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Room 5203
Internal Revenue Service
P.O. Box 7604
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In re: Comments of the National Foreign Trade Council, Inc. on the Proposed Cost Sharing Regulations (REG-144615-02) Set Forth in the Federal Register Dated August 29, 2005

The National Foreign Trade Council ("NFTC") appreciates the opportunity to provide comments on REG-144615-02 ("proposed cost sharing regulations"). The proposed regulations address an important aspect regarding the taxation of cross-border intercompany activity. The NFTC's comments seek to promote changes to the proposed regulation which will facilitate an administratively feasible framework while reducing the risk of double taxation for all multinational enterprises.

I. The National Foreign Trade Council, Inc.

The NFTC, organized in 1914, is an association of some 300 U.S. business enterprises engaged in all aspects of international trade and investment. Our membership covers the full spectrum of industrial, commercial, financial, and service activities, and the NFTC therefore seeks to foster an environment in which U.S. companies can be dynamic and effective competitors in the international business arena. The NFTC's emphasis is to encourage policies that will expand U.S. exports and enhance the competitiveness of U.S. companies by eliminating major tax inequities in the treatment of U.S. companies operating abroad. To achieve this goal, American businesses must be able to participate fully in business activities throughout the world, through the export of goods, services, technology, and entertainment, and through direct investment in facilities abroad. Foreign trade is fundamental to the economic growth of U.S. companies.

II. General Comments

A. Areas of agreement

The NFTC agrees that it is appropriate to distinguish between (i) the use of transferred intangibles (IP) without further development for producing goods (make-and-sell rights), and (ii) the use of the transferred IP as a platform for intangible development under a cost sharing arrangement (CSA) (an external contribution[1] or preliminary or contemporaneous transactions (PCT)). However, it is important that the Treasury and Service not require consideration for the make-and-sell rights and PCTs to exceed the total fair value of the transferred IP. In this regard, the proposed regulations are commended for permitting the aggregation of the consideration for make-and-sell rights and PCTs for purposes of analysis,[2] although the simplification thereby obtained is undone by the fact that the consideration must be disaggregated for purposes of the Periodic Adjustment rule.[3]

The NFTC submits that the proposed detailed rules for valuing external contributions or PCTs overreach by overvaluing such contributions, and would subject to U.S. tax, profits that do not belong in the U.S. under proper economic analysis and international norms, including the OECD Transfer Pricing Guidelines. Our comments set forth below recognize that establishing methods for valuing external contributions are useful. But that said, we believe substantial changes from the Proposed Regulations are called for as discussed below. As a result of overvaluing external contributions or PCTs, the Proposed Regulations undervalue the contribution of intangible development costs (IDCs), thereby leading to an impermissible non-arm's length result. The Treasury[4] should recognize that such over-valuations and undervaluations may result in improper income allocations from both an outbound and an inbound perspective.

B. Discount rate should be adequate.

The two methods that will typically be the best method, the Income-CPM Method and Residual Profit Split Method and other parts of the Proposed Regulations, depend on the discount rate used for IDCs. Only if the discount rate is adequate, will the resulting periodic PCT Payments not be excessive and there is much in the Proposed Regulations that could lead to inadequate discount rates, particularly the emphasis on WACC. Many of the rules favor WACC as the discount rate to be used in making the crucial calculations called for by the Proposed Regulations. For example, Prop. Reg. § 1.482-7(g)(2)(vi) provides: "Where a company is publicly traded and its CSA involves substantially the same risk as projects undertaken by the company as a whole, then the WACC of the activities and transactions might most reliably be based on the company's own WACC." While there is a predicate to using WACC, we fear that when auditing, International Examiners will ignore the predicate and use WACC as the standard. Also, as discussed below, in determining the applicability of the Periodic Trigger,[5] after allocating a return to the routine functions such as manufacturing and distribution, absent a Service determination to the contrary, only a WACC return would be allowed to the IDCs. While there is a range for the Periodic Trigger, we submit that there will be many cases in which the range will not be sufficient to overcome the WACC. Thus, the examples should illustrate the use of arm's length discount rates. We submit that WACC fails to recognize that intangible development is typically the riskiest part of a business enterprise. High risk IP development activities normally necessitate a higher discount rate. Accordingly, the types of returns that are

