a related U.S. person (USS), under §1.367(d)-1T(e)(1)(i) USS (a successor U.S. transferor) is treated as receiving the right to receive a proportionate share of the contingent annual payments that USP would have otherwise taken into account under §1.367(d)-1T(c). As determined under §1.367(d)-1T(e)(4), USS's proportionate share of such payments is 100 percent. Accordingly, USS will annually include in its gross income the full amount of each of the annual payments that USP would otherwise have taken into account under §1.367(d)-1T(c) over the useful life of the transferred IP, and USP will not recognize any gain upon the year 2 transfer. See §1.367(d)-1T(e)(1)(ii) and (iii).

(ii) The year 3 liquidation. The year 3 liquidation results in a subsequent disposition of the transferred IP to USS. USS, a U.S. person treated as the U.S. transferor pursuant to §1.367(d)-1T(e)(1), is a qualified domestic person within the meaning of paragraph (f)(4)(iii) of this section. Pursuant to paragraph (f)(4)(i)(A) of this section, USS must recognize the amount of gain described in paragraph (f)(4)(ii) of this section. Because the year 3 liquidation is a complete liquidation to which sections 332 and 337 apply, the intangible property is transferred basis property (as defined in section 7701(a)(43) and determined without regard to section 367(d), this section, and §1.367(d)-1T), and therefore paragraph (f)(4)(ii)(A) applies to determine the amount of any gain USS must recognize. Because TFC does not recognize gain with respect to the transferred IP (regardless of the adjusted basis in the intangible property) by reason

of the year 3 liquidation, the amount of gain described in paragraph (f)(4)(ii)(A) of this section is $0. Accordingly, USS does not recognize gain pursuant to paragraph (f)(4)(i)(A) of this section by reason of the year 3 liquidation. Additionally, because USS provides the information described in §1.6038B-1(d)(2), paragraph (f)(4)(i)(B) of this section applies to the year 3 liquidation. USS therefore recognizes a deemed payment representing the part of USS's taxable year during which TFC held the transferred IP pursuant to paragraph (f)(4)(i)(B)(1) of this section, and the required adjustments described in paragraph (c)(2)(ii) of this section and §1.367(d)-1T(c)(2)(i) apply as to the deemed payment. Also, because USS does not recognize gain pursuant to paragraph (f)(4)(i)(A) of this section, the required adjustments described in paragraph (f)(2) of this section do not apply. Pursuant to paragraph (f)(4)(i)(B)(2) of this section, after taking the deemed payment into account, the transferred IP is no longer subject to section 367(d), this section, and §1.367(d)-1T. Finally, pursuant to paragraph (f)(4)(iv)(A) of this section, USS's adjusted basis in the transferred IP is $0, which is equal to USP's former adjusted basis in the transferred IP ($0), increased by the greater of the amount of gain recognized by USS under paragraph (f)(4)(i)(A) of this section ($0) or the amount of gain recognized by TFC upon the year 3 distribution ($0).

(B) Example 2: Taxable distribution of the transferred intangible property to a qualified domestic person--(1) Facts. The facts are the same as in paragraph (f)(6)(ii)(A) of this section (Example 1), except that, instead of in year 3 TFC distributing all its property to USS pursuant to a complete liquidation, in year 3 TFC distributes the transferred IP to USS in a distribution described in section 311(b) when the fair market value of the transferred IP is $100x (the "year 3 distribution"). TFC's adjusted basis in the transferred IP immediately before the distribution is $0.

