UNITED STATES

Questionnaire on the Implementation of the HTVI Approach

	QUESTION	RESPONSE
1	**Has your country adopted the hard-to-value intangibles ("HTVI") approach as defined in Chapter VI of the TPG? If so, under what legal basis?**	The United States has adopted the HTVI approach. The United States conceptualizes this approach as stemming from the principle that the consideration for a transfer of an intangible "shall be commensurate with the income attributable to the intangible," as provided in our Internal Revenue Code (IRC), section 482[1]. This principle will be referred to in these responses as the commensurate with income ("CWI") principle. The CWI principle is implemented in US Treas. Reg. sections 1.482-4(a), (f)(2), and (f)(6), and 1.482-7(i)(6), which provide for "periodic adjustments" under certain circumstances. Sections 1.482-4(f)(2) and 1.482-4(f)(6) provide the general rule, while section 1.482-7(i)(6) provides a specific rule that applies to "platform contributions," which are transfers of intangibles by a participant in a "cost sharing arrangement" ("CSA") for use in the CSA. A CSA is a cost contribution arrangement for the development of intangibles.
2	**If your country applies the HTVI approach, what are the conditions for the application of the HTVI approach?**	The CWI principle applies to any intercompany transfer of intangible property, and adjustments under the CWI principle must be consistent with the arm's-length standard. Various conditions constitute exceptions to the applicability of the CWI principle. Under the general rule, these conditions include (a) use of the comparable uncontrolled transaction method for the same intangible transferred under substantially the same circumstances, (b) deviations from projections of less than 20%, (c) extraordinary and unanticipated events, and (d) a five-year commercialization period with deviations from projections of less than 20%. For platform contributions, the conditions are similar, although the conditions regarding quantitative deviations and the commercialization period are somewhat different and more complex.
3	**Are transactions falling within the scope of the HTVI approach subject to a transfer pricing analysis differing from the one established in Chapter I and VI, or to other compliance requirements specifically applicable to transfer prices (e.g. domestic anti-abuse rules)?**	Intangible transactions covered by the US implementation of the HTVI approach are subject to the same analysis under the arm's length standard as reflected in Chapters I and VI, and in the generally applicable US statute and regulations. Such US intangible transactions are also subject to all other US compliance requirements, including penalties (and the corresponding documentation requirements for avoiding penalties) applicable to all intercompany transactions.
4	**What is the statute of limitations applicable to transactions falling within the scope of the HTVI approach in your legislation? Does this statute of limitations differ from those applicable to other transactions?**	In general, the statute of limitations applicable to US intangible transactions subject to the CWI principle is the same as that applicable to all other transactions. The general rule is that the assessment of tax must be made within three years after the return is filed. See IRC section 6501(a). However, the periodic adjustment regulations provide that, under the CWI principle, an adjustment "may be made in a subsequent taxable year without regard to whether the taxable year of the original transfer remains open for statute of limitation purposes." US Treas. Reg. section 1.482-4(f)(2)(i) (penultimate sentence); see also section 1.482-4(f)(6) (last sentence) and section 1.482-7(i)(6)(i) (last

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		sentence). Thus, the fact that the statute of limitations for the year of a transfer is closed does not, by itself, prevent the IRS from making adjustments in open years with respect to that transfer.
5	**Can taxpayers request a bilateral or multilateral advance pricing agreement ("APA") for transactions falling within the scope of the HTVI approach under your legislation?**	Yes. The APA context is highly suited to addressing transfers of hard-to-value intangibles, because the cooperative process will reduce information asymmetry and facilitate a thorough and prompt review of the taxpayer's ex ante analysis. Revenue Procedure 2015-41 section 6.03 states that APAs may provide that covered transfers of intangibles will not be subject to periodic adjustments.
6	**What measures exist or approaches have been adopted to avoid the use of hindsight (e.g. training of tax administrators, internal circulars/informative notes)?**	Chief Counsel Advice Memo AM-2007-007, released March 23, 2007, states on pages 8-9: *Although the IRS necessarily must examine the taxpayer's transaction after-the-fact, it should exercise its periodic adjustment authority consistent with what would have been a conscientious upfront valuation – had the taxpayer in fact made one. Thus, the IRS should decline to make a periodic adjustment to a royalty on the basis of outcomes that could not be reasonably anticipated at the time the intangible transfer was entered into. The regulations clearly reflect the intent that the IRS exercise restraint in making periodic adjustments based only on the upfront reasonable expectations and not based on subsequent events which could not be reasonably anticipated.* In addition, US Treas. Reg. section 1.482-4(f)(2)(i) provides that periodic adjustments "shall be consistent with" the arm's length principle, and section 1.482-7(i)(6)(i) provides that in determining whether to make a periodic adjustment, the IRS "may consider whether the outcome as adjusted more reliably reflects an arm's length result under all the relevant facts and circumstances..."
7	**Is it possible for your tax administration to make adjustments under the HTVI approach in open years for closed years?**	See the explanation in the response to question 4, above.
8	**Does your domestic legislation or administrative practice allow the tax administration to make corresponding adjustments under the HTVI approach in open years for closed years?**	Domestic legislation and regulations permit corresponding adjustments with respect to periodic adjustments in the same manner as for any other transfer pricing adjustment. However, such adjustment would generally not be made in the absence of a MAP request. If the United States is presented with a MAP request, depending on the facts, the United States might make a corresponding adjustment as part of our initial, unilateral consideration of the case (see 2017 Model Tax Convention Article 25 Commentary, paragraph 32), or alternatively after bilateral consideration of the case.
9	**Is it possible for your tax administration to make several adjustments for one single HTVI transaction under the HTVI approach?**	Yes. Under the general rule, adjustments may be made for "each taxable year" under US Treas. Reg. section 1.482-4(f)(2)(i). For platform contributions, adjustments may be made for "an open taxable year" and for "all subsequent taxable years for the duration of the CSA Activity" under US Treas. Reg. section 1.482-7(i)(6)(i). (The CSA Activity includes the development of intangibles under the CSA as well as the exploitation of those intangibles.) In addition,

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		nothing in the rules prohibits more than one adjustment with respect to a single transaction and a single taxable year (e.g., an initial adjustment based on general transfer pricing rules followed by a later periodic adjustment based on later available information about the transaction and the income produced by the transferred intangible property).

For further information, please see http://www.oecd.org/tax/transfer-pricing/transfer-pricing-country-profiles.htm

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[1] IRC section 482, which addresses transfer pricing, provides in its entirety:

"In any case of two or more organizations, trades, or businesses (whether or not incorporated, whether or not organized in the United States, and whether or not affiliated) owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations, trades, or businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses. In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible. For purposes of this section, the Secretary shall require the valuation of transfers of intangible property (including intangible property transferred with other property or services) on an aggregate basis or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers."