

December 15, 2015

By Electronic Submission

Internal Revenue Service  
1111 Constitution Avenue NW.  
Washington, DC 20224  
Attn: CC:PA:LPD:PR (REG-139483-13)

Re: Comment Letter in Response to REG-139483-13 Regarding Certain Transfers of Property by U.S. Persons to Foreign Corporations

Dear Sir or Madam:

The Clearing House Association L.L.C.<sup>1</sup> appreciates the opportunity to comment on proposed Treasury regulations (the “**Proposed Regulations**”) under Section 367 of the Internal Revenue Code.<sup>2</sup> If finalized, those regulations would apply to U.S. persons who transfer assets—including foreign goodwill and going concern value—to foreign corporations in non-recognition transactions.

**I. Introduction**

The Proposed Regulations depart from existing law by taxing certain outbound transfers of foreign goodwill and going concern value in otherwise tax-free transactions. We disagree with this departure and its underlying rationale as set forth in the preamble to the Proposed Regulations (the “**Preamble**”). Nevertheless, we commend the U.S. Treasury Department (“**Treasury**”) and the Internal Revenue Service (“**IRS**”) for requesting comments on whether “a limited exception [to the Proposed Regulations] should be provided for certain narrow cases where there is limited potential for abuse.”<sup>3</sup>

This comment letter requests that any final version of the Proposed Regulations include an exception for outbound transfers of foreign goodwill and going concern value by bank holding

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<sup>1</sup> Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world’s largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost \$2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. See The Clearing House’s web page at [www.theclearinghouse.org](http://www.theclearinghouse.org).

<sup>2</sup> All “Section” references are to the Internal Revenue Code of 1986, as amended.

<sup>3</sup> 80 Fed. Reg. 55,568, 55,574 (proposed Sept. 16, 2015).

companies and their affiliates. We bring a unique perspective to this proposed exception and believe the proposed exception is necessary to ensure a level global playing field for U.S. bank holding companies.

## II. Comments

Section 367's legislative history supports non-recognition treatment for outbound transfers of foreign goodwill and going concern value. Congress did not "anticipate that the transfer of goodwill or going concern value . . . developed by a foreign branch to a foreign corporation [would] result in abuse of the U.S. tax system."<sup>4</sup> For that reason, the legislative history states that "ordinarily, no gain will be recognized on the transfer of goodwill or going concern value for use in an active trade or business."<sup>5</sup>

Notwithstanding this very clear legislative history, the Proposed Regulations provide that an otherwise tax-free transfer of foreign goodwill or going concern value to a foreign corporation would be subject to tax under Section 367 even if the foreign goodwill and going concern value was created exclusively outside the United States. This is a substantial departure from existing law and, if included in final Treasury regulations, would significantly affect transactions such as foreign-branch incorporations and other transfers of property to foreign subsidiaries.

As a general matter, we disagree with the proposal to tax outbound transfers of foreign goodwill and going concern value in non-recognition transactions. However, if Treasury and the IRS ultimately include that proposal in final Treasury regulations, we believe the final Treasury regulations should include an exception for outbound transfers of foreign goodwill and going concern value by any bank holding company as defined in 12 U.S.C. § 1841 or any direct or indirect subsidiary of a bank holding company (collectively referred to in this letter as "bank holding companies and their affiliates").

Bank holding companies and their affiliates conduct substantial business outside the United States through branches and other non-corporate forms. In response to the global financial crisis, local bank regulators in foreign jurisdictions are increasingly requiring inbound banks and other financial institutions to operate through subsidiaries rather than branches or other non-corporate forms. Often referred to as "ring-fencing" or "subsidiarization," this requirement allows local bank regulators to impose macroprudential requirements for the in-country operations of inbound financial institutions and generally permits greater regulatory control over those in-country operations in a scenario where the foreign parent experiences financial distress. China,<sup>6</sup> Hong Kong,<sup>7</sup> Singapore,<sup>8</sup> and New Zealand<sup>9</sup>

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<sup>4</sup> S. REP. NO. 98-169, pt. 1, at 362; *see* H.R. REP. NO. 98-432, pt. 2, at 1317.

<sup>5</sup> S. REP. NO. 98-169, pt. 1, at 365; *see* H.R. REP. NO. 98-432, pt. 2, at 1319.

<sup>6</sup> *See* Saeed Azhar et al., *Singapore Wants Foreign Banks to Go Local*, Reuters (June 29, 2012), <http://in.reuters.com/article/2012/06/29/singapore-banks-idINL3E8HT0BF20120629>.

<sup>7</sup> *See id.*; Norman T. L. Chan, Chief Executive of the Hong Kong Monetary Authority, Keynote Address at the Opening Session of the Asian Banker Summit 2011 (Apr. 7, 2011).

<sup>8</sup> *See supra* note 6; Monetary Authority of Singapore, *Proposed Framework for Systemically Important Banks in Singapore*, Consultation Paper P008-2014, 8 (June 2014) ("In the case where a bank is assessed to have a significant retail presence, such a bank . . . will be required to locally incorporate its retail operations.").

already require inbound banks to operate through local subsidiaries in some instances. Brazil,<sup>10</sup> India,<sup>11</sup> Mexico,<sup>12</sup> Spain,<sup>13</sup> Thailand,<sup>14</sup> and the United Kingdom<sup>15</sup> may be moving in the same direction.