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[1] The term "external contribution" is used in this paper to refer to an external contribution that is non-routine. It is recognized that under the Income Method and the Residual Profit Split Method if an external contribution is routine, it is taken into account as intangible development costs (IDCs).
[2] Prop. Reg. § 1.482-7(g)(2)(v).
[3] Prop. Reg. § 1.482-7(i)((6).
[4] In these comments, the term "Treasury" is intended to include the Internal Revenue Service and the Office of Tax Policy.
[5] Prop. Reg. § 1.482-7(i)(6)(i).

in fact demanded by venture capital investors for single intangible development projects should be recognized as the arm's length discount rate in making the calculations set forth in the Proposed Regulations.

While for some companies the reference to the internal “hurdle rate” might be of help in establishing an appropriate discount rate in some cases, there are limitations on its usefulness. A taxpayer’s general hurdle rate would not be an adequate benchmark for intangible development as in many companies the general hurdle rate serves as only a first filter and a proposed project that just meets the general hurdle rate may not be approved after taking into account the taxpayer’s capital constraints, competitive strategies and other business considerations such as the risk of the proposed project. It is noted that some companies do not have a hurdle rate.

C. Projected operating profit should be realistic in light of risk of intangible development.

Also, it is important that the projected territorial operating profit (or sales) not be inappropriately increased by the IRS on audit as that too would lead to excessive PCT Payments. Only if the discount rate is sufficient and the projected operating is not exaggerated will the resulting PCT be arm’s length. However, given that the proposed rules for determining the discount rate do not seem to change on the basis of the value of the external contributions, the Income Method-CPM and the Residual Profit Split Method would overvalue the PCT when the external contribution has a limited value unless that is reflected in the projected territorial operating profit. Thus, it is important that the regulations illustrate a present value for the projected operating profit that is only marginally in excess of the present value of the cost sharing contributions when the value of the PCT is marginal. Without such an example, it would be very difficult to avoid overvaluing external contributions.

D. Proposed Regulations confer too much discretion on the Service.

A major concern to the NFTC is that the Service is given a great deal of discretion to effectively disregard the taxpayer’s *ex ante* application of an arm's length transfer pricing method. For example, in Prop. Reg. §1.482-7(i)(6) dealing with Periodic Adjustments it is provided that “the Commissioner may make periodic adjustments.” As stated, in determining whether there is a Periodic Trigger, the discount rate is WACC, unless “the Commissioner determines, or the controlled participants establish to the Commissioners satisfaction” that a different discount rate better reflects risks. As discussed below, the Periodic Adjustment rules are rife with the term “to the satisfaction of the Commissioner.” At a minimum, the Periodic Adjustment rules should work with reference to how parties at arm's length may have determined an appropriate discount rate on an *ex ante* basis and without depending on the satisfaction of the Commissioner.

A further example of excessive Service discretion is that with respect to PCT Payments, Prop. Regs. §1.482-7(g)(2)(ix) provides that conversion of the method payment form to the specified payment form must be made “to the satisfaction of the Commissioner.”

Moreover, Service discretion throughout the Proposed Regulations is particularly problematic because IRS tax examinations review the transactions in an *ex post* setting where subsequent economic events unknown to the parties at the time of the PCT may well lead to unnecessary tax controversy. Such controversy can be properly reduced if “to the satisfaction” is not used in the regulations and they provided for a balanced *ex ante* review of the taxpayer’s behavior under the arm's length standard.   For example, the Treasury should consider the judicial precedent that holds fair market valuation must be viewed based on the information available to the taxpayer at the time of the relevant transaction. By failing to limit the Service to reviewing the same information that the taxpayer had or should have had at the time of the PCT and providing that important rules are subject to standards such as “to the satisfaction of the Commissioner,” the Treasury creates an unwarranted dilemma for public companies in reporting their earnings, especially in light of the Sarbanes Oxley requirements.

E. Range principle not recognized.

Except for the Periodic Trigger, the Proposed Regulations also ignore one of the fundamental U.S.-developed principles of transfer pricing by not providing arm's length ranges as part of the proposed methods.

