New U.S. anti-hybrid rules: A primer

Author(s): Paul Seraganian, Jennifer Lee, Kevin Colan, Zack Crawford

In this Update

- On December 20, 2018, the U.S. Department of the Treasury (the Treasury Department) released proposed regulations under new Section 267A of the U.S. Internal Revenue Code
- These regulations are aimed at preventing the use of arrangements involving hybrid transactions or hybrid entities to affirmatively exploit differences in the tax laws across jurisdictions
- Background and basic framework to the proposed regulations
- Analysis and commentary on provisions including the disqualified hybrid amount, the imported mismatch rules and more
- Why Section 267A and these proposed regulations represent nothing less than a “reset” of how the U.S. tax system deals with hybridity

On December 20, 2018, the U.S. Department of the Treasury (the Treasury Department) released eagerly anticipated proposed regulations designed to combat the use of cross-border hybrid financing arrangements. These regulations, issued under new Section 267A of the U.S. Internal Revenue Code, are aimed at preventing the use of arrangements involving hybrid transactions or hybrid entities to affirmatively exploit differences in the tax laws across jurisdictions. This regulatory proposal reflects a broad endorsement of core principles outlined by the OECD in its recent work in combatting so-called “hybrid mismatch arrangements.” It also represents a game-changing escalation of the U.S. tax system’s commitment to neutralize the use of hybrid arrangements that erode the U.S. tax base.

As a technical matter, the proposed regulations are complex and layered. Moreover, given their close conceptual alignment with the BEPS Hybrid report (as defined below), we believe it is important to analyze and interpret the proposed regulations in a way that is informed by that report. These factors make the task of thinking through and applying the proposed 267A regulations challenging work. This article is designed to provide a primer for thinking about these new rules and a framework for their application.
BACKGROUND

Section 267A was enacted as part of the U.S. tax reform legislation commonly referred to as the Tax Cuts and Jobs Act” at the end of 2017. On its face, Section 267A denies a deduction for certain amounts paid or accrued to related parties pursuant to a “hybrid transaction” or by, or to, a “hybrid entity.” The OECD had previously examined this area in the 2015 Base Erosion and Profit Shifting Project final report on Action 2: “Neutralising the Effects of Hybrid Mismatch Arrangements” (the BEPS Hybrid report). The legislative history of Section 267A, as restated in these proposed regulations, notes that Section 267A is intended to be “consistent with many of the approaches to the same or similar problems” addressed in, among other sources, the BEPS Hybrid report.

Along with the specific statutory language, Section 267A also grants the Treasury Department broad authority to promulgate regulations to carry out the purposes of the section, including applying the section to “certain conduit arrangements” involving hybridity, the application of the section to branches, and “certain structured transactions.” The scope of the regulatory authority also includes, as described by the U.S. Joint Committee on Taxation, authority to address the “overly broad or under-inclusive application of this provision.” While the general focus in exercising this regulatory authority is outcomes that involve a deduction in one jurisdiction and non-inclusion in another (a so-called “deduction/no inclusion” or D/NI outcome), the preamble to the proposed regulations makes clear, citing the legislative history of the provision, that “the policy of section 267A is not to address all situations that give rise to no-inclusion outcomes, but to only address a subset of such situations where they arise due to hybrid arrangements,” and that where non-inclusion arises due to other features of the international tax system, other rules (like withholding taxes, tax treaties or new statutes) are better suited to address these concerns.

THE PROPOSED REGULATIONS

BASIC FRAMEWORK

The basic framework of the proposed Section 267A regulations is straightforward. Treas. Reg. 1.267A-1(b) provides that a “specified party’s”[1] deduction for any interest or royalty paid or accrued (such amount paid or accrued, a “specified payment”) is disallowed under 267A to the extent that it is treated as:

(A) A “disqualified hybrid amount” (a DHA);
(B) A “disqualified imported mismatch amount” (a DIMMA); or
(C) A payment subject to the 267A anti-avoidance rule.[2]
Accordingly, the key question in thinking about the application of Section 267A to any given arrangement is determining whether the arrangement qualifies as a DHA, a DIMMA or as subject to the anti-avoidance rule. It is in making these determinations that the real complexity of the regulations becomes apparent. The diagram below provides a flow-chart for thinking systematically through these issues.