(2) Analysis. The consequence of the year 2 transfer is the same as described in paragraph (f)(6)(ii)(A)(2)(i) of this section (Example 1). Like the consequences described in paragraph (f)(6)(ii)(A)(2) of this section (Example 1), the year 3 distribution is a subsequent disposition of the transferred IP to USS, a qualified domestic person. Pursuant to paragraph (f)(4)(i)(A) of this section, USS must recognize the amount of gain described in paragraph (f)(4)(ii) of this section. Because the year 3 distribution is described in section 311(b) the intangible property is not transferred basis property (as defined in section 7701(a)(43) and determined without regard to section 367(d), this section, and §1.367(d)-1T), and therefore USS must recognize $100x gain under paragraph (f)(4)(ii)(B) of this section. The $100x gain amount equals the excess of the fair market value of the transferred IP on the date of the year 3 distribution ($100x) over USP's former adjusted basis in the property ($0). TFC, because of USS's gain recognition under paragraph (f)(4)(i)(A) of this section, reduces (but not below zero) the portion of its earnings and profits and gross income arising by reason of the year 3 distribution by the amount of such gain under paragraph (f)(2)(i) of this section. Specifically, because the year 3 distribution requires USS to recognize $100x of gain, TFC reduces the portion of its earnings and profits and gross income that arise by reason of the year 3 distribution, which is $100x (the excess of the fair market value of the transferred IP ($100x) over TFC's adjusted basis in the transferred IP ($0)), by $100x (the amount of gain USS recognizes pursuant to paragraph (f)(4)(i)(A) of this section). As a result, after taking into account the reduction, TFC has no earnings and profits or gross income that arise by reason of the year 3 distribution. Furthermore, USS may establish an account receivable from TFC equal to $100x under paragraph (f)(2)(ii) of this section. Additionally, and as described in paragraph (f)(6)(ii)(A)(2) of this section (Example 1), pursuant to paragraph (f)(4)(i)(B)(1) of this section, USS recognizes a deemed payment for the portion of USS's taxable year during which TFC

held the transferred IP, and the required adjustments described in paragraph (c)(2)(ii) of this section and §1.367(d)-1T(c)(2) apply to this deemed payment. After taking these consequences into account, pursuant to paragraph (f)(4)(i)(B)(2) of this section, the transferred IP is no longer subject to section 367(d), this section, and §1.367(d)-1T. Finally, pursuant to paragraph (f)(4)(iv)(B) of this section, USS's adjusted basis in the transferred IP is $100x, which is the fair market value of the transferred IP on the date of the year 3 distribution.

(C) Example 3: Qualified domestic person's basis in intangible property when intangible property is repatriated in an exchange described in section 351(b)--(1) Facts. The facts are the same as in paragraph (f)(6)(ii)(A) of this section (Example 1), except that the transfer of stock of TFC to USS in year 2 does not occur and instead of the year 3 liquidation, in year 3 TFC transfers the intangible property to USS (a qualified domestic person as defined in paragraph (f)(4)(iii) of this section) in an exchange described in section 351(b) pursuant to which TFC recognizes $50x of gain and USP recognizes $50x of gain under paragraph (f)(4)(i)(A) of this section (the "year 3 exchange").

(2) Analysis. Pursuant to paragraph (f)(4)(iv)(A) of this section, USS's adjusted basis in the intangible property is $50x, which is the amount equal to the lesser of USP's former adjusted basis in the property ($0) or TFC's adjusted basis in the property ($0), increased by the greater of the amount of gain recognized by USP under paragraph (f)(4)(i)(A) of this section ($50x) or the amount of gain recognized by TFC upon the year 3 exchange ($50x).

(D) Example 4: Repatriation as part of a series of related transactions culminating in transfer to a foreign corporation--(1) Facts. The facts are the same as in paragraph (f)(6)(ii)(A)(1) of this section (Example 1), except that the year 3 liquidation occurs as part of a series of related transactions pursuant to which USS transfers the transferred IP that it receives from TFC to a related foreign corporation (FC1) in exchange for stock in FC1.

(2) Analysis. Because the year 3 liquidation occurs as part of a series of related transactions pursuant to which the transferred IP is ultimately contributed to a FC1, a foreign corporation, and because a foreign corporation is not a qualified domestic person pursuant to paragraph (f)(4)(iii) of this section, then, under paragraph (f)(4)(v) of this section, the year 3 liquidation is not treated as a subsequent disposition described in paragraph (f)(4)(i) of this section, but is instead treated as a subsequent disposition described in paragraph (f)(3) of this section.

(E) Example 5: Repatriation as part of a series of related transactions culminating in transfer to a qualified domestic person--(1) Facts. The facts are the same as in paragraph (f)(6)(ii)(B)(1) of this section (Example 2), except that the year 3 distribution occurs as part of a series of related transactions pursuant to which USS disposes of the transferred IP that it receives from TFC to USP.