F. Under Proposed Regulations cost sharing would be too complex and there are omissions in the guidance provided.

Cost sharing was established as a method to share IP without the complexity of calculating royalties, thereby easing compliance burdens once the buy-in for transferred pre-existing intangible rights was established. Yet, the Proposed Regulations keep the buy-in PCTs constantly under review, with layer after layer of complexity, while requiring taxpayers to make estimates and analyze results, to justify discount rates, to create initial and annual documentation, etc. Regardless of how well a specified method has been applied, it can be overturned under the Realistic Alternative override or under the Periodic Adjustment rules. Cumbersome administrative tax procedures, even if they are considered arm's length, frustrate the U.S. policy of capital export neutrality. Accordingly, the NFTC encourages the Treasury to simplify the regulations as much as possible.

In addition to the lack of guidance for comprehensive ongoing CSAs discussed below, there are many issues not dealt with in the Proposed Regulations and in the examples, such as the effects of currency fluctuations. The current examples are too simplistic. At a minimum, a provision should be included that the lack of specific guidance should be construed to allow taxpayers to use the transfer pricing methods specified throughout the remaining sections of Treas. Reg. § 1.482.

Further, the regulations need guidance on the manner in which the Service can audit ex ante determinations under the various PCT methods and the Realistic Alternative override (if it remains). To reflect what we understand is the intent, the regulations should state that, aside from the Periodic Adjustment rules, the Service will not take into account events subsequent to the date of the PCT. In other words, if the projections are made in good faith on the basis of the information available to the taxpayer at the time of the PCT, they will be accepted for purposes of the ex ante determinations.

G. Incentive for foreign R&D should be avoided.

Since the proposed rules permit foreign participants to share in the residual if they make external contributions to the CSA rather than just paying for the external contributions of the U.S. participants, the Proposed Regulations are an incentive to shift R&D development offshore in anticipation of a CSA. NFTC suggests that R&D development should not be affected by the unintended incentives that may result if the Proposed Regulations are promulgated as currently stated.

H. Proposed Regulations not justified by legislative history.

The NFTC submits that the justification of the Proposed Regulations on the basis of the legislative history of the Tax Reform Act of 1996 misreads Congressional intent. Congress did not intend to discourage cross-border transfers of intangibles; instead Congress charged the Treasury to ensure such transfers occurred at arm's length. Such a charge is consistent with the long-standing U.S. policy of capital-export neutrality.

I. Under Proposed Regulations CSAs not feasible; possible migration of proposed rules is of concern.

The NFTC advises that some of its members that have or are contemplating new or expanded cost sharing arrangements doubt whether they can use a CSA if the Proposed Regulations are finalized without substantial change. In addition, NFTC members that do not use cost sharing are concerned that the very complex rules contained in these Proposed Regulations could be extended to other parts of the Section 482 Regulations despite admonitions in the Proposed Regulations that such rules are limited to CSAs.

III. Comprehensive Cost Sharing Arrangements Are Not Adequately Addressed

The Proposed Regulations generally do not provide guidance for comprehensive ongoing CSAs, and yet, many taxpayers have such CSAs. For example, NFTC members presently have CSAs covering all R&D for a particular division and all R&D conducted at a particular site (that conducts all of the R&D in a specified category).

The Realistic Alternative override, the key specified methods (Income and Residual Profit Split) and the Periodic Adjustment rule work only for a CSA that covers the development of IP with respect to particular products, where the IDCs are estimated to continue for a limited period, and where the resulting cost shared intangibles are estimated to have a limited useful life.

It appears that an Unspecified Method of Prop. Reg. §1.482-7(g)(8) could be used in such a case, but Unspecified Methods are specially subject to the Realistic Alternative override, and neither the Realistic Alternative override nor the Periodic Adjustment rules work in such a case. The Proposed Regulations provide “in establishing whether a PCT achieved an arm’s length result, an unspecified method should provide information on the prices or profits that controlled participants could have realized choosing a realistic alternative to the CSA.” Thus, it would appear that the documentation required by Prop. Regs. §1.482-7(k)(2) would be considered incomplete if information on prices or profits under an alternative scenario is not included in the documentation, and yet following the examples for alternative scenarios with a comprehensive ongoing CSA, this is not possible.