**A. “DISQUALIFIED HYBRID AMOUNT” (DHA)**

The first level of analysis is to determine whether the specified payment in question is a DHA. The rules for making this determination are found in Treas. Reg. 1.267A-2 and, as illustrated in the diagram above, there are five types of DHAs.

1. **Is the specified payment made pursuant to a hybrid transaction?**

   The proposed regulations provide that a payment is made pursuant to a hybrid transaction if:

   a. the “specified recipient” does not include the payment in income (in other words, the specified payee has “no inclusion” (NI) in income in connection with the specified payment — this is referred to as an NI outcome); and

   b. The specified recipient’s NI outcome is a result of the payment being made pursuant to a hybrid transaction.

   A hybrid transaction is defined as “any transaction, series of transactions, agreement, or instrument one or more payments with respect to which are treated as interest or royalties for U.S. tax purposes but are
not so treated for purposes of the tax law of a specified recipient of the payment. Examples of a hybrid transaction include an instrument a payment with respect to which is treated as interest for U.S. tax purposes but, for purposes of specified recipient’s tax law, is treated as a distribution with respect to equity or a return of principal.” The regulations go on to say that specified payments that result in a significant deferral between the time that the payor claims a deduction and the foreign payee accepts the payment as income are deemed to be made pursuant to a hybrid transaction. More specifically, a specified payment is deemed made pursuant to a hybrid transaction if the taxable year in which a specified recipient recognizes the payment (under its tax law) ends more than 36 months after the end of the taxable year in which the specified party would be allowed a deduction for the payment under U.S. tax law.\[5\]

**Osler commentary**

A. It is important to note here that the focal point for determining whether a transaction is a hybrid transaction is on the treatment of the payment itself (and not on the treatment of the underlying instrument giving rise to the payment). This means that the requisite “hybridity” can exist in scenarios where taxpayers may not intuitively expect it to exist. For example, as noted, a specified payment pursuant to a debt instrument may be treated as a hybrid transaction if it’s treated as a payment of deductible interest by the specified payor but treated as a payment of principal by the payee (even if, under the tax laws of both the payor and payee, the underlying instrument is treated as debt — i.e., it’s not a “hybrid instrument”). This counterintuitive result can be exacerbated by the rule that deems a payment made pursuant to a hybrid transaction if there is a 36-month delay between deduction and inclusion. Accordingly, in thinking about the 267A proposed regulations, taxpayers must be mindful that these rules are not necessarily limited to scenarios where there is a hybrid entity or hybrid instrument involved, but that they may also apply if these other specifically prescribed hybrid “features” are present.\[6\]

B. It bears emphasizing (as the preamble does repeatedly) that the mandate of Section 267A is not to address every instance of D/NI that may be encountered in the course of international tax structuring. Rather, the consistent premise of 267A is that it is intended to neutralize D/NI outcomes that are caused by hybrid transactions, instruments or entities. While it is apparent that the proposed regulations do deviate from this foundation in specific, isolated instances (for example, in deeming payments deferred beyond the 36-month period to be made pursuant to a hybrid transaction even in the absence of any actual hybrid element) they appear to do so on the grounds that those deviations are “necessary or appropriate to carry out the purposes of” Section 267A and, accordingly, Congressionally authorized. In the absence of such a targeted rule in the proposed regulations that deems an otherwise non-hybrid transaction to be a DHA, however, it appears reasonable to believe that the rules ought to be interpreted in a way that limits their application to D/NI outcomes that are causally connected to an identifiable hybrid transaction, instrument or hybrid entity. This interpretation would keep the 267A rules tethered to their stated purpose, which is to address hybrid transactions and hybrid entities.
2. **Is the specified payment a disregarded payment?**

The proposed regulations provide that disregarded payments made by a specified party in a taxable year are treated as a DHA to the extent that they exceed the aggregated amount of the specified party’s “dual inclusion income” for such year. These payments give rise to D/NI outcomes because they are treated as regarded deductible items of interest or royalty in the payor’s jurisdiction but do not give rise to income inclusions in the recipient’s jurisdiction by virtue of simply being disregarded.

