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VIA ELECTRONIC TRANSMISSION AND HAND-DELIVERY

CC:PA:LPD:PR (REG-139483-13)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on proposed § 482 regulations in REG-139483-13

Dear Sirs or Madams,

The Silicon Valley Tax Directors Group (“*SVTDG*”) hereby submits these comments on the above-referenced proposed regulations issued under § 482 of the Internal Revenue Code of 1986, as amended, in REG-139483-13, 80 Fed. Reg. 55568 (September 16, 2015).¹ SVTDG members are listed in the Appendix of this letter.

I respectfully request that the Treasury Department and the IRS hold a public hearing on these proposed regulations under § 482.

Sincerely,

A handwritten signature in blue ink that reads "Robert F. Johnson". The signature is written in a cursive style and is contained within a light blue rectangular box.

Robert F. Johnson
Co-Chair, Silicon Valley Tax Directors Group

¹ The proposed regulations were also issued in temporary form in T.D. 9738, 80 Fed. Reg. 55538 (September 16, 2015).

I. INTRODUCTION AND SUMMARY

A. Background on the Silicon Valley Tax Directors Group

The SVTDG represents U.S. high technology companies with a significant presence in Silicon Valley that are dependent on R&D and worldwide sales to remain competitive. The SVTDG promotes sound, long-term tax policies that allow the U.S. high tech technology industry to continue to be innovative and successful in the global marketplace.

B. Recommendation that the proposed regulations be withdrawn

Under § 482, in determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm’s length with an uncontrolled taxpayer. This is the arm’s length standard. The proposed regulations give four clauses—§§ 1.482-1(f)(2)(i)(A)–(D)—that “must be taken into account in determining the true taxable income of a controlled taxpayer.”² Accordingly, the proposed clauses modify the arm’s length standard. Professed adherence to the arm’s length standard in the preamble doesn’t alter this. Courts have held that the arm’s length standard isn’t what the IRS deems it to be. If Treasury and the IRS continue to maintain that the Proposed Regulations are consistent with, and don’t modify, the arm’s length standard, the Proposed Regulations are likely to be found invalid. Accordingly, they should be withdrawn.

Longstanding case law interpreting § 482 and its predecessor (which have been successively reenacted by Congress) and U.S. tax treaties demonstrate that the arm’s length standard is incorporated in § 482, and not merely a regulatory gloss on the statute. Treasury and the IRS therefore lack authority to modify the arm’s length standard, and thus to promulgate any regulations that would do so.

Under existing § 1.482-1, the arm’s length standard is deemed to be met if a controlled transaction(s) is/are properly characterized and the transfer pricing is determined using the method(s) providing the most reliable measure of an arm’s length result. This occupies the field. The existing regulatory framework applies to determine the arm’s length results for any controlled transactions. The guidance in the proposed regulations is therefore unnecessary.

Aside from these general flaws, the particular language used in the proposed clauses suffers from various shortcomings.

The requirement in Prop. § 1.482-1(f)(2)(i)(A) that “all value provided . . . in a controlled transaction requires an arm’s length amount of compensation” is unworkable. “Value” is a characteristic of what’s transferred (property rights) or provided (services) in a controlled

² § 1.482-1(f)(2).

transaction, not a thing itself provided. Use of “value” in the clause will lead to much confusion. Because the value of all the transferee’s assets will generally be changing with time, it may be difficult to determine which of those changes are attributable to the controlled transaction at issue. Even if a causal link can be found, it may be unclear which “value” is referenced. Is value or anticipated value at issue? The requirement that the “value provided” be independent of the character of the controlled transaction ignores the fact that such character determines available transfer pricing methods and possible comparables, thereby directly influencing the arm’s length result. Finally, it’s unclear how the proposed clause would interact with the periodic adjustment rule, which allows ex post value to be taken into consideration.

The aggregation of transactions permitted in Prop. § 1.482-1(f)(2)(i)(B) depends on the transactions being “economically interrelated,” but the proposed clause gives no guidance on how this determination would be made. This is a serious defect, given that aggregation will generally affect the applicable transfer pricing methods and thus arm’s length transfer prices.