It is understood that Treasury did not intend to bar comprehensive ongoing CSAs, but so far the Proposed Regulations leave such CSAs in limbo. The NFTC would like to offer a simple, but justified and powerful suggestion. The regulations should, like the Section 367(d) regulations, provide that PCT Payments are not to continue beyond the shorter of the estimated useful life of the external contribution giving rise to the PCT Payments or 20 years (the PCT Period). Under such a rule, the various estimates and computations under the Income Method and the Residual Profit Split Method and the Periodic Adjustment rules would be based on the PCT Period, so that, after the PCT Period, the required PCT Payment would be zero. Each time there is a new external contribution, there would be a new PCT Period, but that would not extend the PCT Period for prior external contributions. The improvement in the Proposed Regulations that would be achieved by this rule is significant.

IV. Periodic Adjustment Rule Too Harsh

While a Periodic Adjustment rule that is fair and balanced might be devised, the proposed rule falls short. The Proposed Regulations provide that only the Service can make periodic adjustments. While the Preamble provides that taxpayers might achieve the same effect through agreement, the NFTC does not believe that agreements of this type should be necessary. Moreover, in instances where taxpayers have included such provisions in other types of intercompany agreements (which are consistent with how unrelated parties negotiate some long-term contracts), Service International Examiners have been known to disregard such provisions.

The proposal that for purposes of the Periodic Trigger the discount rate of publicly traded companies and their affiliates must be the WACC, unless the Service is satisfied otherwise, is overly restrictive and unrealistic. As discussed above, since intangible development is typically the most risky part of a business operation, it is the view of the NFTC that WACC will rarely be a proper reflection of risk. The use of the WACC effectively transforms the foreign CSA participant into a type of lender rather than a risk-bearing partner for which in fact it is.

If the Periodic Trigger occurs, after allowing a routine return to routine functions such as manufacturing and distribution and a limited investor's return to IDCs, under a special application of the Residual Profit Split Method the entire residual profit is assigned to the participant making external contributions or, if there is more than one, shared among the participants making external contributions in proportion to the value of their external contributions, regardless of the value of the external contribution or contributions. Especially in light of the general preference for WACC as the discount rate, in many cases the effect will be to undervalue the IDCs and overvalue the external contributions. Such a result is not consistent with arm's length behavior as is aptly demonstrated in many licensing arrangements among unrelated parties where the licensee will earn most (typically two-thirds to three-fourths) of the profits related to exploitation of the licensed intangible.

The proposed regulations provide that "[i]f the controlled participants establish to the satisfaction of the Commissioner that the differential between the [actual return ratio] and the nearest bound of the [arm's length range] is due to extraordinary events beyond its control and that could not reasonably have been anticipated at the time of the Trigger PCT, then no periodic adjustment will be made …."[6] While one can commend the general thrust of this rule, it falls short of the mark. It is the NFTC's view that if the projections used to apply the CSA method used reflect a balanced view of the *ex ante* prospects of the CSA (are based on the medium of the anticipated results) at the time of the PCT, results outside of the constructed arm's length range should not

[6] Prop. Reg. § 1.482-7(i)(6)(vi)(B).

result in the application of the Periodic Adjustment rule. Such a rule would be consistent with the legislative history under the commensurate with income rule of Section 482 and is one of the three most needed changes to the Proposed Regulations.

It is understood that the Service recognizes that if a method to value external contributions or PCTs has been agreed to by the Service in the context of an APA, the Periodic Adjustment rule will not be applicable. This should be made clear in the final regulations or the Preamble to the final regulations. Such a provision should govern current APAs, regardless of expansion or new PCTs as taxpayers did not have the opportunity to include such provisions that could have been included to preclude the retroactivity of these rules.

Finally, the possibility of a periodic adjustment raises a special difficulty in the regulatory environment under Sarbanes Oxley, as it will be far from clear how public companies should report earnings when they, their advisors, and ultimately their auditors do not have a reasonable basis to predict whether the Service will, or will not, exercise its discretion to impose a periodic adjustment and what the magnitude of such an adjustment could be given the wide discretion under the Proposed Regulations for the Service to select the discount rate to be used for this purpose.

