

12<sup>TH</sup> ANNUAL NABE

# TRANSFER PRICING SYMPOSIUM

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**The Future of Transfer Pricing?  
Treasury's 482 project on best method,  
risk allocation, and periodic adjustments.**

## Panelists

- **Kate Kerrigan, Attorney, IRS Office of ACCI, Branch 6**
- **Terri Ziacik, Director, Transfer Pricing, Microsoft**
- **Dr. Vladimir Starkov, Director, NERA Economic Consulting**
- **Tom Linguanti, Partner, Morgan, Lewis & Bockius, LLP**
- **Clark Armitage, *Moderator*, Member, Caplin & Drysdale, Chartered**
- **Brian Hale, *Shepherd*, Director, Economics Partners**

# Treasury 2021-2022 Priority Guidance Plan

- Regulations under § 482 further clarifying certain aspects of the arm's length standard, including
  1. coordination of the best method rule with guidance on specified methods for different categories of transactions,
  2. discretion to determine the allocation of risk based on the facts and circumstances of transactions and arrangements, and
  3. periodic adjustments.

# Agenda

- Getting closer to the OECD Guidelines
  - The full DEMPE; everything's a profit split (again)
  - Refinements to substance over form
  - Delineating the (risks in the) transaction
- Regulatory consistency / cleanup
  - -4 versus -7
  - Affirmative taxpayer use of periodic adjustments
- A case for safe harbors?
  - Any method, properly applied
  - Making periodic adjustment risk more predictable

# **Conforming 482 to the OECD Guidelines**

# DEMPE and Profit Split

- What changes might practitioners expect?
- Implications of DEMPE approach
- Should profit split be the future of transfer pricing?

# Substance over Form

- OECD revisions to substance over form doctrine
- Differences with U.S. standard in -1(d)
- Potential resolution
  - 2016 Proposed Regulation

# Delineating Risks

- Will deference to contractual allocations of risk remain preeminent?
- Is there a natural delineation of risk?
  - Driven by value chain conception?
  - Driven by business judgment?
  - Informed by realistic alternatives?

## Other Regulatory Goals

# Transfers of Intangibles

- Best Method – clarifying -4 and -7 approaches
- Income method vs. CUT method

# Taxpayer Use of Periodic Adjustments

- The regulations are a one-way street
- A bilateral approach would be more consistent with the arm's length standard
- Contractual language not a viable alternative

# **Safe Harbors**

# Safe Harbors Opportunities

- Prioritization among methods that produce conflicting results
  - Using best data over time
  - Formulary standards for convergence
  - Establishing deference for taxpayer's method selection
- Existing safe harbors include . . .
  - Uncertainty remains
  - A process safe harbor might preclude periodic adjustments if a properly selected method is rigorously applied

- **Questions and Comments**