Prop. § 1.482-1(f)(2)(i)(C) calls for a “coordinated best method analysis” for one or more controlled transactions governed by more than one Code provision or regulation, but it’s unclear that a best method analysis works outside § 482, or that it should override a Congressionally-intended result arising under such other Code provisions or regulations.

Prop. § 1.482-1(f)(2)(i)(D) provides that allocation of a result determined under a coordinated best method analysis must be made using the method that “provides the most reliable measure of an arm’s length result for each allocated amount.” It’s not clear that existing transfer pricing methods in § 482 regulations can be adapted to allocation. It’s also unclear that an allocation method satisfying the quoted constraint can generally be found.

II. SPECIFIC CONCERNS WITH PROPOSED § 482 REGS IN REG-139483-13

A. General comments on Prop. §§ 1.482-1(f)(2)(i)(A)–(D)

1. Contrary to the preamble, the Proposed Regulations modify the arm’s length standard

Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer.³ The existing regulations provide that in determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm’s length with an uncontrolled taxpayer. This is the unalloyed arm’s length standard.⁴ If a taxpayer meets the arm’s length standard with

³ § 1.482-1(a)(1).

⁴ See, e.g., *Xilinx, Inc. v Comm’r*, 125 T.C. 37, 51 (2005), *aff’d* 598 F.3d 1191 (9th Cir. 2010).

respect to a controlled transaction, its true taxable income relating to the transaction is thus known and no adjustment is permitted under § 482.⁵

Paragraph 1.482-1(f)(2) (entitled “Rules relating to the determination of true taxable income”) provides that the rules listed in the paragraph “must be taken into account in determining the true taxable income of a controlled taxpayer.” If the rules referenced in § 1.482-1(f)(2) must be taken into account in determining the true taxable income, the rules must somehow affect what the true taxable income is. That is, if the rules in § 1.482-1(f)(2) aren’t taken into account, one presumably can end up with a different determination of “true taxable income” than if one takes the rule into account.

But the true taxable income of a controlled taxpayer is determined (fixed) if the controlled taxpayer’s transfer pricing meets the arm’s length standard. How can rules under § 1.482-1(f)(2) have any bearing on true taxable income if true taxable income is determined for a taxpayer that meets the arm’s length standard? They can’t if the arm’s length standard is immutable.

The rules in § 1.482-1(f)(2)—including Prop. §§ 1.482-1(f)(2)(i)(A)–(D)—have the effect of potentially modifying a controlled taxpayer’s true taxable income, and this is only possible if those rules modify the arm’s length standard. That is, if meeting the arm’s length standard determines true taxable income, but the rules in § 1.482-1(f)(2) must be taken into account in determining true taxable income, those rules must modify the arm’s length standard.

This result—modification of the arm’s length standard by the proposed regulations—isn’t altered by professed adherence to the arm’s length standard signaled in the preamble to the Proposed Regulations.⁶ Simply asserting a proposed regulation is consistent with the arm’s length standard doesn’t make it so. Equally, the arm’s length standard isn’t whatever Treasury and the IRS deem it to be. That is, Treasury and the IRS can’t deem or define a controlled transaction to meet the arm’s length standard if and only if certain arbitrary requirements are met.⁷

⁵ § 1.482-1(a)(2) provides that the IRS may make allocations between or among members of a controlled group if a controlled taxpayer hasn’t reported its true taxable income.

⁶ See, e.g., *Altera Corp. v. Comm’r*, 145 T.C. No. 3 (2015), (Treasury’s assertion that a similar rule to the one invalidated in *Xilinx* is consistent with the arm’s length standard “is contrary to all of the evidence before it,” and thus invalid).

⁷ See, e.g., *Xilinx* 125 T.C. at 54–55 (2005) (Tax Court disagrees with Commissioner’s assertion that “application of the express terms of [a cost sharing regulation] itself produces an arm’s length result,” without regard to the existence of controlled transactions).

If Treasury and the IRS continue to maintain that the Proposed Regulations are consistent with, and don't modify, the arm's length standard, the Proposed Regulations are likely to be found invalid.

