Transfer Pricing of Services and Ownership of Intangibles

IRS Adopts Final Section 482 Regulations on the Treatment of Controlled Services Transactions, the Ownership of Intangible Property and Related Issues.

SUMMARY
On July 31, 2009, the Internal Revenue Service adopted final regulations under Section 482 of the Internal Revenue Code on the treatment of so-called “controlled services transactions”, the ownership of intangible property and related issues (the “Final Regulations”). The Final Regulations follow the temporary regulations issued on July 31, 2006 (the “Temporary Regulations”), with only a few changes. Thus, the Final Regulations, like the Temporary Regulations, generally provide specific transfer pricing methods for determining arm’s length compensation for services between controlled taxpayers, including the “services cost method”. The Final Regulations also provide rules for determining the owner of intangible property, for determining arm’s length compensation when a taxpayer that is not the owner contributes to the value of another taxpayer’s intangible property and for certain related issues.

Adoption of final regulations on controlled services transactions, as well as the issuance of new regulations on “global securities dealing” operations, has been a priority of the Internal Revenue Service. The Temporary Regulations were scheduled to expire on July 31, 2009.

The Final Regulations are effective for tax years beginning after July 31, 2009, but a controlled taxpayer may elect to apply the Final Regulations to any taxable year beginning after September 10, 2003.

BACKGROUND
Generally, Section 482 of the Internal Revenue Code authorizes the Internal Revenue Service (the “Service”) to distribute, apportion or allocate gross income, deductions or other tax items among
commonly owned or controlled taxpayers in order to prevent evasion of taxes or in order to clearly reflect the income of these taxpayers. Treasury Regulations issued under Section 482 generally adopt an arm’s length standard and set forth methods that the Service can use to test whether transactions between controlled taxpayers are at arm’s length. The “best method rule” specifies that the method to be used is the method that, under the facts and circumstances, provides the most reliable measure of an arm’s length result. In determining which method provides the most reliable measure, the primary factors to consider are: (i) the degree of comparability between the controlled transaction or taxpayer and any uncontrolled comparables and (ii) the quality of the data and assumptions used in the analysis. Thus, commonly controlled taxpayers may rely on such methods to ensure that they have used acceptable prices and arrangements under Section 482. The Service generally will not reallocate income, deductions or other items so long as the taxpayers’ prices fall within an arm’s length range.

The Final Regulations describe the methods to be used for evaluating transactions between controlled taxpayers that are “controlled services transactions”, as described below. The Final Regulations also contain rules for determining the owner of intangible property and for determining arm’s length consideration when a controlled taxpayer contributes to the value of intangible property that is owned by another controlled taxpayer.

THE FINAL REGULATIONS

Controlled Services Transactions

The Final Regulations apply to “controlled services transactions”, which are defined to include any “activity” by one controlled taxpayer which results in a “benefit” to another controlled taxpayer, such as the performance of services or another activity by a parent corporation that results in a benefit to a subsidiary of that corporation. An “activity” is defined broadly to include the performance of functions, assumptions of risks, or use of tangible or intangible property or other resources, capabilities or knowledge (including knowledge of and ability to take advantage of particularly advantageous situations or circumstances), or making available to the recipient controlled taxpayer any property or other resources of the service provider. This activity results in a “benefit” if the activity directly results in or is reasonably anticipated to result in commercial or economic value that enhances the recipient controlled

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A controlled taxpayer is defined broadly as any person, trade or business or organization (including an organization of any kind, whether a sole proprietorship, a partnership, a trust, an estate, an association, or a corporation) that is under common “control”, and “control” is defined as any kind of control, direct or indirect, whether legally enforceable or not, and however exercisable or exercised, including control resulting from the actions of two or more taxpayers acting in concert or with a common goal or purpose. Treas. Reg. § 1.482-1(i).

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1  A controlled taxpayer is defined broadly as any person, trade or business or organization (including an organization of any kind, whether a sole proprietorship, a partnership, a trust, an estate, an association, or a corporation) that is under common “control”, and “control” is defined as any kind of control, direct or indirect, whether legally enforceable or not, and however exercisable or exercised, including control resulting from the actions of two or more taxpayers acting in concert or with a common goal or purpose. Treas. Reg. § 1.482-1(i).

