taxnotes federal

Volume 186, Number 4 ■ January 27, 2025

Final Section 367(d) Regulations Show No Significant Changes

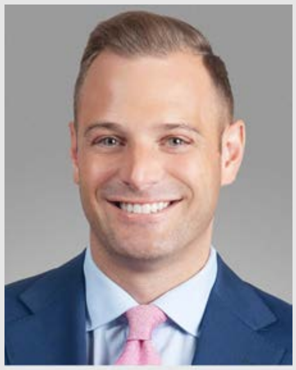
by Lewis J. Greenwald and Eric J. Rietveld

Reprinted from *Tax Notes Federal*, January 27, 2025, p. 745

Final Section 367(d) Regulations Show No Significant Changes

by Lewis J. Greenwald and Eric J. Rietveld

Lewis J. Greenwald



Eric J. Rietveld

Lewis J. Greenwald and Eric J. Rietveld are with Sullivan & Worcester in Boston.

In this article, Greenwald and Rietveld review the proposed regulations under section 367(d), showing the lack of significant change to the final regulations despite several commentator suggestions.

Copyright 2025 Lewis J. Greenwald and Eric J. Rietveld.
All rights reserved.

On May 3, 2023, Treasury and the IRS proposed regulations under section 367(d) (REG-124064-19).[1] The proposed regs were intended to address simple, common fact patterns involving repatriations of intangible property by terminating the continued application of section 367(d) when a transferee foreign corporation repatriates intangible property subject to section 367(d) to a "qualified domestic person," and when certain reporting requirements are satisfied. For purposes of the proposed regs, a repatriation meant a subsequent transfer of intangible property to the U.S. transferor that previously transferred the intangible property to the transferee foreign corporation, or a U.S. person that is related to the U.S. transferor.

Five comments (and requests for clarification of Example 3 and the applicability date of the regulations once finalized) were submitted, but no public hearing was requested or held. On October 10, 2024, the section 367(d) regulations were issued in final form (T.D. 9994). Treasury and the IRS:

- declined to expand the definition of qualified domestic person to partnerships and S corporations, leaving the definition of qualified domestic person in the final regs the same as in the proposed regs;
- declined to expand the guidance on intangible property basis; however, this will be the subject of future basis guidance under section 367(d) more generally;
- declined to expand the required adjustments related to an annual section 367(d) inclusion to be generally deductible under section 162;
- adopted in part and declined in part the request for additional specificity on the required reporting (and relief for missed reporting); and
- declined to make the regulations applicable retroactively.

Each of the above points is addressed further in more detail below.

Definition of Qualified Domestic Person

In general, to terminate the continued application of section 367(d) upon a repatriation of intangible property, the proposed regs required the recipient of the intangible property to be a qualified domestic person. They defined a qualified domestic person by reference to an initial U.S. transferor, a qualified successor, or a U.S. person that was either an individual or

[1] 88 F.R. 27819.

For more *Tax Notes*® *Federal* content, please visit www.taxnotes.com.

© 2025 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

qualified corporation related to either the initial U.S. transferor or qualified successor.[2]

As noted in the preamble to the proposed regs, tax officials based the definition of qualified domestic person on the principle that it is generally appropriate to terminate the continued application of section 367(d) only once all income produced by the intangible property during its useful life, and all gain recognized on its disposition, has been subject to the qualified domestic person's U.S. current tax while that person holds the property. In the case of a repatriation to an initial U.S. transferor, the proposed regs further described how the repatriation restored the circumstances that existed at the time of the original section 367(d) transfer.[3]

Partnerships

The proposed regs neither treated a domestic partnership as a qualified domestic person, nor adopted an approach that would treat a partnership as an aggregate of its partners for purposes of determining qualified domestic person status. One commentator suggested that Treasury and the IRS modify the definition to include partnerships in which all of the partners would themselves be qualified domestic persons, or partnerships that made the original outbound transfer of the intangible property subject to section 367(d) when there is substantial continuity of ownership of that partnership during the period beginning on the date of the initial section 367(d) transfer and ending on the date of the repatriation. The final regs did not adopt this suggestion because Treasury and the IRS believed that identifying domestic partnerships as qualified domestic persons would either expand the scope of the proposed regs in an inappropriate manner or would impose an undue burden on taxpayers and the IRS.