2. Treasury and the IRS lack authority to modify the arm's length standard

But if Treasury and the IRS reissue the Proposed Regulations acknowledging they modify the arm's length standard, the regulations are also likely to be found invalid because Treasury and the IRS lack authority to modify the arm's length standard. The predecessor of § 482 (§ 45) was enacted in the *Revenue Act of 1928*, and the statute per se was interpreted by courts as embodying the arm's length standard.⁸ The Supreme Court agreed the purpose of § 482 is to place controlled taxpayers on a tax parity with uncontrolled taxpayers.⁹ The 1932 income tax treaty between the U.S. and France expressly incorporated the arm's length standard,¹⁰ and the arm's length standard is embodied in all U.S. tax treaties,¹¹ which have been ratified by the Senate. Successive reenactment since 1928 of the pertinent statutory language in § 482, congressional failure to revise or repeal Treasury's interpretation of the arm's length standard as reflecting the purpose of § 482, and Congressional assent to the arm's length standard establish Congressional approval and incorporation of the arm's length standard in § 482.¹² The commensurate-with-income standard under § 482 is, moreover, subject to the arm's length standard.¹³ This weight of authority cuts against Treasury and the IRS changing the arm's length standard under § 482.

⁸ See, e.g., *Asiatic Petroleum Co. v. Comm'r*, 31 B.T.A. 1152, 1158–1159 (1935), *aff'd* 79 F.2d 234 (2nd Cir. 1935) (BTA upheld Commissioner's allocation between related corporations "clearly to reflect [their] income" because the transaction "was not an arm's length transaction."); and *Central Cuba Sugar Co. v. Comm'r*, 198 F.2d 214, 216 (2nd Cir. 1952) (explaining that Congress adopted § 45 "to deny the power to shift income . . . arbitrarily among controlled corporations, and to place such corporations rather on a parity with uncontrolled concerns.").

⁹ *Comm'r v. First Sec. Bank of Utah*, 405 U.S. 394 (1972).

¹⁰ Article IV of the *Convention on Double Taxation Between The United States Of America And The Republic of France* (ratified by the U.S. in 1932) allows a Contracting State to make transfer pricing adjustments with respect to a controlled transaction for which "conditions differ[] from those which would be made with a third enterprise."

¹¹ Notice 88-123, 1988-2 C.B. 458, 475 (the "White Paper").

¹² See, e.g., *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 274–275 (1974). See also, *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991) ("Treasury regulations and [judicial or agency] interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.").

¹³ See *Xilinx, Inc. v. Comm'r*, 125 T.C. at 56–58 (2005) ("[T]he commensurate-with income standard was intended to supplement and support, not supplant the arm's length standard. . . . [T]he [CWI] modification of section 482 did not eliminate the use of comparable transactions in determining a controlled taxpayer's income."), *aff'd*, 598 F.3d 1191 (9th Cir. 2010); *accord*, *Altera Corp. v.*

Although Treasury and the IRS haven't the authority to modify the arm's length standard under § 482, such modifications could be made by Congress changing § 482 itself. That might have occurred to the Obama Administration when in every year since 2009 it's proposed to change the law by amending § 482 to provide—in a transfer of multiple intangible properties—“the Commissioner may value the intangible properties on an aggregate basis where that achieves a more reliable result.”¹⁴ This (and more) is what the Proposed Regulations try to do. What the Obama Administration realized needed a statutory fix to implement, the Proposed Regulations try to shoehorn under the arm's length standard.

3. The existing § 482 regulations determine the arm's length results for any controlled transactions.

It's important to distinguish the terms “arm's length standard” and “arm's length result,” which are pretty carefully defined in the regulations. The regulations provide that “[a] controlled transaction meets the arm's length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstance (arm's length result).”¹⁵ Thus, unsurprisingly, a controlled transaction is deemed to meet the arm's length standard if the controlled taxpayers get an arm's length result.