V. Realistic Alternative Override Should Be Eliminated

The NFTC urges that the Realistic Alternative override set forth in Prop. Reg §1.482-7(g)(2)(iv) not be included in the final regulations except as a safer harbor where the IRS imposes the Market Capitalization Method. It is understood that the Service does not intend the Realistic Alternative override to be applied as a controlling super-method. Yet by providing specific examples, the Realistic Alternative override is available as a usable method and, in all likelihood, will be applied as long as the examples are in the regulations. If the result of applying one of those examples is that there would be more income subject to tax in the U.S., or less income, there is no basis for ignoring the Realistic Alternative override as long as it is part of the regulations.

We understand that the intent of the Treasury is that the Realistic Alternative override be based on projections and not actual results. However, that intention is by no means clear from the Proposed Regulations. If in fact the Realistic Alternative override is applied on the basis of actual results, the effect in many cases would be to assign 100% of the residual profit to the U.S. participants if only they make external contributions.

Moreover, if actual results are irrelevant in applying the Realistic Alternative override it is not clear how the application of that rule might be audited by the Service. Also, the examples in the Proposed Regulations are Quixotic as under one example the residual is assigned to foreign participants, and under the other two examples (one of which is the most likely), the residual is assigned to the U.S. participants. Finally, since the proposed rule does not reflect what we understand to be the intent of Treasury and an effort to reflect such intent would result in uncertainty, the Realistic Alternative provision should be deleted with possibly one exception. In cases where Market Capitalization is chosen by the Service as the best method, the Realistic Alternative override rule would serve as a reasonable safety net.

VI. Foreign External Contributions Should Be Recognized

With one exception, the Proposed Regulations illustrate only U.S. participants making external contributions, and foreign participates making no external contributions. Given the importance of external contributions or PCTs under the various methods and the Periodic Adjustment rules it is important that the regulations recognize a variety of non-routine external contributions by foreign subsidiaries as well as external contributions by U.S. parents or subsidiaries. For example, a participant may carry out functions aside from developing or attempting to develop intangibles, such as manufacturing, that turn out to result in intangibles, or other nonroutine inputs, that are used in developing or improving the cost shared intangibles and such intangibles should be recognized as external contributions.

VII. Requirement of Exclusive Territory Too Restrictive

Treasury should make it clear that the exclusive territory requirement under the Proposed Regulations does not exist under the current regulations and should correct the implication in the Preamble that there may be an exclusive territory requirement under the current regulations. It is recognized that, under the current regulations, events might take place which have the effect of constituting a business transfer, and such events appropriately give rise to a requirement that consideration be provided therefore. Finally, the Treasury is commended for asking for input on possible alternatives to exclusive territories.

The territorial requirement, on its face, is contrary to arm's length licensing practices involving uncontrolled taxpayers. Restrictions on location of manufacturing and annual volume manufactured are typical of technology licenses to uncontrolled taxpayers, but rarely are there restrictions on location of sales of the manufactured product. Imposing the requirement that a controlled participant with sales in another controlled participant's territory forfeit any profit attributable to the intangible property is a form of a trade restriction. To the extent that the regulations seek to mimic true arm's length deals among unrelated taxpayers, there should not be a requirement to forfeit profits attributable to cost shared intangibles for sales in any territory.

The proposed regulations also fail to take into consideration the fact that multiple controlled participants (*i.e.*, in the form of controlled joint ventures) may operate in the same country and are not consolidated for tax purposes. Each of those participants should be allowed to manufacture and sell products utilizing cost shared intangibles.

Similarly, since territorial restrictions are often not included in third party licenses, territorial restrictions in a CSA could result in a third party licensee being able to use CSA technology in a territory where a controlled participant is doing business, but due to CSA territorial restrictions, the controlled participant is prohibited from using the licensed CSA technology. This example makes clear the fact that CSA territorial restrictions are inconsistent with the arm's length standard.

The NFTC recognizes that the exclusive territorial rule was proposed to accomplish two purposes: (i) to facilitate the determination of reasonably anticipated benefits or RAB (Prop. Reg. §1.482-7((e)), and (ii) to help identify when there has been a change in participation in a CSA (Prop. Reg. §1.482-7(f)). However, there are other arrangements under which these purposes can be accomplished with no less reliability, and if taxpayers have such arrangements, that should be sufficient.