A “disregarded payment” is defined as a specified payment (an accrual or payment of deductible interest or royalty) that (a) under the foreign tax law of the payee is disregarded, and (b) if the payment were regarded under such tax law, the payee would be required to include the payment in income. [7]

The “dual inclusion income” concept is a taxpayer-friendly rule that effectively operates to reduce the amount of the disregarded payment that would otherwise be treated as a DHA. The concept here is that a specified person’s deduction related to a disregarded payment shouldn’t be disallowed under Section 267A to the extent it may be applied against income (dual inclusion income) that is taxable to both the specified person for U.S. tax purposes and the foreign recipient for foreign income tax purposes. [8] The preamble to the proposed regulations highlights that although disregarded payments could have been included in the “hybrid transaction” category of DHA, the Treasury Department decided to create an entirely separate category for disregarded payments since disregarded payments are more likely to offset dual inclusion income, and therefore it was appropriate to build in a dual inclusion income limitation for disregarded payments but not hybrid transactions.

3. **Is the payment a deemed branch payment?**

A “deemed branch payment” is an amount of interest or royalties allowable as a deduction in computing the business profits of a U.S. permanent establishment under an income tax treaty to the extent the amount is deemed paid to the home office (or other branch of the home office) and is not regarded or otherwise taken into account under the home office’s (or the other branch’s) tax law. The proposed regulations provide that a deemed branch payment is a DHA if the tax law of the home office provides an exclusion or exemption for income attributable to the U.S. branch. In such case, absent Section 267A and the proposed regulations, such amount would have given rise to a deduction against the U.S. tax base but no income inclusion in the home office jurisdiction.

**Osler commentary**

The “deemed branch payment” category illustrates that there could be a DHA even if there is no payment or accrual that is tied to a legal obligation to make a payment. The amount of interest or royalties allowable as a deduction in computing business profits of the U.S. branch under the income tax treaty is deemed paid by the branch and, if not regarded by the tax law of the home office (or other branch of the home office), treated as a DHA for these purposes. The preamble to the proposed regulations acknowledges that branch transactions are not technically hybrid arrangements. However, the proposed regulations (like the BEPS Hybrid report) expand the application of Section 267A to capture certain branch structures because such structures are viewed as being economically similar to the hybrid...
arrangements that are covered by the statute.

4. **Is the payment a payment to a reverse hybrid?**

Under the proposed regulations, a payment made to an entity that is fiscally transparent under the tax law of the country in which it is established, but not fiscally transparent under the tax law of an investor of the entity (a reverse hybrid), is a DHA to the extent that:

- an investor of the reverse hybrid does not include the payment in income (i.e., NI), and
- the investor’s NI is a result of the payment being made to the reverse hybrid.

For these purposes, the investor’s NI is a result of the payment being made to the reverse hybrid to the extent that NI would not occur if the investor’s tax law had treated the reverse hybrid as fiscally transparent and treated the payment as interest or royalty, as applicable.

5. **Is the payment a branch mismatch payment?**

A specified payment constitutes a “branch mismatch payment” if:

- The payment is treated as income attributable to a branch under the home office’s tax law, and
- Either (x) the branch is not a taxable branch or (y) the payment is not treated as income attributable to the branch under the branch’s tax law.

A branch mismatch payment is treated as a DHA to the extent that the home office does not include such payment in income (i.e., NI) and such NI is a result of the payment being a branch mismatch payment. Such causal relationship exists for these purposes to the extent that the home office’s NI would not occur if the home office’s tax law treated the payment as income that is not attributable to a branch of the home office (and treated the payment as interest or royalty, as applicable).

**(B) THE IMPORTED MISMATCH RULES**

As noted above, even if a specified payment is not a DHA, the corresponding deduction will still be disallowed under the proposed regulations if the payment is a “Disqualified Imported Mismatch Amount” (DIMMA). The basic function of the DIMMA concept is to expand the reach of the anti-hybrid rules and is based on the premise that D/NI inclusion outcomes may be “created” offshore between taxpayers in foreign jurisdictions and then effectively “imported” into the United States in a linked transaction that does not itself include hybridity. The concern is that the transactional leg of the arrangement to which the U.S. taxpayer is party to would fall outside the scope of 267A (because it lacks a direct hybrid element) but that by effectively matching that transaction up with a hybrid transaction that occurs offshore, the overall effect of the arrangement is to create a U.S. D/NI outcome. The proposed regulations provide that a specified payment (which isn’t treated as a DHA) will be treated as a DIMMA to the extent that:

1. The income attributable to the payment is directly or indirectly offset, by
2. A **Hybrid Deduction** that is incurred by a taxable person that is related to the specified party.