2  Treas. Reg. § 1.482-1(b).

3  Treas. Reg. § 1.482-1(c).

4  Treas. Reg. § 1.482-1(e).
taxpayer’s commercial position. There will generally be a “benefit” if an uncontrolled taxpayer in comparable circumstances would be willing to pay for the same or similar activity on either a fixed or contingent fee basis, or if the recipient otherwise would have performed the same or a similar activity for itself. Also, an owner of intangible property may be treated as having derived a benefit from an activity if the activity is reasonably anticipated to result in an increase in the value of such intangible property. However, “duplicate activities” that the recipient controlled taxpayer performs, or may reasonably be anticipated to perform, for its own benefit do not provide a “benefit”, and “shareholder activities” the “sole effect” of which is to protect the service provider’s capital investment in the recipient or other group members or to comply with legal or regulatory requirements generally do not provide a “benefit” for these purposes. These activities are not controlled services transactions. In determining whether there was arm’s length consideration in a controlled services transaction, the Service may in some cases analyze it as two separate transactions.5

Like the Temporary Regulations, the Final Regulations set forth seven methods which can be used to determine the arm’s length amounts charged in such “controlled services transactions”. Generally, the choice of a method is subject to the best method rule, the comparability analysis rule and the arm’s length range rule (each discussed above) of existing Treasury Regulations.6

The Services Cost Method.
The Services Cost Method (“SCM”), which was the focus of most of the comments on the Temporary Regulations, treats the cost of services without any markup as the arm’s length charge for a controlled services transaction.7 It is intended to provide an administrable means of identifying low-margin services that may be evaluated on the basis of total services costs with no markup. If the taxpayer elects to apply and validly applies the SCM, it will be considered the best method under the best method rules described above. In order for a controlled services transaction to be eligible for the SCM, there are several requirements, each of which must be met.

- First, the service must be a “covered service”, which is either a service identified in a Revenue Procedure issued by the Service as eligible for the SCM or a “low margin covered service” (an “LMCS”).
  - Revenue Procedure 2007-138 lists over 100 services eligible for the SCM.

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5 Treas. Reg. § 1.482-9(l).
6 Treas. Reg. § 1.482-9(a).
7 Treas. Reg. § 1.482-9(b).
8 2007-1 C.B. 295.
An LMCS is a controlled services transaction for which the median comparable markup on total services costs is less than or equal to seven percent. The median comparable markup means the excess of the arm’s length price of the controlled services transaction over total services costs, expressed as a percentage of total services costs.

Second, the service must not be a specifically excluded activity. Excluded activities are:
- manufacturing,
- production,
- extraction, exploration, or processing of natural resources,
- construction,
- reselling, distribution, acting as a sales or purchasing agent, or acting under a commission or other similar arrangement,
- research, development, or experimentation,
- engineering or scientific,
- financial transactions, including guarantees, or
- insurance or reinsurance.

Third, the taxpayer must reasonably conclude that, in its business judgment, the service rendered does not contribute significantly to key competitive advantages, core capabilities, or fundamental risks of success or failure in one or more trades or businesses of the controlled group. This test relates to the trades or businesses of the group taken as a whole so an entity established solely for support services would not be disqualified from using the SCM.

The preamble to the Final Regulations notes that, although this determination is based on the taxpayer’s reasonable conclusion, whether such conclusion is reasonable may be subject to examination by the Service.

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9 “Total services costs” means all costs of rendering the relevant services. Treas. Reg. § 1.482-9(j). These specifically include “stock-based compensation” and would therefore include the employee stock options addressed by Xilinx, Inc. v. Comm’r, 567 F.3d 482 (9th Cir., 2009). For more information on the Xilinx decision, please see our memorandum “Court Addresses Employee Stock Option Expenses for Transfer Pricing Purposes” from May 29, 2009. In response to comments concerning how to value and/or compare such compensation and other such technical issues, the preamble to the Final Regulations state: “These final regulations do not provide further guidance regarding stock-based compensation. The Treasury Department and the [Service] continue to consider technical issues involving stock-based compensation in the services and other contexts and intend to address those issues in a subsequent guidance project”.

10 Treas. Reg. § 1.482-9(b)(3).

11 The preamble to the Final Regulations states that, despite being included in this list of “excluded activities”, “no inference is intended that financial transactions (including guarantees) would otherwise be considered the provision of services for transfer pricing purposes”. The preamble further indicates that the Treasury Department and the Service intend to issue future guidance on the topic of financial guarantees.


