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In this article, the author uses recent data to examine whether U.S. corporations have repatriated valuable intangible property following the enactment of the Tax Cuts and Jobs Act and evaluates both the generally accepted accounting principles effective tax rate and the cash tax effects of those repatriations.

Before the enactment of the Tax Cuts and Jobs Act in December 2017, many large U.S. corporations used intangible cost-sharing agreements (CSAs) to shift the income from intellectual property to foreign subsidiaries operating in low-tax jurisdictions.[1] Because of that IP migration, the generally accepted accounting principles effective tax rates (ETRs) for large U.S. corporations in fiscal 2015 and 2016 — the two fiscal years preceding TCJA enactment — were significantly lower for corporations with high shares of worldwide pretax income attributed to their foreign, rather than U.S., affiliates and high research and development expenses expressed as a percentage of their global sales revenues.[2]

Several TCJA provisions will affect a U.S. corporation's choice of the lowest tax location for its valuable IP. First, a new dividends received deduction effectively exempts earnings of qualified foreign subsidiaries from U.S. tax if those earnings are repatriated to the U.S. parent. If the TCJA had made no other changes, that participation exemption would have increased the incentive for U.S. corporations to shift valuable IP to low-tax foreign subsidiaries; however, four other provisions offset the incentive:

- As of January 1, 2018, the maximum corporate rate was reduced from 35 percent to 21 percent.
- In the first fiscal year starting on or after January 1, 2018 (FYB 2018), a U.S. parent corporation was required to pay federal tax on its global intangible low-taxed income, which equals the tested income of any foreign subsidiary that exceeds a 10 percent return on depreciable property used in the production of that income.
- In FYB 2018, a U.S. corporation was also entitled to a special deduction (and thus a reduction in its federal tax) based on its foreign-derived intangible income, which is derived from the corporation's revenues from sales and services to foreign customers.
- The definition of IP under sections 367 and 482 was broadened to include workforce in place, going concern value, and goodwill,

[1] *See, e.g.*, *Amazon.com Inc. v. Commissioner*, 148 T.C. No. 8 (2017).

[2] Thomas Horst, "The TCJA's Impact on GAAP Effective Tax Rates of Large U.S. Nonfinancial Corporations," *Tax Notes Int'l*, May 27, 2019, p. 821, 830 and Table 9.

thereby increasing the income attributable to the transferor of that property.

The Joint Committee on Taxation projected in December 2017 that the TCJA's provisions would result in a substantial increase in federal tax revenues in 2019-2021 resulting from IP repatriation.[3] While I was aware that many U.S. corporations had restructured their foreign operations because of the TCJA's international provisions, I was previously unaware of any evidence that those restructurings had resulted in substantial payments of additional U.S. tax.

This article examines in greater depth and using more recent information the extent to which U.S. corporations have repatriated valuable IP post-TCJA and evaluates both the GAAP ETR and the cash tax effects of those repatriations. It also presents my analysis of how various IRC provisions interact to determine the federal taxes a U.S. corporation will pay under three alternative methods of IP repatriation. My main conclusion is that even under the lowest tax alternative (an IP installment sale to the U.S. parent), an IP repatriation will typically result in an increase in the net present value (NPV) of projected foreign and federal income taxes compared with the NPV of continuing an existing IP CSA. That is, based on the NPVs of future cash tax payments, U.S. corporations typically have a post-TCJA incentive to keep IP in low-tax foreign jurisdictions, rather than repatriating the IP to a U.S. affiliate.

I. ASU 2016-16

In October 2016 the Financial Accounting Standards Board issued Accounting Standards Update (ASU) 2016-16, which required U.S. public corporations to recognize the current and deferred income tax consequences of intra-entity transfers of assets other than inventory (for example, IP). Understanding the requirements of ASU 2016-16 is critical not only to understanding how IP repatriations affect GAAP ETRs, but also to identifying corporations that have actually repatriated IP and inferring how those IP repatriations were structured.