A Hybrid Deduction is generally defined as a deduction allowed to the relevant recipient under its tax law for “an amount paid or accrued that is interest... or a royalty under such tax law (regardless of whether
or how such amounts would be recognized under U.S. law), to the extent that a deduction for the amount would be disallowed if such tax law contained rules substantially similar to” the proposed 267A regulations. Moreover, the proposed regulations go a step further and add that, “a hybrid deduction includes a deduction allowed to the tax resident with respect to equity, such as a notional interest deduction.”

**EXAMPLE:** as an illustration of how the DIMMA rules work, assume a parent corporation (ACo) in Country A wholly owns all of the shares of a U.S. corporation (USCo) and a corporation (XCo) tax resident in Country X. USCo makes a $100 non-hybrid payment of interest to XCo that is included in XCo’s taxable income under Country X law. Assume further that ACo holds an instrument issued by XCo that is treated as equity under Country A law but debt under Country X law (i.e., it is a hybrid instrument as between X and A). In the same taxable year that USCo makes the payment of interest, XCo makes a $100 payment on the hybrid instrument held by ACo. That $100 payment is treated as deductible interest to XCo but gives rise to no income inclusion for ACo (because, for example, Country A exempts distributions on equity under a participation exemption).

In this example, the deductible payment of interest by USCo to XCo would not be treated as a DHA because it does not feature a hybrid element and does not, in and of itself, give rise to a D/NI outcome. However, a D/NI outcome for XCo is effectively synthesized by virtue of the hybrid arrangement between XCo and ACo. As a result, when viewed in its entirety, the arrangement replicates a D/NI outcome even though all the hybrid “activity” occurs offshore and then effectively imported onshore to the U.S.

As noted above, the presence of a hybrid deduction is not itself enough to create a DIMMA. In particular, there must also be a finding that the hybrid deduction directly or indirectly offsets the income inclusion related to the specified payment. While the requisite “offset” may be fairly clear in most “direct” scenarios, the extent to which these rules probe further to root out “indirect” offsets may be surprising to some taxpayers. In particular, the proposed regulations include a series of far-reaching ordering and funding rules designed to detect more attenuated hybrid deduction “offset” scenarios. The reach of these rules will require taxpayers to carefully monitor interconnected payment chains to make sure that the requisite offsetting mechanism does not inadvertently arise and jeopardize connected U.S. tax deductions.

**Osler commentary**

A. The imported mismatch rules substantially expand the reach of Section 267A. In many cross-border financing arrangements involving U.S. and Canadian corporations, the imported mismatch rules will be the relevant rules to apply in order to determine whether the financing is subject to 267A.

B. As noted above, the operation of the DIMMA rule requires one to notionally apply to the foreign recipient a hypothetical version of the DHA rules that are “substantially similar” to 267A in order to test for the existence of a hybrid deduction. This hypothetical application of U.S. tax rules into a non-U.S. scenario threatens to open up a host of interpretational questions about how that transposition is supposed to take place, starting with how one determines whether their hypothetical version of the rule is “substantially similar” to actual 267A. Moreover, the translation of the rule into any given non-U.S. context may as a necessity require a number of modifications in order to function, including adjustments to basic definitions like “interest” and “royalty,” that
could have determinative implications for whether the rule applies or not. The preamble to the proposed regulations explains that use of a hypothetical rule that is “substantially similar” to 267A is “intended to limit the application of the imported mismatch rule to cases in which, had the foreign-to-foreign hybrid arrangement instead involved a specified party, section 267A would have applied to disallow the deduction.” Even with this statement of intent, we anticipate that the lack of prescriptive ground rules for applying the “substantially similar” concept will lead to a range of different interpretations of the DIMMA rules by taxpayers.

(C) ANTI-AVOIDANCE RULE

The proposed regulations contain, as a formidable backstop protection, an anti-avoidance rule. This wide-ranging rule operates to disallow a specified party’s deduction for a specified payment if (i) there is a NI outcome for the foreign recipient, and (ii) a principal purpose of the plan or arrangement is to avoid the purposes of the 267A regulations.