Recognizing that the requirements imposed on the hypothetical uncontrolled taxpayer reference transaction—i.e., the same transaction under the same circumstances—could lead to impracticability, the regulations relax the requirements. They provide that “because identical transactions can rarely be located, whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under

Comm'r, 145 T.C. no. 3 (2015); *White Paper*, p. 475 (“To allay fears that Congress intended the commensurate with income standard to be implemented in a manner inconsistent with international transfer pricing norms and U.S. treaty obligations, Treasury officials publicly stated that Congress intended no departure from the arm's length standard, and that the Treasury Department would so interpret the new law. Treasury and the Service continue to adhere to that view, and believe that what is proposed in this study is consistent with that view.”); § 1.482-4(f)(2)(i) (“If an intangible is transferred under an arrangement that covers more than one year, the consideration charged in each taxable year may be adjusted to ensure that it is commensurate with the income attributable to the intangible. Adjustments made pursuant to this paragraph (f)(2) shall be consistent with the arm's length standard and the provisions of Section 1.482-1.”)

¹⁴ See *Department of the Treasury, General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals (“2010 Greenbook”)*, p. 32, with identical language used in the 2011, 2012, 2013, and 2014 *Greenbooks*. In the 2015 and 2016 *Greenbooks* the language was broadened to cover cases in which “intangible property is transferred with other property or services.” While the *Greenbooks* describe this proposed change to § 482 as a clarification, a court isn't likely to accept this. See, e.g., *VERITAS Software Corp. and Subs. v. Comm'r*, 133 T.C. 297, 316 (2005) (Tax Court explains why “clarification” of the definition of intangibles in § 482 is in fact a change).

¹⁵ § 1.482-1(b)(1) (emphasis added).

comparable circumstances.”¹⁶ So a controlled transaction is still deemed to meet the arm’s length standard if the controlled taxpayers get an arm’s length result in the (relaxed) “comparable” sense.

The regulations offer practical guidance on situations in which controlled taxpayers will be treated as getting an arm’s length result, or equivalently, how to get an arm’s length result. They provide that determination of “whether a controlled transaction produces an arm’s length result is made pursuant to a method selected under the best method rule” described in § 1.482-1(c).¹⁷ The best method rule provides that “the arm’s length result of a controlled transaction must be determined under the method that, under the facts and circumstances, provides the most reliable measure of an arm’s length result.” To summarize, if controlled taxpayers engaging in a controlled transaction use a method that provides “the most reliable measure of an arm’s length result,” they’re deemed to have gotten an arm’s length result (§ 1.482-1(c)(1)), so deemed to have met the arm’s length standard (§ 1.482-1(b)(1)), and finally their true taxable income is deemed determined (under longstanding interpretation of § 482), so no § 482 allocation is permissible.

The regulations give plenty of guidance on methods. Sections 1.482-2 through 1.482-7 and 1.482-9 “provide specific methods . . . to determine the arm’s length result”¹⁸ for any possible controlled transaction, meaning any transaction involving transfers of property interests or the provision of services.¹⁹ Section 1.482-2 applies to particular controlled transactions, including those involving loans or advances or the use of tangible property; §§ 1.482-3 through 1.482-6 apply to controlled transactions involving the transfer of property; § 1.482-7 applies to cost sharing arrangements; and § 1.482-9 applies to controlled transactions involving the performance of services.²⁰ Methods are provided for determining the arm’s length result for all possible controlled transactions.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ § 1.482-1(b)(2).

¹⁹ A “controlled transaction” is any “transaction” between two or more controlled taxpayers, and a transaction means any sale, assignment, lease, license, loan, advance, contribution, or any other transfer of any interest in or a right to use any property (whether tangible or intangible, real or personal) or money, or the performance of any services for the benefit of, or on behalf of, another taxpayer. §§ 1.482-1(i)(7) and -1(i)(8).

²⁰ § 1.482-1(a)(1). *See also*, § 1.482-1(b)(2)(iii), which explains that § 1.482-7 gives the specific methods to be used to determine arm’s length results of controlled transactions in connection with a cost sharing arrangement, and that §§ 1.482-4 and 1.482-9, as appropriate, provide the specific methods to be used to determine arm’s length results of arrangements, including partnerships, for sharing costs and risks of developing intangibles, other than a cost sharing arrangement covered by § 1.482-7.