Here is a simple illustration of how ASU 2016-16 would apply to IP owned by a low-tax foreign subsidiary and sold to its high-tax U.S. parent:

- Assume that both the GAAP financial statement carrying amount and the tax basis of the foreign subsidiary's IP were $0 because the subsidiary's cost of acquiring the IP had been expensed for both financial accounting and tax purposes.
- The assumed fair market value of the IP at the time of sale is $150.
- The foreign subsidiary's taxable gain from the IP sale ($150) may be subject to foreign tax at a low rate and would generate up to $75 of GILTI for the U.S. parent. For simplicity, assume that the combined foreign and U.S. tax on the subsidiary's $150 taxable gain is $15.
- The U.S. parent acquires a stepped-up basis of $150 in the IP, which for U.S. tax purposes will be amortized at a rate of $10 annually over a 15-year amortization period.
- Because no gain is recognized for financial accounting purposes on an intra-entity asset sale, the financial statement carrying amount of the IP on the U.S. parent's book remains $0. Because the U.S. parent's basis in the IP has been stepped up to $150 but its financial statement carrying amount continues to be $0, the parent accrues a deferred tax benefit of $31.50 (21 percent of the $150 difference between the tax basis and the financial statement carrying amount).[4]
- The net effect of the IP repatriation on the affiliated companies' consolidated income tax accrual is a one-time tax reduction of $16.50 — that is, the U.S. parent's deferred tax benefit ($31.50) minus the combined tax ($15) on the foreign subsidiary's gain on the sale of its IP.

In short, under ASU 2016-16, the consolidated GAAP financial statements will reflect a

[3]Joint Committee on Taxation, "Estimated Budget Effects of the Conference Agreement of H.R. 1, the 'Tax Cuts and Jobs Act,'" JCX-67-17 (Dec. 22, 2017). *See also* Horst, "Preliminary Estimates of the Likely Actual Revenue Effects of the TCJA's Provisions," *Tax Notes Int'l*, Sept. 16, 2019, p. 1153.

[4]The $31.50 deferred tax asset equals the cumulative savings in the tax to be paid versus the tax to be accrued in the future resulting from the amortization for tax purposes (but not for financial reporting purposes) of the $150 step-up in basis.

significant one-time reduction in the reported ETR if valuable IP is sold by a low-tax foreign subsidiary to a high-tax U.S. affiliate.

Public companies were required to apply ASU 2016-16 for fiscal years beginning after December 15, 2017. By pure serendipity, the first fiscal year to which ASU 2016-16 applies is also the first fiscal year to which the TCJA's GILTI, FDII, and base erosion and antiabuse tax provisions apply. The application of ASU 2016-16 allowed me to identify major IP repatriations by scrutinizing corporations' GAAP ETR reconciliation tables for FYB 2018 to identify significant one-time reductions in ETRs attributed to IP repatriations.

II. Reported IP Repatriations Post-TCJA

I have reviewed the GAAP ETR reconciliation tables for 186 large corporations that had filed SEC 10-Ks for FYB 2018.[5] Eighteen of those corporations reported adjustments to their GAAP ETRs attributable to internal reorganizations, restructurings, or asset transfers. However, based on a close reading of the corporation's (often limited) description of its one-time ETR adjustments and other income tax disclosures, I concluded that as of December 31, 2019, only three companies — Microsoft Corp., Qualcomm Inc., and McKesson Corp. — conducted repatriations of valuable IP from a foreign subsidiary to a U.S. affiliate.

I will also describe Google's plan to have its Bermuda affiliate repatriate IP in 2020.

A. Microsoft's IP Repatriation

In its SEC Form 10-K for the fiscal year ending (FYE) June 30, 2019, Microsoft states:

> In the fourth quarter of fiscal year 2019, in response to the TCJA and recently issued regulations, we transferred certain intangible properties held by our foreign subsidiaries to the U.S. and Ireland. The transfer of intangible properties resulted in a $2.6 billion net income tax *benefit* recorded in the fourth quarter of fiscal year 2019, as the value of future tax deductions exceeded the current tax liabilities from foreign jurisdictions and U.S. GILTI tax. [Emphasis added.]

The ETR reconciliation table indicates that this IP transfer yielded a 5.9 percent reduction in Microsoft's ETR for that fiscal year. Further, Microsoft's provision for U.S. federal deferred tax accrual for that year was a deferred tax reduction of $5.65 billion. That deferred federal tax benefit presumably reflects the federal tax rate multiplied by the difference between Microsoft's U.S. stepped-up IP tax basis and the financial statement carrying cost of the transferred IP.