S Corporations

Similarly, one commentator suggested that the final regs allow S corporations to be treated as qualified corporations. The commentator noted that the shareholders of an S corporation must generally be U.S. individuals subject to U.S. taxation, which ensures that income attributable to intangible property held by an S corporation would be subject to U.S. taxation (though, the commentator noted that this limitation is not absolute, insofar as certain plans described in section 401(a) may be shareholders of an S corporation). A principle for the definition of qualified domestic person is that termination of the continued application of section 367(d) should occur only when all the income produced by the intangible property is subject to tax in the United States. In the case of an S corporation, that result is not guaranteed. Given the foregoing, the final regs did not include partnerships and S corporations in the definition of qualified domestic person and, as such, retain the definition of qualified domestic person from the proposed regs without change.

Adjusted Basis in Repatriated Intangible Property

The proposed regs provided rules regarding a qualified domestic person's adjusted basis in the intangible property it receives in a repatriation.[4] One commentator described how existing uncertainty over the treatment of adjusted basis of intangible property subject to section 367(d) might be implicated when that intangible property is repatriated. Another commentator suggested that, when a transferee foreign corporation incurs expenditures related to the repatriated intangible property after the initial outbound transfer, the proposed regs should be modified to allow a qualified domestic person's adjusted basis in the repatriated intangible property to reflect those expenditures, reduced by any attributable amortization allowed or allowable to the transferee foreign corporation.

The proposed regs noted that the adjusted basis in the repatriated intangible property in the hands of the qualified domestic person or transferee should operate "in a manner intended

---

[2] Prop. reg. section 1.367(d)-1(f)(4)(iii).

[3] The proposed regs (and final regs) included a rule coordinating the application of section 367(d) and the provisions of reg. section 1.904-4(f)(2)(vi)(D) that apply the principles of section 367(d) to determine the appropriate amount of gross income attributable to a foreign branch.

[4] Prop. reg. section 1.367(d)-1(f)(4)(iv).

© 2025 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more Tax Notes® Federal content, please visit www.taxnotes.com.

to reach an appropriate result regarding a qualified domestic person's basis in repatriated intangible property" until future rulemaking is issued that can address general basis rules under section 367(d). Treasury and the IRS continue to believe that any resolution of these issues necessarily implicates broader issues under section 367(d) and, as such, are beyond the scope of this rulemaking. As such, the proposed regs were finalized without changes to the adjusted basis issue.

Annual Section 367(d) Inclusion Adjustments

The proposed regs provided that the deemed annual payment under section 367(d) by the transferee foreign corporation should be treated as an allowable deduction that must be allocated and apportioned to the transferee foreign corporation's classes of gross income. The proposed regs clarified "that the allowable deduction is allocated and apportioned potentially to any class (or classes) of gross income (as appropriate) rather than solely to gross income subject to subpart F in all circumstances."

One commentator suggested that the proposed regs were unclear as to whether the described allowable deduction was limited to the certain listed provisions,[5] or whether the deduction was more generally available (for example, as a deduction under section 162). The commentator posited that the latter approach was more appropriate and requested that the final regs adopt the more expansive section 162 position. Treasury and the IRS believed that adopting the commentator's suggestion would be inconsistent with the proposed regs and section 367(d) generally. Therefore, the final regs did not adopt this suggestion.

Multiple Transfers Before Repatriation

One commentator asked that the proposed regs accommodate repatriations preceded by certain transfers of intangible property subject to section 367(d) between related foreign corporations. The commentator suggested modifying the proposed regs to effectively negate a prior transfer that was subject to tax under a separate regime (for example, the global intangible low-taxed income provisions under section 951A).

Treasury and the IRS concluded that coordinating potential disparities between income recognition under section 367(d) and other generally applicable provisions of the code, and potential disparities in tax basis for purposes of section 367(d) as compared with adjusted basis for other purposes, was beyond the scope of the final regs. Therefore, they did not adopt the request for additional guidance addressing multiple related transfers.

Reporting

As a condition for terminating the application of section 367(d) regarding repatriated intangible property, the proposed regs required the U.S. transferor to provide specific information about the repatriation. If the U.S. transferor failed to provide that information, notwithstanding the repatriation, *inter alia*, the requirement to take an annual inclusion into account over the useful life of the intangible property, continued to apply. However, a U.S. transferor was eligible for relief under the proposed regs if, upon becoming aware of the failure, the U.S. transferor promptly provided the required information, explained its compliance failure, and met other requirements as applicable.

One commentator requested clarifications of the reporting and relief provisions. First, the commentator requested that the final regs clarify whether relief for a failure to comply is, in relevant part, also conditioned on the U.S. transferor timely filing one or more amended returns for the tax year in which the subsequent transfer occurred and succeeding years, and, if the U.S. transferor is under examination when an amended return is filed, providing a copy of the amended returns to the IRS personnel conducting the examination. Treasury and the IRS adopted this comment by clarifying in the final regs that relief for a failure to comply is conditioned upon these requirements, if applicable.