Characterization of a controlled transaction—e.g., a license versus a sale, or a sale versus the provision of services—is important for two reasons. It’s necessary first to peg the same or comparable transaction engaged in by uncontrolled taxpayers. But, second, the method giving the most reliable measure of an arm’s length result depends on characterization of the underlying transaction.²¹ The regulations provide that “the method or methods most appropriate to the calculation of arm’s length results for controlled transactions must be selected, and different methods may be applied to interrelated transactions if such transactions are most reliably evaluated on a separate basis.”²² For example, if services are provided in connection with the transfer of property, it may be appropriate to separately apply the methods applicable to services and property in order to determine an arm’s length result.²³

The arm’s length standard is thus deemed to be met if a controlled transaction(s) is/are properly characterized and the transfer pricing is determined using the method(s) providing the most reliable measure of an arm’s length result. The existing regulatory framework applies to determine the arm’s length results for any controlled transactions. The guidance in the proposed regulations is unnecessary.

B. Further particular comments on Prop. § 1.482-1(f)(2)(i)

1. Further particular comments on Prop. § 1.482-1(f)(2)(i)(A)

The justification for Prop. § 1.482-1(f)(2)(i)(A) given in the preamble to the Proposed Regulations is that the proposed clause “is consistent with the principles underlying the arm’s length standard, which require arm’s length compensation in controlled transactions equal to the compensation that would have occurred if a similar transaction had occurred between similarly situated uncontrolled taxpayers.”²⁴ This is wrong. The arm’s length standard simply requires only that the results of controlled transactions be consistent with the results realized if uncontrolled taxpayers had engaged in the either the same or a comparable transaction under the same or comparable circumstances.²⁵ Once controlled transactions are properly characterized, controlled taxpayers reach arm’s length results—thereby meeting the arm’s length standard—by determining transfer pricing through application of methods providing the most reliable measure of an arm’s length result. The proposed clause redefines the boundaries of the arm’s length standard, which (as discussed above) is impermissible.

²¹ For example, § 1.482-1(b)(2)(ii) provides that “other applicable provisions of the Code may affect the characterization of a transaction, and therefore affect the methods applicable under section 482.”

²² § 1.482-1(b)(2)(ii)

²³ *Id.*

²⁴ T.D. 9738, 80 Fed. Reg. at 55539–40.

²⁵ § 1.482-1(b)(1).

The language in Prop. § 1.482-1(f)(2)(i)(A) that “all value provided . . . in a controlled transaction requires an arm’s length amount of compensation” is in any case unworkable.

As noted above, a “controlled transaction” is defined to involve either a transfer of property rights or a provision of services. This makes sense because characterization of a transaction for tax purposes involves figuring out what property rights bundles are transferred and/or services are provided. So what’s provided in a controlled transaction is either property rights or services—not “value” per se. Consistent with this, the regulatory methods for determining an arm’s length result apply to transfers of property rights or the provision of services. “Value” is a characteristic of what’s transferred (property rights) or provided (services) in a controlled transaction,²⁶ but value per se isn’t a thing technically transferred in a controlled transaction. So the use of “value” in the proposed clause is misleading.

Assuming the “value” referred to is a characteristic of the property rights or services provided in the relevant controlled transaction, as noted above the existing transfer pricing methods should yield arm’s length results for all property rights transferred or services provided in a controlled transaction. As explained above, to the extent the proposed clause requires arm’s length results be determined for controlled transactions, it’s redundant: the proposed clause says all value provided in a controlled transaction requires arm’s length compensation determined under the best method rule in § 1.482-1(c), but the best method rule already mandates using the most reliable measure of an arm’s length method to get the arm’s length result. To the extent the proposed clause requires further compensation be paid, it’s contrary to the arm’s length standard.

Again assuming the “value” referred to is a characteristic of the property rights or services provided in the relevant controlled transaction, four other criticisms can also be leveled at Prop. § 1.482-1(f)(2)(i)(A).

First, focusing on “value” could lead to confusion in practice because the value of a transferee’s²⁷ other assets will generally be changing with time, and it may be quite difficult to determine which value changes are attributable to the controlled transaction and which are attributable to other causes. Taxpayers face a risk that any increases in values of their assets will be deemed by the IRS to have been caused by a controlled transaction, however tenuous the link.

