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Major policy changes expected following November election

The November presidential election results will be certified by the Electoral College on 14 December 2020, with President-elect Joe Biden, as recognized by the Associated Press.

Tax, healthcare, immigration and climate policy are key areas where a Biden Administration likely will diverge significantly from the Trump Administration.

Although candidate Biden had previously signaled that tax increase plans would be implemented on “Day 1,” it now appears that such plans may wait until after the coronavirus and its effects are addressed. The likelihood and scope of any such changes will become clearer only after control of the Senate is decided by two run-off elections in Georgia on 5 January 2021; the composition of the incoming Senate now stands at 48 Democrats to 50 Republicans.

On taxes, Biden has said he would raise the top corporate income tax rate to 28% from 21%. He also proposed taxing capital gains and dividends as ordinary income for those with annual incomes of more than \$1 million and setting a 15% minimum tax on the book income of corporations with book income greater than \$100 million. These changes are proposed to pay for increased spending on infrastructure, healthcare, education and the environment, not to reduce the debt or deficit. Biden may face a Congress reluctant to raise taxes or increase spending, however.

In regard to international tax, Biden indicated he supports measures that would discourage off-shoring and encourage on-shoring. To that end, Biden has proposed increasing the tax rate on profits earned by foreign subsidiaries of US firms by increasing the global intangible low-taxed income (GILTI) tax rate to 21% and applying the regime on a per-country basis. He has also proposed creating a “Made in America” tax credit to offset 10% of investments geared toward

creating jobs in the US and introducing a surtax on certain goods and services imported into the US. For more details, see recent EY articles on [tax and trade policy under a Biden Administration](#) and how the [outcome of the Senate races could shape policy in 2021](#).

Treasury and IRS news

Treasury and IRS finalize regulations to reduce possibility of double taxation caused by anti-abuse rules on GILTI gap period

Treasury and the IRS on 20 November 2020 issued final regulations ([TD 9934](#)) under Sections 245A and 951A that coordinate two independent sets of anti-abuse rules that apply to extraordinary dispositions and disqualified transfers (together, EDs). Both rules apply to certain transactions of a controlled foreign corporation occurring during the so-called Global Intangible Low-taxed Income (GILTI) gap period. Absent the final regulations, gain recognized in an ED effectively could be taxed twice. The final regulations, which come three months after the release of the proposed regs in August 2020, are effective 12 January 2021. The final regulations are substantially similar to the proposed regulations.

The final regulations can be applied retroactively, at the taxpayer's option. As a result, taxpayers may wish to file amended returns to mitigate negative consequences caused by the application of both sets of anti-abuse rules. In addition, taxpayers should evaluate whether the final regulations create opportunities to manage their overall tax liability, taking into account potential legislative and regulatory changes in the coming years, the taxpayer's attribute profile (including foreign tax credits), projections for future income and taxes, repatriation strategies, mergers and acquisitions, and numerous other unique considerations.

No prohibition against PLRs on virtual currency transactions

An IRS official in November 2020 was quoted as saying that there is no overall policy against issuing private letter rulings in regard to the tax treatment of virtual currency transactions, noting that the IRS addresses issues on a case-by-case basis. The official added that while summary statistics for 2019 are not yet in, the Government has seen a “steady increase in income and gain reported for taxpayers' virtual currency transactions” for tax years 2013 through 2018.

IRS officials provide international regulatory update

A senior IRS official in mid-November said the Government hopes to release a revenue procedure by the end of the year on the interaction of the Global Intangible Low-taxed Income (GILTI) provision and a controlled foreign corporation's (CFC) change of accounting method.

Treasury and the IRS had indicated in the final GILTI regulations (issued in June 2019) that they planned to issue a revenue procedure "further expanding the availability of automatic consent for depreciation changes and updating the terms and conditions in ... Rev. Proc. 2015-13 (related to the source, separate limitation classification, and character of Section 481(a) adjustments) to take into account Section 951A."