As is evident from the tables showing the components of Microsoft's deferred income tax assets and its deferred income tax liabilities, the company elected to apply deferred tax accounting to its GILTI tax liability rather than treat GILTI as a current tax expense. Microsoft's deferred GILTI liability increased from $61 million as of June 30, 2018, to $2.61 billion as of June 30, 2018. I infer from those disclosures that Microsoft's foreign subsidiary did not report in FYE June 30, 2019, the full taxable gain on its transferred IP, but rather had an installment sales agreement or some other arrangement that allowed Microsoft to defer recognition of some portion of the subsidiary's taxable gain.

In its SEC Form 10-Q for the first quarter of its current fiscal year (the quarter ending September 30, 2019), Microsoft says that "during the three months ended September 30, 2019, we also paid $3.5 billion [in tax] related to the transfer of intangible properties that occurred in the fourth quarter of fiscal year 2019." I assume that a major portion of that $3.5 billion was offset against the $2.6 billion deferred GILTI liability that Microsoft reported for FYE June 30, 2019. Microsoft did not disclose why the tax paid exceeded its deferred GILTI liability by $900 million.[6]

[5] My initial database included 151 nonfinancial U.S. corporations that filed SEC Forms 10-K for a fiscal year beginning in 2017 and had a market capitalization of at least $25 billion as of October 3, 2018. I expanded my database to include 33 U.S. financial services corporations and five inverted corporations (for example, Medtronic PLC) that met my other selection criteria. I also added Dell Technologies Inc., which issued an SEC 10-K for the fiscal year ending February 2019 but not for its previous fiscal year because it was privately held. Of those 190 corporations in my database, 186 filed an SEC 10-K for a fiscal year beginning in 2018, the first year in which the GILTI, FDII, and BEAT provisions applied. The remaining four corporations were acquired or merged in their FYB 2018, so they no longer file an SEC 10-K.

[6] One possibility is that Microsoft accrued in the fourth quarter of FYE June 30, 2019, a current GILTI tax liability on an initial installment of its total taxable gain but did not pay that tax until the following quarter.

In any event, Microsoft's repatriation of IP in the quarter ending June 30, 2019, followed by its payment of $3.5 billion in tax in the following quarter, appears to exemplify the type of transaction that in its 2017 estimates the JCT assumed many U.S. multinationals would undertake in the next few years.

Finally, while Microsoft appears to have deferred most of its GILTI tax liability by only one fiscal quarter, a longer deferral period could be elected under an installment sale agreement. Indeed, the timing of the GILTI tax liability on the foreign subsidiary's IP gain in future years could in theory be synchronized with the timing of the U.S. affiliate's amortization of its stepped-up IP tax basis to achieve a more or less fixed annual payment of income tax over the remaining life of the repatriated IP.

B. Qualcomm's IP Repatriation

Qualcomm's SEC Form 10-K for FYE September 29, 2019, describes the company's IP repatriation:

> During fiscal 2018, one of our foreign subsidiaries distributed certain intellectual property to a U.S. subsidiary resulting in a difference between the GAAP basis and the U.S. federal tax basis of the distributed intellectual property. Upon adoption of new accounting guidance in the first quarter of fiscal 2019, we recorded a deferred tax asset of approximately $2.6 billion primarily related to the distributed intellectual property, with an adjustment to opening retained earnings (Note 1). During the third quarter of fiscal 2019, the United States Treasury Department issued new temporary regulations that resulted in a change to the deductibility of dividend income received by a U.S. stockholder from a foreign corporation. As a result of this change, pursuant to an agreement with the Internal Revenue Service, we relinquished the federal tax basis step-up of intellectual property that was distributed in fiscal 2018 by one of our foreign subsidiaries to a U.S. subsidiary. Therefore, the related deferred tax asset was derecognized, resulting in a $2.5 billion charge to income tax expense in fiscal 2019.

Based on that disclosure, I infer that Qualcomm distributed IP from a foreign subsidiary to a U.S. subsidiary in its FYE September 30, 2018. Assuming Qualcomm's IP transfer was made after December 31, 2017, but before September 30, 2018, the foreign subsidiary's gain on the IP distribution may have been entitled to the new section 245-A participation exemption, but it did not produce GILTI because those provisions did not apply to Qualcomm before October 1, 2018. That is:

- Qualcomm initially claimed for FYE September 30, 2018, that its U.S. subsidiary was entitled to a step-up in the basis of the IP even though the foreign subsidiary's gain was not subject to GILTI and the IP distribution was apparently exempt from federal income tax under section 245-A.
- However, in the following FYE September 29, 2019, Qualcomm agreed with the IRS that it was not entitled to a stepped-up basis. Thus, Qualcomm's IP repatriation would result in the foreign subsidiary's (low or zero) tax basis carrying over to its U.S. parent, which is the result that would arise in a section 332 liquidation.[7]
- Qualcomm's additional federal tax in FYE September 29, 2019, resulting from the denial of a stepped-up basis was mitigated by the additional tax benefit resulting from the increase in Qualcomm's FDII. Qualcomm's SEC 10-K states:

  > Beginning in fiscal 2019, substantially all of our income is in the U.S., of which a significant portion qualifies for preferential treatment as FDII at a 13 percent effective tax rate. The impact of GILTI and BEAT is negligible. Accordingly, our annual effective tax rate for fiscal 2019

[7]Qualcomm states in its SEC 10-K for FYE September 29, 2019:

> We are currently a participant in the IRS Compliance Assurance Process, whereby we and the IRS endeavor to agree on the treatment of all tax issues prior to the tax return being filed.

My understanding is that under the compliance assurance process, Qualcomm would retain the right to sue the IRS for a refund of the federal tax reported and paid on its tax return.

> reflected the effects of these provisions of the Tax Legislation. Our annual effective tax rate for fiscal 2018 reflected a blended federal statutory rate of approximately 25 percent.

C. McKesson's IP Repatriations

McKesson's SEC 10-K for FYE March 31, 2019, shows that the company reduced its effective tax payments by $42 million for that year for an IP transfer described as:

> During [FYE March 31, 2019], we sold software between wholly-owned legal entities within the McKesson group that are based in different tax jurisdictions. The transferor entity recognized a gain on the sale of assets that was not subject to income tax in its local jurisdiction; such gain was eliminated upon consolidation. An entity based in the U.S. was the acquirer of the software and is entitled to amortize the purchase price of the assets for tax purposes. In accordance with the recently adopted amended accounting guidance on income taxes, a discrete tax benefit of $42 million was recognized in the second quarter of 2019 with a corresponding increase to a deferred tax asset for the future tax amortization.

Unlike Microsoft, McKesson elected to account for federal tax on its GILTI as a current expense, rather than use the deferred tax method. For that reason, I have no way of determining from McKesson's financial statement whether the consideration for the IP transfer was a lump sum or some form of an installment sale.

McKesson's most recent SEC Form 10-K also describes an earlier IP repatriation:

> On December 19, 2016, we sold various software relating to our technology businesses between wholly owned legal entities within the McKesson group that are based in different tax jurisdictions. The transferor entity recognized a gain on the sale of assets that was not subject to income tax in its local jurisdiction; such gain was eliminated upon consolidation. A McKesson entity based in the U.S. was the recipient of the software and is entitled to amortize the fair value of the assets for book and tax purposes.
>
> The tax benefit associated with the amortization of these assets is recognized over the tax lives of the assets. As a result, we recognized a net tax benefit of $178 million and $137 million in 2018 and 2017. We no longer recognize the tax benefit associated with this amortization in continuing operations upon adoption of the amended guidance related to intra-entity transfer of an asset other than inventory in 2019. Refer to Financial Note 1, "Significant Accounting Policies," for more information.

I infer from this disclosure that McKesson, like Qualcomm, initially took the position on its federal tax return and in its SEC Form 10-K that its U.S. affiliate was entitled to a step-up in the tax basis of IP repatriated before the GILTI rules came into effect. McKesson changed its financial reporting to reflect its amended position that no step-up was allowed for its December 2016 IP repatriation. McKesson also appears to have agreed in 2019 to amend its federal tax returns for its fiscal 2017 and 2018 to reflect that change.[8]

D. Relative Frequency of IP Repatriations

I have investigated the relative frequency of reported IP repatriations, and for fiscal periods beginning in 2018 found only the three cases reported above. Eighty-six of the included 186 corporations (including Microsoft, Qualcomm, and McKesson) disclosed that foreign tax rates lower than the U.S. rate allowed them to reduce their 2015 and 2016 GAAP ETRs by more than 5 percentage points. Assuming that foreign subsidiaries of those 86 U.S. corporations owned valuable foreign IP that could have been repatriated in fiscal year 2018, I conclude that significant IP repatriations occurred in approximately 4 percent of the relevant cases. In

[8] McKesson states in its latest SEC 10-K that "the decrease in unrecognized tax benefits in 2019 compared to 2018 is primarily attributable to a $171 million decrease, with a corresponding increase in taxes payable, due to the issuance of new tax regulations." It is unclear what new tax regulations McKesson is referring to and why it felt compelled to amend the financial reporting of an IP repatriation made in December 2016, a year before the TCJA's enactment.

other words, the IP repatriations by Microsoft, Qualcomm, and McKesson appear to be exceptions to the general pattern of retaining foreign subsidiaries' ownership of foreign IP.