(D) OTHER RULES

The above summary does not purport to address all of the components of the proposed 267A regulations. The proposed regulations contain a number of other important rules and definitions that shape the application of Section 267A in any given case. These include:

a. Definitions of key terms such as “interest”, “royalty”, and “related.”
b. Co-ordination rules explaining the interaction of 267A with other Code provisions.
c. Rules governing the application of 267A rules to “structured arrangements” — in general, these rules can extend the application of 267A to specified payments made to unrelated parties if (i) the hybrid mismatch is priced into the terms of the unrelated party arrangement, or (ii) based on all the facts and circumstances, the hybrid mismatch is a principal purpose of the arrangement.
d. Rules expanding the concept of “specified payment” (which generally only includes interest and royalties) to include certain “structured payments.” Structured payments include a broad range of items including certain fees, debt issuance costs, guaranteed payments by partnerships, as well as any items of deductible expense or loss incurred exchange for securing the use of funds if such expense or loss is predominantly incurred in consideration of the time value of money. This rule will extend the reach of 267A to many transactions that taxpayers may not anticipate.
e. Information reporting: The proposed regulations create new information reporting requirements related to certain specified payments.
f. Examples which provide important illustrations of the application of the 267A regulations in particular circumstances.
g. Applicability dates: The proposed regulations are generally contemplated to be effective for taxable years beginning after December 31, 2017, except for certain provisions which have a delayed effective date, applying to taxable years beginning on or after December 20, 2018. The delayed effective date generally applies to provisions of the proposed regulations that expand beyond the statutory language of Section 267A (including certain rules implementing the broad regulatory authority granted under Section 267A(e)), such as the rules regarding disregarded payments, deemed branch payments, branch mismatch payments, and DIMMA.
CHANGES TO THE DUAL CONSOLIDATED LOSS (DCL) RULES

As noted above, the preamble to the proposed regulations clarify that the Section 267A rules are designed to address hybrid arrangements that generate D/NI outcomes. The preamble indicates that hybrid arrangements that produce deductions in both the U.S. and in another taxing jurisdiction (so-called “double deduction” or “D/D” outcomes) are addressed separately by other U.S. tax rules, most notably the “dual consolidated loss” (DCL) regulations issued under Section 1503(d) of the Code. As part of its campaign to combat hybrid mismatch arrangements, the Treasury Department (somewhat unexpectedly) also included proposed changes to the DCL rules in the proposed regulations.

These changes to the DCL rules, if finalized, would have critical repercussions for cross-border D/D financing arrangements that utilize so-called “domestic reverse hybrids” (DRHs) — such as so-called “tower” structures that have been commonly used across the Canada-U.S. border. The Treasury Department notes in the preamble that it is aware that taxpayers have been taking the position D/D structures involving DRH entities are not subject to deduction disallowance under the DCL rules because the DRH is not a “dual resident entity” and therefore not within scope of the DCL rules. While this conclusion seems fairly clear under the DCL regulations as finalized in 2007, the Treasury Department has now concluded that these structures are “inconsistent with the principles of Section 1503(d).” As a result, the proposed regulations modify the U.S. “check-the-box” rules to impose a precondition that any U.S. entity electing to be classified as a corporation must consent to being treated as a “dual resident corporation” for purposes of the DCL rules for taxable years in which two requirements are satisfied. These requirements will generally be satisfied if both: (a) a foreign resident corporation derives income, gain, deduction or loss through the DRH, and (b) such foreign resident corporation is related to the DRH. When these conditions are satisfied, the DRH will become subject to the DCL rules and any D/D created through the use of the DRH would be expected to be disallowed.

This new rule would apply to U.S. entities that elect to be treated as corporations on or after December 20, 2018. Importantly, for DRHs that have made elections prior to December 20, 2018, the DRH will be deemed to consent to be treated as a dual resident corporation as of its first taxable year beginning on or after December 20, 2019. Accordingly, calendar year DRH entities with pre-existing check-the-box elections would become subject to the DCL rules beginning January 1, 2020 unless they take affirmative steps to restructure or elect to be classified as a partnership for U.S. tax purposes.

