

IRS and Treasury Announce Section 482 Guidance Project for Application of Simplified and Streamlined Approach to Baseline Distribution Activities (Amount B of Pillar One)

Tax Alert

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The [2024-2025 Priority Guidance Plan](#) issued by the Internal Revenue Service (IRS) and the Department of the Treasury (Treasury) on October 3, 2024, included a new section 482 guidance project that would provide guidance consistent with the work of the Organisation for Economic Cooperation and Development (OECD)/Group of 20 (G20) Inclusive Framework on Base Erosion and Profit Shifting (IF) on Amount B of Pillar One, which has been adopted as an annex to the OECD Transfer Pricing Guidelines (OECD Amount B Guidance).

The OECD Amount B Guidance provides a "simplified and streamlined" approach to the application of the arm's-length principle to baseline marketing and distribution activities of multinational enterprises (MNEs). The purpose of the OECD Amount B Guidance is to relieve compliance burdens and uncertainty for MNEs while at the same time relieving the burden on tax authorities, in particular those in low- and middle-income jurisdictions, of administering the transfer pricing rules. The OECD Amount B Guidance includes criteria to determine whether activities are in scope, a formulaic pricing method based on a Transactional Net Margin Method with a return on sales profit level indicator (and an operating expense cross-check), and rules related to documentation. Additional administrative guidance pertaining to Amount B provides lists of "covered jurisdictions" whose adoption of Amount B must be respected by other jurisdictions, and "qualifying jurisdictions" that may be entitled to higher returns for in-scope activities. See our previous coverage on the OECD Amount B Guidance [here](#), and the additional administrative guidance [here](#).

Incorporating the OECD Amount B Guidance into U.S. law will raise significant practical and procedural questions for the IRS and Treasury. Jurisdictions can choose to adopt the OECD Amount B Guidance beginning in 2025 but domestic adoption is not required. Under the political commitment entered into by IF participants, jurisdictions must respect others' decision to apply the Amount B guidance, even if they have not done so. The U.S. has publicly advocated for the application of the OECD Amount B guidance by all jurisdictions, but some IF members have resisted its mandatory application. In light of this, the IRS and Treasury will have to consider the extent to which they adopt the OECD Amount B Guidance for in-scope U.S. activities (which have been the subject of increased [compliance efforts](#)), or in cases where a U.S. taxpayer is the counterparty to an affiliated in-scope distributor in a jurisdiction that has not adopted the OECD Amount B Guidance. In addition, the IRS and Treasury will have to consider whether to adopt the OECD Amount B Guidance as a safe harbor, consistent with the Services Cost Method in existing U.S. regulations, or as a mandatory rule for in-scope activities. Commentators have advocated for a safe harbor approach to Amount B, noting that requiring all in-scope MNEs to apply an untested approach that may or may not be appropriate under the facts and circumstances might exacerbate the administrative burdens that Amount B is designed to alleviate. In considering these questions, the IRS and Treasury will have to be mindful of the authority provided by section 482 and Article 9 of U.S. income tax treaties.

More broadly, the IRS and Treasury have never undertaken an administrative guidance project with the explicit objective of implementing into U.S. law new guidance from the OECD Transfer Pricing Guidelines. The OECD Amount B Guidance was heavily negotiated by the U.S. and other IF jurisdictions. To what extent will the IRS and Treasury consider proposals to modify that guidance in the process of developing U.S. guidance? For example, commentators unsuccessfully advocated for an expanded scope to include distributors of services and digital goods and services within the OECD Amount B Guidance; would the IRS and Treasury consider and ultimately adopt this position in the context of developing U.S. rules? Further, to what extent would the IRS and Treasury consider adopting other recent changes to the OECD Transfer Pricing Guidelines into U.S. law? For example, the 2024 Priority Guidance Plan includes a longstanding regulatory project "clarifying" the effects of group membership specifically with respect to financial transactions, an issue that was addressed in a 2020 update to the OECD Transfer Pricing Guidelines.

MNEs with in-scope distribution activities that are in the U.S., or those that transact with U.S. affiliates, would be well advised to monitor this guidance project and the implementation of the OECD Amount B Guidance more broadly.

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