

## Report on recent US international tax developments - 22 February 2019

---

### **NEW!** EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

---

Efforts to update the United States (US) transfer pricing regulations and align them with the *Tax Cuts and Jobs Act* (TCJA) remain underway. The Internal Revenue Service (IRS) and Treasury included the Internal Revenue Code<sup>1</sup> Section 482 regulations in two of the high-priority projects listed in the 2018-2019 Priority Guidance Plan released 8 November 2018. According to a recent tax press article regarding the 2018-2019 Guidance Plan, the IRS is working on "regulations addressing the changes to [sections] 367(d) and 482" as part of the TCJA implementation effort. The article notes that the regulations could reflect the TCJA's expanded definition of intangible property under Section 367(d)(4), which added to the definition of intangible property, goodwill, going concern value, or workforce in place (including its composition and terms and conditions (contractual or otherwise) of its employment), and amended Section 482, which now explicitly authorizes valuation of intangible transfers on an aggregate basis or use of realistic alternatives to the transaction. The 2018-2019 Guidance Plan also includes "final regulations under [section] 482, including with respect to the treatment and allocation of risk" among its general guidance projects. The description of the project cites the temporary regulations (T.D. 9738), which expired in September 2018, on aggregation of transactions issued in 2015 under Treas. Reg. Section 1.482-1T, but does not specify whether the controversial provisions of those regulations will be reintroduced or how they relate to risk. The 2018-2019 Guidance Plan's descriptions do not provide much indication of what changes are under consideration, and IRS officials have declined to comment.

The New York State Bar Association (NYSBA), in a letter and report containing comments on the Section 59A proposed Treasury regulations submitted to IRS and Treasury this week, objected to the inclusion, as a base erosion payment, of a noncash consideration transaction that otherwise qualifies for nonrecognition under the Code. Proposed Treasury Regulations under the base erosion and anti-abuse tax (BEAT) ([REG-104259-18](#)) were [released on 13 December 2018](#). Under the guidance, a base erosion payment includes noncash payments or accruals to a foreign related party even for nonrecognition transactions such as [Section 351](#) exchanges, [Section 332](#) liquidations, and [Section 368](#) reorganizations, including stock that is deemed to be issued or exchanged. The preamble to these Treasury Regulations states that the “statutory definition of this type of base erosion payment that results from the acquisition of depreciable or amortizable assets in exchange for a payment or accrual to a foreign related party is based on the amount of imported basis in the asset. That amount of basis is imported regardless of whether the transaction is a recognition transaction or a transaction subject to rules in subchapter C or elsewhere in the code.” In its 19 February letter to Treasury and the IRS, the NYSBA makes it clear that it remains unconvinced that this characterization is warranted. Instead, it proposes that an anti-abuse rule be included.

The General Court, the court of first instance for the European Union (EU) which is the court people turn to when they have disputes about matters of EU law, ruled on 14 February that Belgium’s “excess profits” tax regime was not an illegal State

aid scheme because each company had to request a ruling on its individual merits. Belgium’s appeal had included requests that the court rule that the commission overstepped its authority in challenging the tax rulings on the basis of State aid treaties, which the General Court rejected.

In response, an EU high-ranking official stated “The EU Court of Justice has upheld our central principle: If a tax advantage is selective for companies, there is illegal State aid.” This same high-ranking EU official told members of the European Parliament’s Special Committee on Financial Crimes, Tax Evasion, and Tax Avoidance 19 February 2019 that “[s]tate aid rules target companies who get a selective advantage that others don’t. Only better taxation rules can close loopholes that are available to everyone.”

The Organisation for Economic Co-operation and Development (OECD) on 14 February released the fifth batch of peer review reports relating to the implementation of the Base Erosion and Profit Shifting (BEPS) Action 14 minimum standard (Making Dispute Resolution Mechanisms More Effective). Countries in the fifth batch include Estonia, Greece, Hungary, Iceland, Romania, Slovak Republic, Slovenia and Turkey. Overall, the reports conclude that the majority of these jurisdictions meet most or almost all of the elements of the BEPS Action 14 minimum standard. Iceland meets more than half of the elements of the BEPS Action 14 minimum standard, and Romania meets less than half of these elements.<sup>2</sup>

---

## Endnotes

1. All “Section” references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.
2. See EY Global Tax Alert, [OECD releases fifth batch of peer review reports on BEPS Action 14](#), dated 18 February 2019.

For additional information with respect to this Alert, please contact the following:

### Ernst & Young LLP, International Tax Services, Washington, DC

- ▶ Arlene Fitzpatrick [arlene.fitzpatrick@ey.com](mailto:arlene.fitzpatrick@ey.com)
- ▶ Joshua Ruland [joshua.ruland@ey.com](mailto:joshua.ruland@ey.com)

#### About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit [ey.com](https://ey.com).

© 2019 EYGM Limited.  
All Rights Reserved.

EYG no. 000646-19Gbl

1508-1600216 NY  
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

**[ey.com](https://ey.com)**