VIII. Stock Based Compensation

The NFTC believes that the Tax Court decision in the *Xilinx* case is correct. While the Treasury has every right to seek a different outcome on appeal, in the meantime it is important that there be no penalty to any taxpayer that relies on the Tax Court decision in filing tax returns consistent with this judicial precedent.

Also, the transition rules apply only to those in compliance with the current regulations. It is important that compliance be judged in light of the Tax Court decision.

IX. Existing CSAs

A. Under the current regulations.

In the view of the NFTC, it is important that existing CSAs that comply with the current regulations not be disturbed, now and when the regulations emanating from the Proposed Regulations become final. The NFTC is concerned about the Audit Checklist suggesting that many of the questionable provisions of the Proposed Regulations are now in force and unnecessarily challenging taxpayer practices.

The Audit Checklist acknowledges that sales are often used as the basis for measuring reasonably anticipated benefits (RABs), but then it goes on to state that while sales may be the easiest basis to measure benefits, "it may not be the most reliable." The NFTC does not know of taxpayer abuses resulting from the use of third party sales as the measure of benefits, and believes the quoted language has the danger of leading to unnecessary review of taxpayers' existing CSAs. As long as sales are determined at the same market level, unless there is a manifest distortion, if the taxpayer uses third party sales as the measure of benefits that should be accepted. Indeed the examples in the Proposed Regulations are useful in showing when current sales can be used for estimating RAB.

The Audit Checklist refers to the information document request in the pending Glaxo case as a precedent for requesting similar documents. The Audit Checklist refers to market capitalization (a PCT method in the Proposed Regulations) for valuing the buy-in. Given the vagaries of the stock market, market capitalization should not be used under the QCSA Regulations or under the Proposed Regulations without a safety net.

The Audit Checklist states that periodic adjustments are the prerogative of the IRS. That is not the current law under the commensurate with income standard, even though such adjustment is included in the Proposed Regulations.

The Service should exercise caution that the forthcoming Appeals settlement guidelines are realistic in light of the current QCSA regulations. The Audit Checklist that uses many of the same terms that are used in the Proposed Regulations may result in unnecessary tax controversy. Nevertheless, the Service should not seek to impose the Proposed Regulations on existing CSAs.

B. Under the new regulations.

With respect to the new regulations, it is provided in Prop. Reg. §1.482-7(m), that existing CSAs (that are in compliance with the current regulations) are given 120 days to amend the governing agreement to conform to the new regulations with certain exceptions. Happily, the exclusive territory rule need not be applied. However, if there is a material change in the scope of the arrangement, such as a material expansion of the activities undertaken beyond the scope of the intangible development area, the grandfathered status will terminate.

If a CSA qualified as a cost sharing agreement under the current regulations and its pricing was acceptable as an arm's length price for both U.S. and foreign jurisdictions, there should be no need to change any provisions of the existing agreement under the proposed regulations simply because the U.S. tax authorities unilaterally decided to redefine what constitutes an arm's length agreement in the U.S.

The proposed regulations state that a failure of the controlled participants to substantially comply with the provisions of the new regulations except where compliance is specifically waived results in the termination of the CSA grandfathered status. As stated above with regard to language requiring compliance "to the satisfaction" of the Service, the proposed regulations offer no guidance to either the taxpayers or the examining agents in defining "substantial compliance." On the one hand, this lack of an objective standard may lead to an onslaught of litigation as taxpayers defend themselves and their long-standing cost sharing agreements from unrealistic assessments by examining agents. On the other hand, taxpayers may be compelled to abandon existing qualified cost sharing agreements and reluctantly engage in unnecessary efforts to achieve compliance with the proposed regulations to avoid adjustments and possible penalties. Renegotiation of a pre-existing CSA may be viewed as contrary to the arm's length standard as there is no sound business purpose justifying the renegotiation from the standpoint of the non-U.S. participant and its home country tax authority.

It is noted that PCTs occurring prior to the date of publication of the new regulations in the Federal Register are subject to the existing regulations. However, a buy-in governed by the old regulations becomes subject to the new regulations if there is a Periodic Trigger with respect to a PCT occurring on or after the date of publication of the new regulations in the Federal Register. In the view of the NFTC, it is wrong to subject buy-ins subject to the existing regulations to the new regulations.

Sincerely,

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