13 Treas. Reg. § 1.482-9(b)(5).
While Notice 2007-5\textsuperscript{14} stated (with regard to the Temporary Regulations) that in applying this business judgment rule a service’s contribution to the group’s operating profit should be taken into account, the preamble specifically notes that the Final Regulations do not contain the operating profit concept because the concept was too broad and would require the type of analysis that the business judgment rule is intended to avoid. However, the preamble states that, with respect to the specific situation discussed in Notice 2007-5, the Service still believes that the activities of a controlled taxpayer’s tax department, which may affect net income by reducing the taxpayer’s tax burden, are not excluded by this rule.

- Fourth, the taxpayer must maintain permanent books of account and records for as long as the costs with respect to the covered services are incurred by the service provider, and these books and records must:
  - include a statement evidencing the taxpayer’s intention to apply the SCM, and
  - be adequate to permit verification by the Service of the total services costs incurred by the service provider.\textsuperscript{15}

**Shared Services Arrangements.** If controlled taxpayers enter into a shared services arrangement (“SSA”), and if the SCM applies, allocations of cost among the controlled taxpayers will be the arm’s length charge. An SSA must (i) include two or more participants, (ii) include as participants all controlled taxpayers that reasonably anticipate a “benefit” (as described above) from one or more covered services specified in the SSA and (iii) be structured such that each covered service confers a benefit on at least one participant in the SSA. The allocation of the costs under the SSA must be based on the participants’ respective shares of the reasonably anticipated benefits from the covered services, without regard to whether these benefits are in fact realized.\textsuperscript{16}

- The Final Regulations state that costs are first allocated pursuant to the SSA and thereafter, if the costs are also included in a taxpayer’s cost of developing an intangible, are further allocated under a cost sharing agreement pursuant to Temp. Treas. Reg. § 1.482-7T.\textsuperscript{17}
- The preamble to the Final Regulations affirms that, while controlled taxpayers may enter into agreements to share costs that are not eligible for the SCM, the flexible rules for establishing the joint benefits and selecting the allocation key that apply to an SCM do not apply to an SSA that relates to services not priced under the SCM.

**Comparable Uncontrolled Services Price Method.**

The Comparable Uncontrolled Services Price (“CUSP”) method evaluates whether the amount charged in a controlled services transaction is arm’s length by reference to the amount charged in a comparable uncontrolled services transaction, and is usually used where the controlled services are identical or have a high degree of similarity to services provided in the comparable uncontrolled transaction.\textsuperscript{18}

\textsuperscript{14} 2007-1 C.B. 269.
\textsuperscript{15} Treas. Reg. § 1.482-9(b)(6).
\textsuperscript{16} Treas. Reg. § 1.482-9(b)(7)(ii)(B).
\textsuperscript{17} Treas. Reg. § 1.482-9(b)(7)(iii)(C).
\textsuperscript{18} Treas. Reg. § 1.482-9(c)(1).
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The determination of comparability is made using the general comparability factors of Treas. Reg. § 1.482-1(d) (mentioned above), and the Final Regulations list specific examples of certain factors that may be particularly relevant. The CUSP is generally analogous to the comparable uncontrolled price method for transfers of tangible property described in Treas. Reg. § 1.482-3(b).

**Gross Services Margin Method.**
The Gross Services Margin (“GSM”) method evaluates whether the amount charged in a controlled services transaction is arm’s length by reference to the gross profit margin realized in comparable uncontrolled transactions. This method is ordinarily used in cases where a controlled taxpayer performs services or functions in connection with an uncontrolled transaction between a member of the controlled group and an uncontrolled taxpayer, and may be used where a controlled taxpayer (i) renders services to another member of the controlled group in connection with a transaction between that other member and an uncontrolled taxpayer, or (ii) contracts to provide services to an uncontrolled taxpayer and another member of the controlled group actually performs a portion of the services provided. The appropriate gross services profit for a controlled taxpayer is determined based on the gross margin applied to comparable uncontrolled transactions. The determination of comparability is made using the general comparability factors of Treas. Reg. § 1.482-1(d) (mentioned above), and the Final Regulations list specific examples of certain factors that may be particularly relevant. The GSM method is generally analogous to the resale price method for transfers of tangible property described in Treas. Reg. § 1.482-3(c).