E. Google's IP Repatriation Plan for 2020

Google has announced that "in line with the OECD's [base erosion and profit-shifting] conclusions and changes in U.S. and Irish tax laws, we're now simplifying our corporate structure and [in 2020] will license our IP from the U.S., rather than from Bermuda."[9] Google's initial statement did not indicate whether Google plans to have its Bermuda affiliate sell its IP to a U.S. affiliate, undertake a tax-free liquidation of its Bermuda affiliate, or use some other IP repatriation method that I have not considered.

Google's statement suggests to me that the company is concerned not only about minimizing its future tax payments, but also about the harm to its corporate reputation from relying on a tax haven (Bermuda) to reduce its GAAP ETR. Google and other U.S. providers of digital services may also be concerned that their use of tax havens undermines their claim that digital service taxes like those recently imposed by France and Italy unfairly discriminate against U.S. corporations. Given those broader concerns, I would not be surprised if the frequency of foreign IP repatriations accelerates in 2020.

III. Tax Consequences of IP Repatriations

A. Overview of My Tax Cash Flow Analysis

A 2014 article reported the results of a survey of tax executives' reliance on GAAP ETRs versus tax cash flows in tax planning:

> We find that 47 percent of the tax executives in publicly traded companies state that top management values the GAAP ETR more than the cash taxes paid and in another 37 percent of public firms the two metrics are equally valued by top management. Thus, in 84 percent of the public companies, the accrual accounting measure of taxes that affects reported accounting earnings is at least as important as the cash taxes paid.[10]

Despite that stated preference for GAAP ETR measures, this section summarizes the results of my analysis of the impact of IP repatriations on the NPVs of cash taxes paid. My tax cash analysis is based on a hypothetical example described in greater detail in a technical supplement to this article (available online at http://pdfs.taxnotes.com/2020/Horst_Technical_Supplement.pdf). My main conclusion is that most IP repatriations would result in an increase in the NPV of projected total tax payments vis-à-vis the default option of continuing to operate under the existing IP cost-sharing agreement.

Broadly, I begin by assuming that a U.S. parent and its wholly owned foreign subsidiary are operating under an IP CSA under which the foreign subsidiary has acquired the IP used in sales to its foreign customers. I project the cash flows (including income taxes) by assuming that the IP CSA remains in effect (the default option) and calculate the NPV of the income taxes that would be paid on the foreign subsidiary's income by both the subsidiary and its U.S. parent (because of GILTI).

I then project the total income tax payments and their NPV under three methods of repatriating IP:

- Under Alternative 1, the foreign subsidiary sells its IP at an arm's-length price to its U.S. parent under an installment sale agreement.
- Under Alternative 2, the foreign subsidiary undergoes a section 332 liquidation under which its IP is distributed to its parent with no step-up in tax basis. After that liquidation, the U.S. parent earns (and pays federal income tax on) the income that would have been earned by the subsidiary had the CSA remained in effect. This is the

[9] Amanda Athanasiou, "Google Signals an End to Use of Double Irish Structure," *Tax Notes Int'l*, Jan. 13, 2020, p. 210.

[10] John R. Graham et al., "Incentives for Tax Planning and Avoidance: Evidence from the Field," 89(3) *Acct. Rev.* 991 (May 2014).

tax treatment the IRS required Qualcomm and McKesson to apply to their IP repatriations made before the start of FYB 2018, but it would also be available in a section 332 liquidation after that start date.
- Under Alternative 3, the foreign subsidiary enters into a long-term IP license agreement under which it receives arm's-length royalties from its U.S. parent.

Under a tax cash flow analysis, any economic benefit of continuing the existing IP CSA or adopting one of the three alternatives is indicated by the NPVs of the projected tax cash payments under those alternatives.

B. Projected Payments Under the CSA

All the tax cash flow projections in the supplement to this article rely on the same projections of third-party sales, net investments in depreciable property, other current costs, and the total IP costs to be shared. Broadly, I have made what I believe are reasonable assumptions about those projections, and after deriving the projected tax payments I assessed the sensitivity of the NPVs of those payments under each IP repatriation method.

