

integrated transactions structured as services transactions.

*e. Global Dealing Operations—* § 1.482–9(m)(5). Under proposed § 1.482–9(m)(5), guidance concerning the treatment of global dealing operations is reserved, pending the issuance of transfer pricing guidance specifically applicable to global dealing operations.

*C. Income Attributable to Intangibles—* § 1.482–4(f)(3) and (4)

The proposed regulations would replace the provisions of § 1.482–4(f)(3), relating to the allocation of income from intangibles, with proposed § 1.482–4(f)(3) and (4).

*1. Ownership of Intangible Property—* § 1.482–4(f)(3)

Proposed § 1.482–4(f)(3)(i)(A) provides guidance for determining the owner of an intangible. In general, the owner is the taxpayer identified as the owner of an intangible under the intellectual property laws of the relevant jurisdiction, or the taxpayer that holds rights constituting an intangible in accordance with contractual terms or other legal provision. For example, in the case of a typical license of an intangible between controlled parties, the proposed regulations treat the licensee as the owner of contractual rights pursuant to the license, and the licensor as the owner of the intangible subject to the license. The identification of a single owner for each discrete intangible replaces the provision in the existing regulations that under certain circumstances could be read to provide for multiple owners of an intangible. See existing § 1.482–4(f)(3)(i) and § 1.482–4(f)(3)(iv), *Example 4*. The ownership of an intangible must in all cases accord with the economic substance of the underlying transaction. See § 1.482–1(d)(3). In the case of intangible property for which no owner can be identified under intellectual property law, contractual terms, or other legal provision, the owner will be the controlled taxpayer that has control of the intangible, based on all the facts and circumstances.

Proposed § 1.482–4(f)(3)(i)(B) generally excludes from the rules of proposed § 1.482–4(f)(3)(i)(A) intangibles subject to the cost sharing provisions of § 1.482–7. The Treasury Department and the IRS are reviewing the current regulatory guidance related to qualified cost sharing arrangements, and intend to issue proposed regulations in the near term.

Proposed § 1.482–4(f)(3) does not include the rules in the existing

regulations for allocations with respect to assistance provided to the owner of intangible property. These rules, in modified form, are provided in proposed § 1.482–4(f)(4).

*2. Contributions To Develop or Enhance an Intangible—* § 1.482–4(f)(4)

Proposed § 1.482–4(f)(4)(i) provides that the arm's length consideration for a contribution by one controlled taxpayer to develop or enhance an intangible owned by another controlled taxpayer must be determined under the applicable rules of section 482.

The section 482 regulations generally give effect to the contractual terms specified for controlled transactions. Consistent with this principle, proposed § 1.482–4(f)(4)(i) also provides rules for situations where controlled taxpayers "embed" compensation for a contribution in the contractual terms of a transaction involving an intangible. For instance, under a typical intangible license between controlled parties the licensee may render marketing services that are anticipated to enhance the intangible owned by the licensor. The licensor may compensate such services through a separately stated fee, or such compensation may be embedded within the royalty paid by the licensee (*i.e.*, through reduction of the royalty). In addition, the licensee may undertake marketing activities that are anticipated to enhance the value of its rights to exploit its license. Such activities do not require compensation by the licensor.

Proposed § 1.482–4(f)(4)(i) provides that ordinarily no separate allocation is appropriate where compensation for a contribution is embedded within the terms of a related controlled transaction. The contribution, however, must be taken into account in evaluating the comparability of the controlled transaction to any uncontrolled comparables and in determining the arm's length consideration for the controlled transaction that includes the embedded contribution. This rule is intended to reach a result that is implicit under the existing regulations.

In some cases, this rule may operate in conjunction with § 1.482–3(f), which deals with transfers of tangible property that contains an embedded intangible. For example, in a typical distribution arrangement for the resale of trademarked goods, the distributor may perform marketing services that are not separately compensated. In such a case, ordinarily no separate allocation would be appropriate with respect to either the embedded trademark or the embedded marketing services. These embedded elements, however, must be taken into account in evaluating the comparability

of the controlled transfer to any uncontrolled comparables and in determining the arm's length consideration for the intercompany sale of the trademarked goods. See proposed § 1.482–4(f)(4)(ii), *Example 2*.

The Treasury Department and the IRS intend that this rule pertaining to contributions to develop or enhance an intangible will provide a clearer framework for analysis than existing § 1.482–4(f)(3), particularly where controlled taxpayers document the relevant transactions in advance and act in accordance with the documentation. In this regard, the proposed regulations are intended to encourage controlled taxpayers to document such transactions contemporaneously and consistently over time.

Examples in proposed § 1.482–4(f)(4)(ii) illustrate the application of proposed § 1.482–4(f)(4) to a range of transactions involving contributions to develop or enhance an intangible.

*D. Contractual Terms Imputed From Economic Substance—* § 1.482–1(d)(3)(ii)(C), *Examples 3, 4, and 5*

The proposed regulations recognize that controlled taxpayers have considerable flexibility to specify the contractual terms regarding contributions to develop or enhance an intangible. The Commissioner generally will give effect to these contractual terms for Federal income tax purposes, provided that they are consistent with the economic substance of the parties' conduct. On the other hand, if the controlled taxpayer fails to specify contractual terms for a transaction, or if the stated terms do not accord with the economic substance of the underlying activities, the Commissioner may impute contractual terms that are consistent with the economic substance of the underlying transactions. See § 1.482–1(d)(3).

Proposed *Example 3*, *Example 4*, and *Example 5* in § 1.482–1(d)(3)(ii)(C) illustrate scenarios in which the Commissioner may impute contractual terms based on the principles in proposed § 1.482–4(f)(3) and (f)(4) and proposed § 1.482–9. These new examples illustrate the imputation of contractual terms in cases where controlled taxpayers fail to specify contractual terms or where the contractual terms specified do not accord with economic substance.

*E. Conforming Changes to Other Provisions*

In view of the proposed changes described above, conforming changes to §§ 1.482–0 through –2, 1.6038A–3, 1.6662–6(g), and 31.3121(s)–1 are