CONCLUSION

Section 267A and these proposed regulations represent nothing less than a “reset” of how the U.S. tax system deals with hybridity. As such, these rules will reshape how cross-border U.S. tax structuring and planning is done. The Treasury Department, following the direction of Congress, has structured these rules in a manner that aligns closely with the blueprint provided in the BEPS Hybrid report. Despite this foundation, the proposed regulations leave many core concepts underdefined and under-prescriptive, making it difficult to apply them with confidence. This is, in part, a reflection of the intrinsically difficult task of isolating the myriad scenarios where hybrid transactions, instruments and/or entities can generate the tax asymmetry of D/NI outcomes, while at the same time differentiating these from situations where D/NI arises due to other features of the international tax system. It also reflects the challenges of building domestic tax rules that require as inputs conclusions of foreign tax law. We anticipate that the proposed regulations will provoke a wide range of public comments with a focus on the practical mechanics and scope of these anti-hybrid rules. As a result, it is quite possible that in the
final version these regulations may evolve beyond their current form.

[1] The definition of “specified party” is important because it limits the scope of the 267A regulations to a particular group of taxpayers. A specified party means a tax resident of the U.S., a CFC with at least one direct or indirect United States shareholder and a U.S. taxable branch.

[2] Treas. Reg. 1.267A-1(c) goes on to establish a fairly stingy *de minimis* rule which turns off the above disallowance rule if the taxpayer’s total specified payments for a taxable year is less than $50,000.

[3] A “specified recipient” means, with respect to a specified payment, any tax resident that derives the payment under its tax law or any taxable branch to which the payment is attributable. There may be more than one specified recipient with respect to a specified payment.

[4] This “as a result of” language is an important limitation to the scope of the 267A regulations because it requires that there be a causal connection between hybridity and the NI outcome before deduction is disallowed by 267A. For this purpose, the proposed regulations provide that an NI outcome is “as a result of” hybridity to the extent that the NI outcome would not occur if the specified recipient’s tax law treated the specified payment in question as interest or a royalty, as applicable. In other words, a specified payment made pursuant to a hybrid transaction is caught if the recipient’s NI outcome is dependent on the specified recipient’s tax law treating that payment as something other than interest or a royalty.

[5] In addition, the proposed regulations make it clear that certain payments made in connection with repo and securities lending transactions are treated as being made to a specified recipient and are subject to hybrid transaction treatment. This specific rule targeted on repo transactions makes it relatively clear that most cross-border related party repo financing arrangements will be brought within scope of the new 267A regulations.

[6] In addition, as discussed below, Section 267A applies to certain branch structures.

[7] The proposed regulations also state that a specified payment will be treated as a disregarded payment if the payment gives rise to a deduction or similar offset allowed to the payee (or a group of entities that includes the payee) under a foreign consolidation, fiscal unity or similar regime. In addition, a disregarded payment does not include a “deemed branch payment” (described below).

[8] As an example, assume a Country X corporation (XCo) holds shares of a U.S. corporation (USCo). Under the laws of country X, USCo is a disregarded entity. Under U.S. law, USCo earns $75 of net income (before taking into account the $100 interest deduction described below). Under Country X law, the XCo also includes this $75 of income earned by USCo in its income and it is subject to tax under Country X law. Assume further that USCo makes a $100 payment of interest to XCo that is deductible for U.S. purposes but not regarded under Country X law. In this case, USCo’s $100 disregarded payment is treated as a DHA to the extent it exceeds USCo’s dual inclusion income ($75). Accordingly, $25 of the disregarded payment is a DHA and disallowed under Section 267A.


[10] In this context, a “domestic reverse hybrid” is an entity formed under U.S. law that is classified as a
corporation for U.S. tax purposes but as a fiscally transparent entity under the foreign tax law of the 
owner of the entity. “Tower” structure arrangements frequently involve a Delaware partnership that “checks-the-box” to elect to be treated as a corporation for U.S. tax purposes but that remains treated as a fiscally transparent partnership for Canadian tax purposes.
CONTACT US

For more information, please visit osler.com or contact the following individual(s):

NEW YORK
Paul Seraganian, New York
Managing Partner
212.991.2526
pseraganian@osler.com

NEW YORK
Jennifer Lee, Partner,
Taxation
212.991.2597
jennifer.lee@osler.com

NEW YORK
Kevin Colan, Counsel, Taxation
212.991.2538
kcolan@osler.com

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