Regarding the existing IP CSA, I assumed:
- The U.S. parent and its foreign subsidiary have an existing IP CSA under which the parent has retained the right to use the cost-shared IP in sales to U.S. customers and the subsidiary has the right to use the IP in sales to foreign customers.
- For simplicity, I further assume that in previous years the foreign subsidiary fully paid any buy-in amounts for the U.S. parent's preexisting intangibles, so prospectively the subsidiary is required to make only the ongoing IP cost-sharing payments.
- The U.S. parent and its foreign subsidiary have both invested, and will continue to invest, in depreciable property and will also incur other current costs stemming from sales to their respective markets.
- For calculating their respective IP cost shares, the U.S. parent and the foreign subsidiary are allocated a return for routine functions equal to an 8 percent markup on their respective total support costs (depreciation plus other current supporting costs).[11]
- Ongoing IP development costs are shared in proportion to the U.S. parent and foreign subsidiary's respective net income after deducting their total support costs and associated functional returns, but before deducting any IP development costs or income taxes.[12]
- The foreign subsidiary pays foreign income tax at a rate of 5 percent.[13]

C. Projected Payments Under Alternative 1

1. Key Assumptions

Projecting total tax payments under Alternative 1 (installment sale of the IP) requires several additional assumptions about arm's-length transfer prices, foreign income tax rates, and the U.S. tax treatment of the parent company's income and expenses:
- The purchase price of the foreign subsidiary's foreign-use IP equals the NPV of the excess of the foreign subsidiary's projected pretax income over its projected functional return under the existing IP cost-sharing agreement.[14]
- The discount rate of 7.5 percent used in calculating this NPV is the assumed risk-adjusted cost of capital of the U.S. parent.[15]
- The buyout is in the form of an installment sale with fixed annual payments over 15 years.[16]
- The stated 3.5 percent interest rate in the installment sale agreement is the cost of the U.S. parent's long-term debt.[17]
- The foreign subsidiary's initial investment in depreciable property is transferred to the parent at its net book value.[18]

[11] Lines 22-23 of the technical supplement table.

[12] *Id.*

[13] *Id.* at line 36.

[14] *Id.* at lines 51-54.

[15] *Id.* at line 54.

[16] *Id.* at line 56.

[17] *Id.* at line 57.

[18] *Id.* at lines 68, 89, and 96.

- The foreign subsidiary's installment payment receipts are taxed at 5 percent.[19]
- The portions of the annual IP installment sale payments that represent stated interest would be treated as U.S. subpart F foreign personal holding company income of the foreign subsidiary.[20]
- The portions of the annual IP installment sale payments that represent repayment of principal would be treated as the foreign subsidiary's tested income (the starting point for the GILTI computation).[21]
- The U.S. parent would amortize the purchase price of the IP over 15 years under a straight-line method under IRC section 197.[22]
- Because the foreign subsidiary's erstwhile sales are to foreign customers, those sales when made by the U.S. parent result in gross foreign-derived deduction eligible income (FDDEI).[23]
- The U.S. parent's deductions from its gross FDDEI consist of:
  - other supporting costs stemming from the foreign sales;[24]
  - depreciation of the depreciable property that supports the foreign sales;[25]
  - amortization of the foreign IP purchase price;[26] and
  - IP development costs apportioned to foreign sales.[27]
- The U.S. parent deducts stated interest from its taxable income[28] but does not treat stated interest as a deduction allocable to its gross FDDEI.[29]
- Under the IP buyout alternative, the foreign subsidiary is a resident of a foreign country having a U.S. tax treaty that exempts interest paid to the subsidiary from U.S. withholding tax.
- In every year, the U.S. parent's total base erosion payments from all its operations will be less than the minimum that would result in triggering the BEAT.

2. Conclusions Based on NPV Comparisons

In general, the NPV of projected future tax payments under Alternative 1 were greater than the NPV of projected future tax payments under the existing IP CSA. In other words, a foreign IP installment sale did not generally appear to make economic sense.

I performed sensitivity analyses that identified the specific assumptions that mitigated, or in combination could reverse, that general conclusion. Those mitigating factors were:

- lower required investments in depreciable property;
- longer installment sale repayment periods relative to the U.S. parent's IP amortization period;
- higher rate of foreign income tax on a foreign subsidiary; and
- higher discount rate used in the NPV of projected tax payments.

