



Transfer Pricing  
**Country Summary**

**United States**

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## 1. Introduction

Under Section 482 of the Internal Revenue Code (IRC) of the U.S. Treasury, the Internal Revenue Service (IRS) has the authority to adjust the allocation of gross income, deductions, credits or allowances among or between businesses that are owned or controlled directly or indirectly by the same interests if such adjustments are necessary to prevent the evasion of tax or clearly to reflect the income of such businesses. The corresponding Section 1.482 of the U.S. Treasury Regulations (Section 1.482) sets forth the general principles and guidelines to be followed under Section 482 of the IRC, and establishes the arm's length principle as the standard for determining the true taxable income of a taxpayer.

On July 31, 2009, the Treasury issued Final Service Regulations (§1.482 -9), providing greater guidance under circumstances in which a controlled party makes contributions to an intangible owned by another party. In December 2011, the U.S. Treasury released final cost-sharing regulations, which were intended to provide further guidance to taxpayers choosing to enter into qualified cost-sharing arrangements (CSAs).

## 2. Laws & Regulations

### a) References to OECD/EU/Local Rules

- Under Section 482 of the Internal Revenue Code (IRC)
- Section 1.482 of the U.S. Treasury Regulations
- issued Final Service Regulations (§1.482 -9)
- The US is a Member of the OECD and it follows the OECD TP Guidelines.

### b) Definition of Related Party

Related parties are entities under common control, direct or indirect, whether legally enforceable or not, by the same interests. Related parties include taxpayers that have ownership or control of other taxpayers. Control is only generally defined in the IRC, however, common examples include voting power.

The right to appoint the majority of the members of management, and control on the basis of contractual arrangements. Treasury Regulations Section 1.482-1(i)(4) specifies that "controlled" includes 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. It is the reality of the control that is decisive, not its form or the mode of its exercise. A presumption of control arises if income or deductions have been arbitrarily shifted.

### c) Nature of Transfer Pricing Documentation

The Internal Revenue Service ("IRS") requires precise information on regulated transactions with foreign organizations to be disclosed with the filing of a tax return (i.e., Form 5471 or 5472).

Furthermore, the IRS requires taxpayers to submit paperwork to substantiate their intercompany transactions in order to avoid fines resulting from a potential transfer price adjustment. Transfer pricing paperwork should give an arm's length analysis of transactions between linked parties. A taxpayer must provide "contemporaneous" evidence demonstrating that it took a reasonable effort to examine the intercompany transactions. The paperwork must be "contemporaneous," which means that it must be created prior to the submission of the tax return. Section 482 also includes a full list of the main documents that must be included in a report.

#### d) Tax Havens & Blacklists

The US considers tax havens countries with a very low CIT rate. Accordingly, such countries are the Caribbean islands, Cayman Islands, Switzerland, Panama. Etc.

#### e) Advance Pricing Agreement (APA)

A taxpayer may seek an APA on a bilateral, multilateral, or unilateral basis. A bilateral or multilateral APA consists of an agreement between the taxpayer and the IRS, as well as an agreement between the United States and one or more foreign tax authorities, executed by the relevant competent authority in accordance with the MAP of the applicable US income tax treaty, that the transfer pricing method is correct. A bilateral or multilateral APA provides assurance that revenue derived from covered transactions will not be subject to double taxation. Where a MAP is available, taxpayers are urged to pursue bilateral or multilateral APAs. If this procedure is unavailable or fails, the IRS may enter into a unilateral APA with the taxpayer, agreeing on a transfer pricing mechanism. Since 1991, US taxpayers have had access to the APA procedure. In a cooperative negotiating approach, the program allows taxpayers and the government to reach an agreement on transfer prices before submitting tax returns.

#### f) Audit Practice

The level of transfer pricing scrutiny is high and the IRS has significant experience in dealing with transfer pricing audits. The focus is on large corporations and the audits can be random or risk-selected. The IRS has recently issued Transfer Pricing Examination Process (Publication 5300 (6-2018)), a guide to best practices and processes to assist with the planning, execution and resolution of transfer pricing examinations. The publication is intended to be consistent with the Large Business & International (LB&I) Examination Process (LEP) (Publication 5125). The Transfer Pricing Examination Process (TPEP) replaces the Transfer Pricing Audit Roadmap (Roadmap), a 2014 toolkit designed to provide IRS examiners with audit techniques, advice, links and reference materials. The TPEP is similar in many respects to the Roadmap and also includes new materials related to country-by-country reporting, exhibits related to newly developed Practice Units, and new guidance on the Initial Transfer Pricing Documentation IDR. The IRS conducts audits for both taxpayers that are suspected to have not complied with the arm's length standard as well as taxpayers that should affirmatively demonstrate their transfer pricing policies. The IRS requests supporting transfer pricing documentation within 30 days of providing an Information Document Request ("IDR").