**Cost of Services Plus Method.**
The Cost of Services Plus (“CSP”) method evaluates whether the amount charged in a controlled services transaction is arm’s length by reference to the markup realized in comparable uncontrolled transactions. This method is ordinarily used in cases where a controlled taxpayer provides the same or similar services to both controlled and uncontrolled parties and is ordinarily not used in cases where the controlled services transaction involves a contingent-payment arrangement (described below). To determine the appropriate arm’s length consideration, the markup of uncontrolled transactions is generally applied to the controlled taxpayer’s comparable transaction costs, rather than its total services.

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19 Treas. Reg. § 1.482-9(c)(2). These factors include: the quality of the services rendered, the contractual terms, the intangible property used, the geographic market, the risks borne, the duration or quantitative measure of services rendered, collateral transactions or ongoing business relationships and realistically available alternatives.

20 Treas. Reg. § 1.482-9(d).

21 Treas. Reg. § 1.482-9(d)(3). These factors include: the contractual terms, the intangible property used, the geographic market and the risks borne.

22 Treas. Reg. § 1.482-9(e).
Comparable transaction costs are the costs taken into account in determining the markup of comparable uncontrolled transactions. The determination of comparability is made using the general comparability factors of Treas. Reg. § 1.482-1(d) (mentioned above), but if the markup is derived from transactions of other service providers (rather than those of the controlled taxpayer), comparability must also be evaluated by taking into account the results of this method expressed as a result of the controlled taxpayer’s total services costs. In one example of the Final Regulations, this evaluation resulted in an operating loss, and the example stated that the CSP method may not be the most reliable arm’s length measure. The Final Regulations also list specific examples of certain comparability factors that may be particularly relevant. The CSP method is generally analogous to the cost plus method for transfers of tangible property described in Treas. Reg. § 1.482-3(d).

Comparable Profits Method.
The Comparable Profits Method (“CPM”) method evaluates whether the amount charged in a controlled services transaction is arm’s length based on objective measures of profitability derived from uncontrolled taxpayers that engage in similar business activities under similar circumstances. The rules in Treas. Reg. § 1.482-5 relating to the comparable profits method of tangible property generally apply to the CPM method. Under these existing rules, profitability is measured by various ratios, such as the ratio of operating profit to operating assets or the ratio of gross profit to operating expenses, and the appropriate ratio is then applied to the “tested party”. The “tested party” is the participant in the controlled transaction whose operating profit attributable to such transaction can be verified using the most reliable data and requiring the fewest and most reliable adjustments, and for which reliable data regarding uncontrolled comparables can be located. Consequently, in most cases, the tested party will be the least complex of the controlled taxpayers and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. In addition to the measures of profitability provided in Treas. Reg. § 1.482-5, the Final Regulations state that the ratio of profit to the total services

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23 Treas. Reg. § 1.482-9(e)(2).


25 Treas. Reg. § 1.482-9(e)(3)(ii). These factors include: the complexity of the services, the duration or quantitative measure of the services, the contractual terms, economic circumstances and the risks borne.

26 Treas. Reg. § 1.482-9(f).

27 Treas. Reg. § 1.482-5(b).


29 Id.
costs may also be appropriate in certain circumstances. The CPM method applies only where the controlled taxpayer rendering the services is the “tested party”.

**Profit Split Method.**

The profit split method evaluates whether the allocation of the combined operating profit or loss attributable to one or more controlled services transactions is arm’s length by reference to the relative value of each controlled taxpayer’s contribution to that combined operating profit or loss. The relative value of each controlled taxpayer’s contribution is determined in a manner that reflects the functions performed, risks assumed and resources employed by such controlled taxpayer in the controlled services transaction. Under existing rules, the allocation of profit or loss must be made in accordance with either the comparable profit split method or the residual profit split method.

- Pursuant to existing rules, the comparable profit split method is derived from the combined operating profit of uncontrolled taxpayers whose transactions and activities are similar to those of the controlled taxpayers. Each uncontrolled taxpayer’s percentage of the combined operating profit or loss is used to allocate the combined operating profit or loss of the controlled transaction. The determination of comparability is made using the general comparability factors of Treas. Reg. § 1.482-1(d) (mentioned above), but the Final Regulations state that comparability is particularly dependant on factors relating to profitability, like those factors described in relation to the CPM. Further, the comparable split method cannot be used if the combined operating profit of uncontrolled taxpayers varies significantly from that of the controlled taxpayers.