(2) Analysis. Because the year 3 distribution occurs as part of a series of related transactions pursuant to which the transferred IP is distributed to USP, and because USP is a qualified domestic person pursuant to paragraph (f)(4)(iii) of this section, paragraph (f)(4)(v) of this section does not prevent paragraph (f)(4)(i) of this section from applying to the year 3 distribution. Accordingly, the consequences under section 367(d) of the year 3 distribution are the same as those described in paragraph

(f)(6)(ii)(B)(2) of this section (Example 2), and the consequences of the subsequent disposition of the transferred IP by USS to USP are determined after applying paragraph (f)(4) of this section to the transfer of the transferred IP by TFC to USS.

(g) Special rules--(1) Establishment of accounts receivable. For further guidance, see §1.367(d)-1T(g)(1).

(2) Election to treat transfer as sale. For further guidance, see §1.367(d)-1T(g)(2) introductory text.

* * * * *

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

(iii) [Reserved]

(A) through (D) [Reserved]

* * * * *

(4) Coordination with section 482. For further guidance, see § 1.367(d)-1T(g)(4).

(5) Determination of fair market value. For further guidance, see §1.367(d)-1T(g)(5).

(6) Anti-abuse rule. For further guidance, see §1.367(d)-1T(g)(6).

(h) Related person. For further guidance, see §1.367(d)-1T(h) introductory text and (h)(1).

(1) [Reserved]

(2) For further guidance, see §1.367(d)-1T(h)(2) introductory text and (h)(2)(i).

(i) [Reserved]

(ii) Section 1563 applies (for purposes of section 267(f)) without regard to section 1563(b)(2).

(i) Effective date. For further guidance, see §1.367(d)-1T(i).

(j) Applicability dates--(1) In general. 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 of this chapter

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.

(2) Certain subsequent dispositions of intangible property. Paragraphs (c)(2)(ii), (e)(2)(ii), (f)(2) through (5), and (h)(2)(ii) of this section apply to subsequent dispositions of intangible property occurring on or after [date of publication of final regulations in the **Federal Register**]. For subsequent dispositions of intangible property occurring before [date of publication of final regulations in the **Federal Register**], see §1.367(d)-1T (as contained in 26 CFR part 1, revised as of April 1, 2022).

**§1.367(d)-1T [Amended]**

**Par. 4.** Section 1.367(d)-1T is amended by:

1. Removing "; and" at the end of paragraph (c)(2)(i) and adding a period in its place.

2. Removing and reserving paragraphs (c)(2)(ii), (e)(2)(ii), and (f)(2) and (3).

3. Removing "; and" at the end of paragraph (h)(2)(i) and adding a period in its place.

4. Removing and reserving paragraph (h)(2)(ii).

**§1.367(e)-2 [Amended]**

**Par. 5.** Section 1.367(e)-2 is amended by removing the language "section 936(h)(3)(B)" in the last sentence of paragraph (b)(2)(i)(B) and adding the language "section 367(d)(4)" in its place.

**Par. 6.** Section 1.904-4 is amended by adding paragraph (f)(2)(vi)(D)(4) and revising paragraph (q)(3) to read as follows:

**§1.904-4 Separate application of section 904 with respect to certain categories of income.**

* * * * *

(f) * * *

(2) * * *

(vi) * * *

(D) * * *

(4) Multiple transfers of intangible property. If the same intangible property is transferred in a series of transfers described in paragraph (f)(2)(vi)(D)(1) of this section, each successive transfer is separately subject to the provisions of paragraph (f)(2)(vi)(D)(1) and will not terminate or otherwise affect the application of paragraph (f)(2)(vi)(D)(1) to a prior transfer described in paragraph (f)(2)(vi)(D)(1).

* * * * *

(q) * * *

(3) Except as provided in the following sentence, paragraph (f) of this section applies to taxable years that begin after December 31, 2019, and end on or after November 2, 2020. Paragraph (f)(vi)(D)(4) of this section applies to taxable years that begin on or after [date of publication of final regulations in the **Federal Register**].