### 3. Transfer Pricing Documentation

#### a) Level of Documentation

The main requirements for complete contemporaneous transfer pricing documentation under §1.6662 - 6(d)(2)(iii)(B) are:

- Overview of the taxpayer's business, including an analysis of the economic and legal factors that affect the pricing of its property or services;
- Description of the taxpayer's organizational structure (including an organization chart) covering all related parties engaged in transactions potentially relevant under section 482;
- Documentation explicitly required by the regulations under section 482, including any inter - company contracts, documentation (if applicable) of: a bona fide cost sharing arrangement, a market share strategy, correlative adjustments resulting from proposed setoffs;
- Description of the transfer pricing method selected and an explanation of why that method was selected;

- Description of the alternative methods that were considered and an explanation of why they were not selected;
- Description of the controlled transactions (including the terms of sale) and any internal data used to analyze those transactions;
- Description of the comparables that were used, how comparability was evaluated, and what (if any) adjustments were made;
- Explanation of the economic analysis and projections relied upon in developing the method;
- Description or summary of any relevant data that the taxpayer obtains after the end of the tax year and before filing a tax return which would help determine if a taxpayer selected an applied a specified method in a reasonable manner;
- A general index of the principal and background documents and a description of the recordkeeping system used for cataloging and accessing those documents. For intra-group services, documentation should include the following: intercompany agreement, group ownership/organizational structure and a detailed description of functions and expenses incurred in providing services.
- Supporting documentation in the form of an appendix used in preparation of the analysis included in the report

For country-by-country reporting obligation, taxpayers are required to file Form 8975 for tax years beginning on or after 1 July 2016. The IRS will also allow voluntary filing for tax years beginning on or after 1 January 2

#### b) Industry Analysis

By identifying value drivers for the relevant industry, a first indication of the level of profitability common in the industry is being given.

#### c) Company Analysis

A description of the management structure of the local entity, a local organisation chart, and a description of the individuals to whom local management reports and the country(ies) in which such individuals maintain their principal offices.

A detailed description of the business and business strategy pursued by the local entity including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and an explanation of those aspects of such transactions affecting the local entity.

#### d) Functional Analysis

In conducting a functional analysis, an assessment is made of the significant activities and responsibilities that are performed by the related parties relevant to the Intercompany Transactions under review, the tangible and intangible assets that are employed and the risks that are borne in undertaking the business activities. Such an assessment is consistent with the recommendations that have been made in the OECD Guidelines at paragraph 1.51.

#### e) Choice of Transfer Pricing Method

Section 1.482 specifies methods for documenting transactions that largely parallel those specified in the OECD Transfer Pricing Guidelines. For tangible goods transactions, taxpayers can use one of five specified methods: the CUP method, the resale price method, the cost plus method (CPM), the profit split method and the comparable profits method (similar to the transactional net margin method under the OECD Guidelines). For intangibles, taxpayers can use of three specified methods: the CUT method (comparable uncontrolled

transaction, similar to the CUP), CPM, the profit split method and the comparable profits method. In certain circumstances, methods for platform contribution transactions ("PCT") in a Cost Sharing Arrangement ("CSA"). For service transactions, taxpayers can use one of six specified methods: the service cost method, the comparable uncontrolled service price method, the gross services margin method, the cost of services plus method, the comparable profits method, and the profit split method. Other unspecified methods may also be applied, and should be applied if they lead to a more reliable arm's length result. Taxpayers are required to choose the "best method," defined as the method that leads to the most reliable arm's length result. Treasury Regulations Section 482 also establishes methodologies for other intercompany transactions which include:

- Loan and advances, for which methods are based on an arm's length rate or a safe harbor (See Safe Harbor section); and
- CSA transactions, for which the methodology is based on a Reasonably Anticipated Benefit share. The CSA buy-ins, or PCT, are determined based on the following methods:

- CUT;
- CUSP;

Income method;

- Acquisition price;
- Market capitalization; and
- Residual profit split

#### f) Economic Analysis – Benchmark Study

For examination of a testing party who is a U.S. taxpayer, the IRS would normally favor U.S. comparables. Comparables from Canada will also be welcomed. However, in the lack of comparables on a local level,

If there is a compelling justification, comparables from another market may be allowed. Uncontrolled comparables should normally be avoided, according to Treasury Regulations Section 1.482-1(d)(4)(ii), be drawn from the geographical market in which the controlled taxpayer operates, since there are considerable disparities in economic situations between markets. If data from the same market is available

If a controlled comparable from a different geographic market is not accessible, an uncontrolled comparable from a different geographic market may be used. If modifications are made to account for to make changes for such disparities is not accessible, then

#### g) Inter-company (IC) Legal Agreement

Although an Inter-company legal agreement formalizes the business and financial relationship between group entities, the legal agreements have a lower ranking since the OECD 2017 Guidelines made the "conduct of parties" the prevailing concept.