- The Final Regulations set forth a two step process for the residual profit split method.
  - First, income is allocated to each controlled taxpayer to provide a “market return” for its “routine contributions” to the relevant controlled transactions. “Routine contributions” are contributions of the same or a similar kind to those made by uncontrolled taxpayers involved in similar business activities for which it is possible to identify market returns. “Routine contributions” will ordinarily include contributions of tangible property, services and intangibles that are generally owned by uncontrolled taxpayers engaged in similar activities. A functional analysis is required to identify these contributions according to the functions performed, risks assumed, and resources employed by each of the controlled taxpayers. “Market returns” for the routine contributions should be determined by reference to the returns achieved by uncontrolled taxpayers engaged in similar activities, consistent with appropriate applicable transfer pricing standards described in existing Treasury Regulations.

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32 Treas. Reg. § 1.482-9(g).
33 Treas. Reg. § 1.482-6(c).
34 Treas. Reg. § 1.482-6(c)(2).
35 Id.
Second, any residual profit remaining after the allocation of step one is allocated to each controlled taxpayer in proportion to its contributions to the controlled transaction that are not routine contributions (“nonroutine contributions”). The relative value of the nonroutine contributions of each taxpayer should be measured in a manner that most reliably reflects each nonroutine contribution made to the controlled transaction and each controlled taxpayer’s role in the nonroutine contributions. If the nonroutine contribution is intangible property, in allocating the residual profit under this step two, the value of nonroutine intangible property contributed by the controlled taxpayers may be measured by external market benchmarks that reflect the fair market value of such nonroutine intangible property or, in some cases, by its cost.

The comparable profit split and residual profit split methods are also generally applicable to controlled property transactions and are not limited to controlled services transactions.

**Unspecified Methods.**

As in the case of transfers of tangible property under Treasury Regulations § 1.482-3, the Final Regulations allow unspecified methods, i.e., methods not specified in the Final Regulations, to be used to evaluate whether the amount charged in a controlled services transaction is arm’s length so long as such method is applied in accordance with the existing rules, such as the rules regarding best methods, comparability and arm’s length range. Alternative structures are to be considered in making this determination.

**Contingent Payments.**

The Final Regulations state that the arm’s length result can apply to contingent payment arrangements so long as (i) the arrangement is set forth in a written contract entered into prior to, or at least contemporaneous with, the start of the activity and (ii) the payments reflect the relative benefits and risks borne by the recipient and service-providing controlled taxpayers. Furthermore, the arrangements must be consistent with the economic substance of the transaction and the conduct of the controlled taxpayers, and the Service may impute contractual terms if it determines that the economic substance of the contingent payment controlled services transaction is consistent with the existence of such imputed terms.

**Allocation of Costs.**

The Final Regulations provide for allocations of costs where (i) the service being rendered generates benefit for more than one controlled taxpayer (including any benefit to the service provider itself) and

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41 See Treas. Reg. § 1.482-6(a).
42 Treas. Reg. § 1.482-9(h).
43 Treas. Reg. § 1.482-9(i).
44 Treas. Reg. §§ 1.482-9(i)(2)(C)(ii) and 1.482-9(i)(3).
method being used to determine arm’s length consideration makes reference to costs, or (ii) it is appropriate to allocate any class of costs (i.e., overhead costs) in order to determine a controlled taxpayer’s total services costs. In allocating costs, the Final Regulations impose a “reasonable method standard” in which consideration should be given to all factors, including, but not limited to, total services costs, total costs for a relevant activity, assets, sales, compensation, space utilized, and time spent.

While practices used by a taxpayer to apportion costs in connection with other matters (such as statements or analyses for management or creditors) may indicate reliable allocation methods, they are not conclusive.

Coordination with Other Transfer Pricing Rules.
Transactions which are structured as controlled services transactions, but that have elements for which other specified pricing methods are provided under applicable Treasury Regulations (i.e., loans, rentals, or transfers of tangible property), ordinarily do not require a separate evaluation for such other elements under the other specified methods. Instead, such elements are evaluated together with the controlled services under the Final Regulations, but these additional elements must be taken into account in evaluating comparables. However, transactions structured as controlled services transactions that also effect a transfer of intangible property that is material to the evaluation of the arm’s length consideration require a separate evaluation based on the intangible property rules. Transactions between controlled taxpayers structured other than as controlled services transactions but that also provide for the rendering of services ordinarily do not require a separate evaluation under the Final Regulations as long as these services are accounted for in evaluating comparables. The preamble to the Final Regulations notes that for transactions between controlled taxpayers relating to a global dealing operation taxpayers may rely on the proposed global dealing regulations. Finally, the preamble states that services related to a qualified cost sharing arrangement are subject to the existing cost sharing regulations.