The commentator also asked that Treasury and the IRS consider providing a form for filing the required information. The proposed regs, in fact, noted that Treasury and the IRS will consider prescribing a particular form as part of future

[5] Reg. sections 1.882-4(b)(1), 1.954-1(c), and 1.960-1(c) and (d).

© 2025 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes® Federal* content, please visit www.taxnotes.com.

improvements to reporting for section 367(d) generally. However, to provide taxpayers with additional guidance on the manner for providing a U.S. transferor's explanation for its failure to comply to the IRS, the final regs provide an eFax number (and, if a tax year of the U.S. transferor is under examination, that information should instead be provided to the IRS personnel conducting the examination).

Finally, the commentator suggested clarifications or modifications to the requirements in the proposed regs that the U.S. transferor promptly address its failure to file and the way the U.S. transferor provides the remedial information (that is, to the director of field operations, cross-border activities practice area of Large Business & International, or any successor to that role). The commentator suggested that "promptly" did not provide sufficient guidance to taxpayers (the comment requested a prescribed period) and asserted that it is unusual for regulations to require a taxpayer to provide information directly to a specified official within the IRS.

The final regs did not adopt these suggestions. Treasury and the IRS believe that requiring the U.S. transferor to address its failure to comply promptly, rather than providing a specific period, allows flexibility so that the relief may apply as appropriate to a taxpayer's particular facts and circumstances. Also, the provided relief mechanism is modeled on similar relief provisions in other contexts.[6]

That said, Treasury and the IRS clarified the relief mechanism in the proposed regs by striking language that described the consequences of a failure to comply, namely the continued application of the annual inclusion stream and application of the gain recognition rule. If the failure to comply is remedied, the rules of the proposed regs are treated as satisfied as of the date of the repatriation (that is, the repatriation terminates the continued application of section 367(d) and the U.S. transferor, if applicable, would take a partial annual inclusion into account).

Clarification to Example 3

Example 3 in the proposed regs illustrated the determination of a qualified domestic person's adjusted basis in intangible property. In that example, TFC transferred the intangible property to USP (a qualified domestic person) in an exchange described in section 351(b) under which TFC recognized $50x of gain and USP recognized $50x of gain. The analysis under the proposed regs was, and remains, limited to the determination of USP's adjusted basis in the intangible property.

One commentator asked that the final regs clarify that TFC's earnings and profits and gross income arising from the repatriation are reduced by the amount of gain recognized by USP. Treasury and the IRS agreed and adopted the comment by clarifying in the facts of the example that TFC will reduce its E&P and gross income by $50x, the amount arising from the repatriation and the amount of gain recognized by USP.

Applicability Dates

The proposed regs were generally proposed to apply to subsequent dispositions of intangible property occurring on or after the date of publication of the regulations in final form in the *Federal Register*.[7] In that regard, commentators recommended that they apply retroactively.

It was noted that Treasury and the IRS generally consider several factors when evaluating whether a rule should apply retroactively on an elective basis. For example, retroactive application may be more compelling when the regs are issued relating to new legislation, or when retroactive application is necessary to achieve policy objectives. Treasury and the IRS also evaluate the administrative burden likely to result from retroactive application. Finally, if the regs represent a change in existing regs, consideration is given to whether retroactive application could advantage certain taxpayers over similarly situated taxpayers, based on whether the relevant tax year remains open for the taxpayer to amend its return to take advantage of the change. Given the above, Treasury and the

[6] *See, e.g.*, reg. sections 1.367(a)-8(p) and 1.721(c)-6(f).

[7] *See* prop. reg. sections 1.367(d)-1(j)(2), 1.904-4(q)(3), and 1.6038B-1(g).

© 2025 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes*® *Federal* content, please visit www.taxnotes.com.

IRS determined that, on balance, these factors, though not representing an exhaustive list of factors, weighed against permitting the retroactive application of the final regs.

The final regs largely adopt the proposed regs with some minor modifications. While the IRS still has some guidance to issue, namely for the adjusted basis of repatriated intellectual property, the final regs provide clarification for taxpayers going forward on intellectual property repatriations. ■

taxnotes®

Federal | State | International

Want to be renowned in the tax community?
Write for Tax Notes.

If you do, you will:

- Receive exposure in the world's leading tax publication
- Join a network of the best and brightest minds in tax

taxnotes.com/acquisitions

Your byline here.

© 2025 Tax Analysts. All rights reserved. Tax Analysts does not claim copyright in any public domain or third party content.

For more *Tax Notes*® *Federal* content, please visit www.taxnotes.com.