

Report on recent US international tax developments - 20 December 2019

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The United States (US) Congress this week passed, and President Trump is expected to sign into law, limited tax extenders legislation that was included as part of year-end appropriations bills. Among the provisions, the legislation extends the Internal Revenue Code¹ Section 954(c)(6) controlled foreign corporation (CFC) look-through rule through 2020. The CFC look-through rule was set to expire at the end of the year.

The Internal Revenue Service (IRS) this week issued final regulations under Section 871(m) ([TD 9887](#)) with guidance for entities that hold certain US equities and financial products referencing US-source dividends. The 2019 final regulations adopt 2017 proposed regulations without substantive change. The regulations are effective 17 December 2019. The IRS also concurrently issued Notice 2020-2, announcing that it is extending the transition relief provided in Notice 2018-72 for two additional years and that it plans to amend the Section 871(m) regulations to reflect the delayed effective/applicability dates. This guidance is relevant for entities making payments to non-US entities on derivatives and other financial instruments referencing US-equity securities.

Section 871(m) treats "dividend equivalent payments" made with respect to certain derivative transactions referencing dividend-paying US equities as actual US-source dividends subject to withholding under Sections 1441 and 1442 (NRA withholding) and Section 1471 and 1472 (chapter 4 or the *Foreign Account Tax Compliance Act* (FATCA)).

Two sets of *Tax Cuts and Jobs Act*-related international tax regulatory guidance this week inched closer to release. Treasury on 17 December sent final Section 163(j) regulations to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review. The IRS published proposed regulations under Section 163(j) in December 2018. Treasury on 16 December also sent to OIRA final hybrid mismatch regulations under Section 267A that address certain related-party amounts paid or accrued in hybrid transactions or with hybrid entities. The IRS in December 2018 released proposed regulations implementing Section 245A(e) and Section 267A regarding hybrid dividends and some amounts paid or accrued in hybrid transactions or with hybrid entities.

Pascal Saint-Amans, Director of the Organisation for Economic Co-operation and Development's (OECD) Center for Tax Policy and Administration, told a Washington audience on 19 December that OECD staff and the 136 countries of the Inclusive Framework will continue to move forward with additional details on the Pillar One project to establish new taxing rights for allocating more taxable profits of multinational enterprises (MNEs) to market jurisdictions. Saint-Amans said documents are being developed for the coming Inclusive Framework meeting in late January that will provide more details

on this new taxing right, as well as how additional refinements to the arm's-length principle – including dispute resolution and dispute prevention – could work.

The objective is for the Inclusive Framework to agree to an outline of the Pillar One work in late January, endorsing with modifications and further detail the Pillar One proposal. If consensus within the Inclusive Framework is reached, the plan would be to provide a public report to the G20 Finance Ministers in late February, with the hope of reaching a final agreement on Pillar One in July 2020. Saint-Amans said that he hoped this timetable would hold despite the uncertainty created by US Treasury Secretary Steven Mnuchin's 3 December letter to the OECD Secretary General suggesting that "taxpayer concerns could be addressed and the goals of Pillar One could be substantially achieved by making Pillar One a safe-harbor regime."

Addressing the same Washington conference, a senior Treasury official said that the OECD BEPS 2.0 negotiations really come down to whether a consensus can be reached that would trade off better administrability of the arm's-length principle for a new simplified formula for determining nexus and profit allocation rules for larger, consumer-facing MNEs. The official expressed concerns that the Pillar One approach was evolving in a manner that could bring into scope more MNEs than some countries would like and would move the international tax system towards a partial destination-based system, which raises some concerns.

Endnote

1. All "Section" references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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