45 Treas. Reg. § 1.482-9(k).
46 Treas. Reg. § 1.482-9(k)(2).
48 Treas. Reg. § 1.482-9(m)(1).
49 Treas. Reg. § 1.482-9(m)(2).
50 Treas. Reg. § 1.482-9(m)(3).
51 “A global dealing operation consists of the execution of customer transactions, including marketing, sales, pricing and risk management activities, in a particular financial product or line of financial products, in multiple tax jurisdictions . . . or through multiple participants”. Proposed Treas. Reg. § 1.482-8(a)(2)(1).
Intangible Property.

The Final Regulations, like the Temporary Regulations, provide that the owner of intangible property\textsuperscript{52} is either the legal owner of that property pursuant to the intellectual property law of the relevant jurisdiction or the holder of rights constituting an intangible property pursuant to contractual terms (such as the terms of a license), unless this would be inconsistent with the economic substance of the underlying transaction. If there is no legal owner under the law of the relevant jurisdiction or under contractual terms, the controlled taxpayer who controls the intangible property (the “control test”) will be treated as the owner.\textsuperscript{53}

- For example, where no relevant law applies and there are no applicable contractual terms, a company that has knowledge of the customers on a customer list and that controls the use and dissemination of the list is treated as the owner of the list.\textsuperscript{54}

A controlled taxpayer that develops or enhances the value, or may be reasonably anticipated to develop or enhance the value, of intangible property but that does not own the property must be compensated in accordance with applicable existing Treasury Regulations and the new Final Regulations. If the compensation for development of intangible property is imbedded within the contractual terms for another controlled transaction, then a separate determination of the arm’s length consideration is not required. Instead, it is a factor in evaluating the comparability of the controlled transaction to uncontrolled comparables.\textsuperscript{55}

Economic Substance.

Existing Treasury Regulations permit the Service to impute the terms of a contractual agreement if either (i) the controlled taxpayers fail to specify terms of the transaction or (ii) the controlled taxpayers have specified terms but such terms are not in accordance with the economic substance of the controlled transaction. The Final Regulations contain examples applying these existing rules to controlled services transactions. The preamble to the Final Regulations affirms that one of the examples is intended to show that the pricing of a controlled transaction alone, even if outside the arm’s length range, would not allow the Service to impute additional contractual terms.

The Final Regulations clarify, and the preamble explains, that imputed contractual terms may be used to determine the owner of intangible property, in which case, the control test (explained above) would not apply. The preamble also affirms that the Service may impute contingent payment terms where the economic substance of the controlled transaction warrants it.

\textsuperscript{52} Existing Treasury Regulations provide a list of “intangible” property but require that such property have substantial value independent of the services of any individual. The list includes patents, designs, know-how, copyrights, trademarks, licenses, systems, studies, customer lists and technical data, amongst other items. Treas. Reg. § 1.482-4(b).

\textsuperscript{53} Treas. Reg. § 1.482-4(f)(3).

\textsuperscript{54} Treas. Reg. § 1.482-4(f)(3)(ii), Example 2.

\textsuperscript{55} Treas. Reg. § 1.482-4(f)(4).
The Final Regulations allow the Service to examine alternative structures to controlled transactions and to determine the appropriate arm’s length consideration based on an alternative structure if it determines that an uncontrolled taxpayer would have structured the controlled transaction differently. The preamble notes that this concept has been imported to the Unspecified Methods rule in order to determine whether the best comparable has been used.

**Conforming Changes.**

The Final Regulations make conforming changes to the sourcing rules so that stewardship expenses are treated consistently with the definition of “benefit” under the controlled services rules.

**Effective Date.**

The Final Regulations are effective for tax years beginning after July 31, 2009. A taxpayer may elect to apply the Final Regulations to any taxable year beginning after September 10, 2003. The election requires that all the provisions of the Final Regulations be applied to such taxable year (and all subsequent years) and may not be revoked without the consent of the Commissioner.

It appears that there may be a gap between the expiration of the Temporary Regulations on July 31, 2009 and the application of the Final Regulations because most taxpayers would not begin to apply the Final Regulations until after July 31, 2009 (for example, calendar year taxpayers would apply the Final Regulations starting January 1, 2010, absent an election to retroactively apply the Final Regulations). It is unclear whether this gap was intentional.

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57 Treas. Reg. § 1.482-9(n).
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