In exceptional cases, a hypothetical installment sale of a foreign subsidiary's IP to a U.S. affiliate could result in small tax savings over the default option of continuing with an IP cost-sharing agreement. However, in most of my hypothetical cases, an IP installment sale resulted in an increase in the NPV of future income tax payments.

D. Projected Tax Payments Under Alternative 2

Under Alternative 2 (tax-free liquidation of the foreign subsidiary), the foreign subsidiary has no taxable gain in the current or any future year and no tested income that would result in the U.S. parent's reporting GILTI. The parent would obtain a carryover tax basis (assumed to be zero) in the foreign IP distributed in the total liquidation of the foreign subsidiary.

The U.S. parent's FDII benefit is greater under Alternative 2 than under Alternative 1 because there is no step-up in the U.S. tax basis to be amortized. Even so, under all cases considered,

[19] *Id.* at line 61.

[20] *Id.* at lines 62 and 80.

[21] *Id.* at line 65.

[22] *Id.* at lines 90-92.

[23] *Id.* at line 87.

[24] *Id.* at line 88.

[25] *Id.* at line 89.

[26] *Id.* at line 91.

[27] *Id.* at line 93.

[28] *Id.* at line 101.

[29] *Id.* at line 94.

the NPV of the projected tax payments under Alternative 2 was significantly higher than the comparable NPV under the default option of continuing the IP CSA.

E. Projected Tax Payments Under Alternative 3

By definition, a license agreement provides more restricted IP rights to the licensee than does an outright sale of the IP. Because I want to focus on income tax consequences, I have assumed that arm's-length royalty payments to the foreign subsidiary under a license agreement under Alternative 3 are the same in each year as the annual installment sale payments under Alternative 1.

Simply put, Alternative 3 would never produce an NPV of future tax payments lower than the NPV of taxes under the default option because royalties the foreign subsidiary would receive from its U.S. parent, a related party, would be included in foreign personal holding company income, which is fully taxable subpart F income for the U.S. parent. By contrast, if the IP cost-sharing agreement is continued, the amount of the grossed-up GILTI taxable to the U.S. parent can never exceed 50 percent of the foreign subsidiary's before-tax income.

F. Summary of Tax Cash Flow Analyses

In summary, alternatives 2 and 3 would invariably result in an increase in the NPV of projected tax payments compared with the NPV of projected tax payments from a continuation of the IP CSA. Under most circumstances, Alternative 1 would also result in an increase in the NPV of projected tax payments; under some plausible assumptions, it might yield a small reduction in the NPV of projected tax payments.

IV. Conclusions

Based on my review of 186 GAAP financial statements attached to the SEC Forms 10-K for FYB 2018, I could identify only three corporations that reported IP repatriations. The largest IP repatriation was made by Microsoft, which appears to have made a two-step installment sale of its foreign subsidiary's IP. A foreign subsidiary of McKesson also appears to have sold its IP to a U.S. affiliate, but I cannot determine whether the consideration was a lump sum or one or more installment payments.

Qualcomm appears to have transferred IP from a foreign to a U.S. entity via a check-the-box election made in 2018 after the enactment of the TCJA, but before the GILTI provisions first applied to Qualcomm for the fiscal year that started on October 1, 2018. The IRS objected to Qualcomm's tax claims, and the company ultimately agreed to forgo the step-up in tax basis it had claimed. I suspect that with the wisdom of hindsight, Qualcomm would either have left its existing IP cost-sharing arrangement in place or deferred an IP sale to sometime after October 1, 2018.

I infer from the paucity of reported IP repatriations that U.S. corporations have generally not succumbed to the temptation of reporting large, one-time reductions in GAAP ETRs resulting from IP repatriations under ASU 2016-16. That paucity of post-TCJA IP repatriations is fully consistent with the conclusions of my tax cash flow analysis summarized in Section III. The evidence that I have reviewed suggests to me that through 2019, large corporations generally avoided repatriating their foreign subsidiaries' IP because the post-TCJA tax rules typically result in an increase, rather than a reduction, in the NPVs of their projected future tax cash payments. However, Google's recent announcement of its plan to repatriate foreign IP in 2020 suggests that growing concerns about the OECD's BEPS program may result in an increase in IP repatriations in 2020. ■