**Par. 7.** Section 1.951A-2 is amended by revising paragraph (c)(2) to read as follows:

**§1.951A-2 Tested income and tested loss.**

* * * * *

(c) * * *

(2) Determination of gross income and allowable deductions. For purposes of determining tested income and tested loss, the gross income and allowable deductions of a controlled foreign corporation for a CFC inclusion year are determined under the rules of § 1.952-2 for determining the subpart F income of the controlled foreign corporation, except, for a controlled foreign corporation which is engaged in the business of reinsuring or issuing insurance or annuity contracts and which, if it were a domestic corporation engaged only in such business, would be taxable as an insurance

company to which subchapter L of chapter 1 of the Code applies, substituting "the rules of sections 953 and 954(i)" for "the principles of §§ 1.953-4 and 1.953-5" in § 1.952-2(b)(2).

* * * * *

**Par. 8.** Section 1.951A-7 is amended by adding paragraph (e) to read as follows:

**§1.951A-7 Applicability dates.**

* * * * *

(e) Determination of gross income and allowable deductions. Section 1.951A-2(c)(2) applies to taxable years of foreign corporations ending on or after [date of publication of final regulations in the **Federal Register**], and to taxable years of United States shareholders in which or with which such taxable years end. For taxable years of foreign corporations ending before [date of publication of final regulations in the **Federal Register**], and to taxable years of United States shareholders in which or with which such taxable years end, see §1.951A-2(c)(2)(i) and (ii) as contained in 26 CFR part 1, revised as of April 1, 2022.

**Par. 9.** Section 1.6038B-1 is amended by:

1. Removing reserved paragraphs (d)(1) through (1)(iii).

2. Adding paragraphs (d) heading and (d)(1) introductory text and reserved paragraphs (d)(1)(i) through (iii).

3. Removing reserved paragraphs (d)(1)(viii) through (d)(2).

4. Adding paragraphs (d)(1)(viii), (d)(2), and (g)(8).

The additions read as follows:

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

* * * * *

(d) Transfers subject to section 367(d)—(1) Initial transfer. For further guidance, see § 1.6038B–1T(d)(1) introductory text through (d)(1)(iii).

(i) through (iii) [Reserved]

* * * * *

(viii) Other intangibles. For further guidance, see § 1.6038B–1T(d)(1)(viii).

(2) Subsequent transfers. For additional, see § 1.6038B–1T(d)(2) introductory text through (d)(2)(ii).

(i) through (ii) [Reserved]

(iii) Subsequent transfer. Except for a subsequent transfer described in paragraph (d)(2)(iv) of this section, provide the following information concerning the subsequent transfer:

(A) For further guidance, see § 1.6038B–1T(d)(2)(iii)(A) through (C).

(B) through (C) [Reserved]

(iv) Subsequent transfer of intangible property to a qualified domestic person. Provide the following information concerning a subsequent transfer of intangible property described in §1.367(d)-1(f)(4)(i):

(A) A statement providing that §1.367(d)-1(f)(4)(i)(B) applies to the subsequent transfer;

(B) A general description of the subsequent transfer and any wider transaction of which it forms a part, including the U.S. transferor's former adjusted basis in the intangible property and the transferee foreign corporation's adjusted basis in the intangible property (as determined immediately before the subsequent transfer), the amount and computation of any gain recognized by the U.S. transferor under §1.367(d)-1(f)(4)(i)(A), and a description of whether the intangible property was, or is expected to

be, subsequently transferred to one or more other persons (as described in §1.367(d)-1(f)(4)(v));

(C) A description of the intangible property;

(D) A copy of the Form 926 with respect to the original transfer of the intangible property and any attachments identifying the intangible property as within the scope of section 367(d);

(E) The name, address, and taxpayer identification number of the qualified domestic person that receives the intangible property, including a statement describing the relationship between the U.S. transferor and the qualified domestic person, and, if applicable, such information regarding any other persons described in §1.367(d)-1(f)(4)(v); and

(F) Any other information as may be prescribed by the Commissioner in publications, forms, instructions, or other guidance.

* * * * *

(g) * * *

(8) Paragraphs (d)(2)(iii) introductory text and (d)(2)(iv) of this section apply to transfers occurring on or after [date of publication of final regulations in the **Federal Register**].

**Par. 10.** Section 1.6038B-1T is amended by revising paragraph (d)(2)(iii) introductory text to read as follows:

**§ 1.6038B-1T Reporting of certain transactions to foreign corporations (temporary).**

* * * * *

(d) * * *

(2) * * *

(iii) Subsequent transfer. For further guidance, see § 1.6038B–1(d)(2)(iii) introductory text:

* * * * *

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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