For a U.S. bank holding company, transforming operating units in a non-U.S. jurisdiction from a foreign branch or other non-corporate form to a foreign subsidiary requires an outbound asset transfer that generally includes foreign goodwill and going concern value. Under the Proposed Regulations, an outbound transfer of goodwill and going concern value would result in adverse U.S. tax consequences under Section 367.<sup>16</sup> The Proposed Regulations, therefore, create an unpalatable result for bank holding companies that face regulatory pressure or compulsion to incorporate a foreign branch or otherwise transfer assets to a foreign subsidiary. Any final version of the Proposed Regulations should include an exception for bank holding companies and their affiliates to avoid penalizing them for doing business abroad.

In the Preamble, Treasury and the IRS state that one potential exception to the Proposed Regulations “might be a financial services business that operates in true branch form and for which there is regulatory pressure or compulsion to incorporate the assets of the branch in a foreign corporation.”<sup>17</sup> Treasury and the IRS, therefore, already recognize that some form of exception is warranted for financial services businesses. However, the exception should not be limited to transfers made in response to “regulatory pressure or compulsion” but instead should apply any time a bank holding company or one of its affiliates makes an outbound transfer of foreign goodwill or going concern value.

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<sup>9</sup> See Jonathan Fiechter et al., *Subsidiaries or Branches: Does One Size Fit All?*, IMF SDN /11/04, n.2 (Mar. 7, 2011); Reserve Bank of New Zealand, *Statement of Principles: Bank Registration and Supervision*, 6-7 (July 2014).

<sup>10</sup> See Fiechter et al., *supra* note 9.

<sup>11</sup> See Dr. Duvvuri Subbarao, Governor of the Reserve Bank of India, Address at the 7th International Banking & Finance Conference 2013 (June 5, 2013).

<sup>12</sup> See Fiechter et al., *supra* note 9.

<sup>13</sup> See *id.* at 11.

<sup>14</sup> See Azhar et al, *supra* note 6.

<sup>15</sup> See Brooke Masters, *Britain Tightens Grip on Foreign Banks*, Financial Times (Dec. 9, 2012), <http://www.ft.com/intl/cms/s/0/3edf0b3a-41ef-11e2-979e-00144feabdc0.html>; Bank of England, *Supervising International Banks: The Prudential Regulation Authority’s Approach to Branch Supervision*, Consultation Paper CP4/14, 60 (Feb. 2014).

<sup>16</sup> Closing a foreign branch or other business operating in non-corporate form and reopening that business as a foreign subsidiary would yield the same adverse U.S. tax consequences under Section 367 with respect to foreign goodwill and going concern value.

<sup>17</sup> 80 Fed. Reg. 55,568, 55,574 (proposed Sept. 16, 2015).

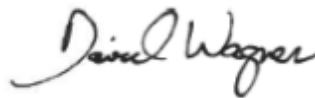
As Treasury and the IRS recognize in the Preamble, regulators may “pressure” (without technically compelling) bank holding companies and their affiliates to undertake actions that involve an outbound transfer of foreign goodwill or going concern value. Even without such pressure, however, bank holding companies and their affiliates often voluntarily undertake such actions to enhance compliance with regulatory rules or objectives. Limiting an exception in any final version of the Proposed Regulations to transfers in response to regulatory pressure or compulsion would discourage proactive behavior and instead incentivize bank holding companies and their affiliates to act only in response to regulatory pressure or compulsion. To avoid this undesirable incentive, an exception for bank holding companies and their affiliates should not be limited to transfers in response to regulatory pressure or compulsion. Rather, the exception should apply generally to bank holding companies and their affiliates that make outbound transfers of foreign goodwill and going concern value.

We believe a general exception for bank holding companies and their affiliates has limited potential for abuse given the significant regulation and oversight such taxpayers already face. Bank holding companies and their affiliates are subject to statutes administered by, and the regulations and policies of, various federal regulatory authorities, including the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. If Treasury and the IRS believe a general exception for bank holding companies and their affiliates has potential for abuse notwithstanding existing regulation and oversight, we would welcome an opportunity to discuss additional limitations on the proposed exception.

The proposed exception’s narrow scope should minimize any burden that Treasury and the IRS face in administering the exception. In this regard, the proposed exception could be administered by expanding existing reporting requirements related to tax-free transfers to foreign corporations. Section 6038B requires U.S. taxpayers to file an IRS Form 926 to report transfers of property to a foreign corporation in a tax-free exchange. That form could be amended to include a checkbox for taxpayers to mark when relying upon the proposed exception.

We greatly appreciate your consideration of our comments and would welcome the opportunity to discuss them with you at your convenience. If we can assist in arranging those discussions, or if you have any questions or are in need of any further information, please contact me at 212.613.9883 (email: david.wagner@theclearinghouse.org).

Respectfully submitted,



David Wagner  
Executive Managing Director Head of Finance,  
Risk and Audit Affairs and Senior Associate  
General Counsel  
*The Clearing House Association L.L.C.*

cc: The Honorable Mark Mazur  
Assistant Secretary (Tax Policy)  
*Department of the Treasury*

The Honorable John Koskinen  
Commissioner  
*Internal Revenue Service*

The Honorable William Wilkins  
Chief Counsel  
*Internal Revenue Service*

Emily McMahon  
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