#### h) Financial Statements

SEC regulations require publicly traded companies to disclose certain types of business and financial data to the SEC and their stockholders on a regular basis. When new securities, such as stocks and bonds, are issued to the public, the SEC requires disclosure of relevant business and financial information to potential investors, with exceptions made for small issues and private placements. The current corporate disclosure system is known as the integrated disclosure system. The SEC has attempted to make this system less burdensome on corporations by standardizing various forms and eliminating some differences in reporting requirements to the SEC and to shareholders by amending some of its regulations.

Companies that are publicly traded must file two annual reports: one for the SEC and one for their shareholders. Form 10-K is the SEC's annual report, and its content and format are strictly governed by federal statutes. It includes detailed financial and operational data, as well as management responses to specific questions about the company's operations.

According to SEC regulations, annual reports to stockholders must include certified financial statements and other specific items. A two-year audited balance sheet and a three-year audited statement of income and cash flows must be included in the certified financial statement. Furthermore, annual reports must include selected financial data from the previous five years, such as net sales or operating revenues, income or loss from continuing operations, total assets, long-term obligations and redeemable preferred stock, and cash dividends declared per common share.

Management's discussion and analysis of the firm's financial condition and results of operations must also be included in annual reports to stockholders. There is information in there about the firm's liquidity, capital resources, results of operations, any favorable or unfavorable industry trends, and any significant events or uncertainties. A brief description of the business covering such topics as main products and services, sources of materials, and the status of new products will also be included in annual reports to stockholders. The corporation's directors and officers must be identified. Market data on common stock must also be provided.

#### i) Production Process for TP Relevant Returns, Documents, Forms and Financials

In the chart below, the existence of the filing requirements with the details of which format is used, the latest filing date, notification requirement and its deadline, thresholds to be applied in case it exists, and the required languages are demonstrated. This information can be seen respectively for CIT, master file, local file, CbCR, local forms, annual accounts and segmented P&L documentations.

	Prepare or File?	Format	Deadline	Notification Deadline*	Threshold* (Yes/No)	Local Language (Yes/No)*(If "No", it can be filed in English)
<b>Corporate Income Tax</b>	File	US GAAP	April, 15 <sup>th</sup> .	N/A	N/A	No
<b>Master File</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Local File</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>CbCR</b>	File	Form 8975	15 <sup>th</sup> of April - Must be filed on or before the due date (including extensions) for the annual tax return.	N/A	Yes	No

<b>Local Form</b>	File	Form 8975 (required for CbCR Filing)	April, 15 <sup>th</sup> .	N/A	No	No
<b>Local Form</b>		Form 5472 information returns				
<b>Local Form</b>		M3 Form				
<b>Annual Accounts</b>	File	US GAAP	60 days immediately prior to the first day of the anniversary month	N/A	N/A	No
<b>Segmented P&amp;L</b>	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.
* The US has signed the MCAA agreement for the filing of CbCR						
* US does request as much and detailed information from smaller and less complex enterprises (SME's included) than it does from large and complex enterprises						

#### j) Mandatory Language

The documentation must be filled in English.

#### k) Notification Requirement

Documentation must be in place at the time the taxpayer files its tax return. Failure to provide contemporaneous documentation does not trigger a penalty in and of itself. Nonetheless, The taxpayer must be able to provide documentation of its inter- company transactions within 30 days of a request from the IRS for such documentation in order for the documentation to protect it from potential penalties related to an adjustment (and, as stated, the documentation must have been completed prior to filing its tax return). Failure to provide contemporaneous documentation does not trigger a penalty in and of itself.

#### l) Record Keeping

There is no statutory requirement to keep transfer pricing documentation. However, having transfer pricing documentation is potentially helpful in avoiding penalties stemming from transfer pricing adjustments, and must be submitted within 30 days of being requested to serve this purpose. Therefore, at a minimum it is prudent to retain the transfer pricing documentation for all years that are still open under audit.

#### m) Penalties and Interest Charges

The IRS may levy fines under Section 1.6662 of the Internal Revenue Code for underpayment of taxes as a consequence of incorrect intercompany transfer costs. For major valuation misstatements, the penalty is 20% of the unpaid taxes, and 40% for gross valuation misstatements. Taxpayers can avoid transfer pricing penalties if they have transfer pricing documentation when they file their tax return, which includes intercompany transactions that are the subject of an adjustment, if the documentation shows that the taxpayer determined the transfer pricing in accordance with a specified method under Section 482 that is reasonably applied.

There are two types of transfer pricing penalties: transactional penalties and netadjustment penalties.

When the IRS concludes that the transfer price was misstated, a significant valuation misstatement penalty may be imposed.