²⁶ The § 482 regulations in many places discuss the “value of” property rights or services. For example, § 1.482-4(b)(6) defines an “other similar item” of intangible property to be an item that “derives its value not from its physical attributes but from its intellectual content or other intangible properties.” Nowhere in the § 482 regulations is “value” used in a sense other than meaning a numerical quantity associated with other-referenced property rights or services.

²⁷ By “transferee” we mean here a recipient of either property rights transferred or services provided in a controlled transaction.

Second, and related, even if a causal link can be established between property rights transferred, or services provided, and a transferee’s other assets, confusion is likely to arise in distinguishing what value is at issue. For example, if services provided in a controlled transaction contribute to the value of an existing intangible,²⁸ what value is at issue—that of the services provided or the change in value of the intangible?

Third, and related, what “value” is relevant—that of property rights transferred or services provided, or anticipated changes to the value of property rights or services not the subject of the controlled transaction?²⁹

Fourth, in requiring the arm’s length compensation amount be consistent with, and account for all of, the “value provided . . . without regard to the form or character of the transaction,” the proposed clause puts the cart before the horse. The character of a controlled transaction generally informs which transfer pricing methods might be applicable and the set of comparable uncontrolled transactions (if any). The method providing the most reliable measure of an arm’s length result—and thus the ultimate transfer price satisfying the arm’s length standard—can thus be expected to depend on the character of the controlled transaction. This common sense notion is acknowledged in the § 482 regulations, which, as noted above, provide “the characterization of a transaction [may] therefore affect the methods applicable under section 482.”³⁰

Fifth, and related, the periodic adjustment rules, which implement the commensurate-with-income standard under § 482 and are subject to the arm’s length standard, apply only to transfers of intangible property. If no exceptions apply, permitted periodic adjustments arguably can take into account ex post “value”—to the extent reflected in income—attributable to the transferred intangible. So the relation between the proposed clause and the periodic adjustment rule would turn critically on characterization of the controlled transaction. No ex post value would be relevant, for example, to the provision of services, or to any other arrangement between controlled taxpayers that didn’t involve the transfer of intangible property.

2. Further particular comments on Prop. § 1.482-1(f)(2)(i)(B)

Prop. § 1.482-1(f)(2)(i)(B) initially follows in part existing § 1.482-1(f)(2)(i)(A) on aggregation of transactions, but deletes the directive that “[g]enerally, transactions will be

²⁸ § 1.482-4(f)(4).

²⁹ § 1.482-4(f)(4), for example, deals with arm’s length consideration for a contribution by one controlled taxpayer that develops or enhances the value, or may be reasonably anticipated to develop or enhance the value, of intangible property owned by another controlled taxpayer.

³⁰ § 1.482-1(b)(2)(ii).

aggregated only when they involve related products or services.” This directive is replaced by the sentence—

Whether two or more transactions are evaluated separately or in the aggregate depends on the extent to which the transactions are economically interrelated and on the relative reliability of the measure of an arm’s length result provided by an aggregate analysis of the transactions as compared to a separate analysis of each transaction.

The proposed clause gives no guidance on when multiple controlled transactions³¹ might be “economically interrelated,” leaving a taxpayer exposed to the risk that almost any two controlled transactions it enters into might be alleged by the IRS to be “economically interrelated,” thus subject to aggregation. This uncertainty would make it very difficult for taxpayers to select suitable transfer pricing methods and prepare contemporaneous documentation.

Presumably in an attempt to clarify what might be meant by “economically interrelated,” the proposed clause continues: “For example, consideration of the combined effect of two or more transactions may be appropriate to determine whether the overall compensation in the transactions is consistent with the value provided, including any synergies among items and services provided.” Reference to “value provided” links this proposed clause with Prop. § 1.482-1(f)(2)(i)(A), making it vulnerable to the same criticisms outlined above relating to the use of “value.” Controlled transactions involve transfers or property rights or the provision of services, so it’s unclear whether “items and services provided” is an attempt to broaden the definition of “controlled transaction.” Hopefully not, as the transfer pricing methods under § 482 apply only to transactions involving loans, advances, or the use of tangible property; transfers of property; cost sharing; or the provision of services. The terms “synergies” or “synergy” aren’t used in the § 482 regulations, and the proposed clause gives no indication of how taxpayers might determine if any referenced synergies exist. Under this proposed clause aggregation turns on the existence of synergies, further compounding the difficulty in selecting appropriate transfer pricing methods.

3. Further particular comments on Prop. § 1.482-1(f)(2)(i)(C)

Prop. § 1.482-1(f)(2)(i)(C) calls for a “coordinated best method analysis” for one or more controlled transactions governed by more than one Code provision or regulation. It’s unclear that a best method analysis under § 1.482-1(c) works in the context of other (non-§ 482) Code provisions or regulations. It’s moreover unclear that a best method analysis can override a Congressionally-intended result arising under such other Code provisions or regulations.

³¹ Prop. § 1.482-1(f)(2)(i)(B) refers simply to “transactions,” but we assume “controlled transactions” are at issue.

Prop. § 1.482-1(f)(2)(i)(C) references “value provided” and “synergies,” so it’s vulnerable to the same criticisms given above.

4. Further particular comments on Prop. § 1.482-1(f)(2)(i)(D)

Prop. § 1.482-1(f)(2)(i)(D) provides that allocation of a result determined under a “coordinated best method analysis” described in § 1.482-1(f)(2)(i)(C) “must be made using the method that, under the facts and circumstances, provides the most reliable measure of an arm’s length result for each allocated amount.” The proposed regulations provide no examples of any allocation methods,³² and it’s unclear what allocation methods Treasury and the IRS might be thinking of. Existing § 482 regulations provide transfer pricing methods that don’t seem particularly suited to allocation. It’s moreover unclear that an allocation method can generally be found that “provides the most reliable measure of an arm’s length result for each allocated amount.” It may not be possible to meet the constraints. It’s unclear that Treasury and the IRS have thought this through sufficiently to justify the proposed clause.

³² Prop. § 1.482-1(f)(2)(i)(E) *Example 11* references the need to allocate, but is silent on any allocation method.

Appendix—SVTDG Membership

Accenture
Acxiom Corporation
Adobe Systems, Inc.
Advanced Micro Devices, Inc.
Agilent Technologies, Inc.
Altera Corporation
Amazon.com
Apple Inc.
Applied Materials, Inc.
Autodesk
Avago Technologies
BMC Software
Broadcom Corporation
Brocade Communications Systems , Inc.
Cadence Design Systems, Inc.
Chegg, Inc.
Cisco Systems, Inc.
Cypress Semiconductor
Dolby Laboratories, Inc.
Dropbox Inc.
eBay, Inc.
Electronic Arts
EMC Corporation
Expedia, Inc.
Facebook, Inc.
FireEye, Inc.
Fitbit, Inc.
Flextronics
Fortinet
Genentech, Inc.
Genesys
Genomic Health, Inc.
Gilead Sciences, Inc.
GitHub
GLOBALFOUNDRIES
GlobalLogic, Inc.
Google, Inc.
GoPro, Inc.
Groupon
Hewlett-Packard Company
Ingram Micro
Integrated Device Technology, Inc.
Intel Corporation
Intuit, Inc.
Intuitive Surgical
KLA-Tencor Corporation
Lam Research Corporation
LinkedIn Corporation
Marvell Semiconductor, Inc.
Maxim Integrated
Mentor Graphics
Microsemi Corporation
Microsoft Corporation
NetApp, Inc.
Netflix, Inc.
Oracle Corporation
Palo Alto Networks, Inc.
Pandora Media, Inc.
PayPal Holdings, Inc.
Pivotal Software, Inc.
Plantronics, Inc.
Qualcomm, Inc.
Rovi Corporation
salesforce.com
SanDisk Corporation
Sanmina Corporation
SAP
Seagate Technology
ServiceNow, Inc.
Symantec Corporation
Synopsys, Inc.
Tesla Motors, Inc.
The Cooper Companies
The Walt Disney Company
Theravance Biopharma
Trimble
Twitter, Inc.
Uber Technologies
Visa
VMware Corporation
Yahoo!
Yelp, Inc.