Another IRS official was quoted as saying the future revenue procedure would also clarify that a Section 481(a) adjustment is an increase or decrease to tested income since it is an increase or decrease to CFC income.

The official also said final regulations on the aggregate treatment of partnerships for subpart F purposes are on the horizon, and that the final rules could be accompanied by proposed rules on related passive foreign investment company issues. The IRS is also reportedly working on a Section 367(d) project that would address issues regarding intangible property that previously was transferred overseas and now brought back to the US. A new international tax project on Section 864(f) on the election to allocate interest on a worldwide basis is also part of the IRS's 2021 priority guidance plan that was released in November.

Earlier in the month, a senior IRS official was quoted as saying the IRS would not be releasing proposed regulations on previously taxed earnings and profits (PTEP) this year. The anticipated PTEP regulations, which are important across a variety of provisions, have faced several delays over the years and are now expected for release in early 2021.

The official added that taxpayers can further expect proposed regulations on the *Foreign Investment in Real Property Tax Act* aspects of opportunity zones.

Transfer pricing news

US, Mexico renew competent authority agreement on unilateral APAs for maquiladoras

The IRS [announced](#) on 16 November 2020 that it has reached an agreement with the Mexican Tax Authority (SAT) to renew the competent authority agreement arrangement known as the Qualified Maquiladora Approach Agreement (QMA). Under the QMA, a US taxpayer can avoid double taxation on its maquiladora contract manufacturing and assembly functions by entering into a unilateral advance pricing agreement (APA) with SAT's large taxpayer division under terms agreed in advance by the US and Mexican competent authorities.

The US and Mexican competent authorities last negotiated a QMA agreement in 2016. The 2016 QMA updated and expanded a 1999 agreement between the US and Mexican competent authorities on transfer pricing and other aspects of the tax treatment of maquiladoras of US multinational enterprises. The 2016 QMA included changes reflecting revisions to Mexican domestic transfer pricing rules, documentation requirements and other tax attributes of maquiladoras.

The 2020 renewal agreement follows the framework of the 2016 QMA, which the competent authorities agree has continued to work to produce arm's-length results. The 2020 renewal agreement adds several new features, however. Specifically, the 2020 agreement adds a mechanism for addressing situations in which the maquiladora has an outstanding accounts-receivable balance that the competent authorities agree is inconsistent with the transfer pricing profile of the Mexican entity.

LB&I issues internal memo on Section 965 transition tax issues

The IRS Large Business and International (LB&I) Division on 17 November 2020 released a memorandum ([LB&I-04-1120-0020](#)) providing interim guidance for revenue agents and examiners regarding examinations with Section 965 transition tax issues. In particular, the memorandum provides guidance on the Section 965(k) six-year statute of limitations on assessment for returns with a Section 965 transition tax. The guidance does not cover returns that are subject to the centralized partnership audit regime under the *Bipartisan Budget Act of 2015* or TEFRA partnerships, which will be the subject of separate guidance.

The 2020 QMA covers tax years through 2019 and commits the competent authorities to continue collaborating on another renewal for tax years 2020 and beyond. The competent authorities intend discussions on future agreements to consider the impacts of current economic, commercial and public health conditions affecting taxpayers.

Over 700 US taxpayers with maquiladoras are expected to qualify for the QMA. SAT will directly notify qualifying Mexican taxpayers, and such notifications will include details on necessary steps for taxpayers with pending unilateral APA requests. Taxpayers can also reach out to the IRS Advance Pricing and Mutual Agreement program with questions regarding whether the QMA or a bilateral APA would be more appropriate for its facts and circumstances.

IRS updates list of jurisdictions for automatic exchange of CbC reports

The IRS has updated the [website](#) that includes a listing of the jurisdictions with which the US Competent Authority has entered into a Competent Authority Agreement (CAA) for the automatic exchange of Country-by-Country (CbC) reports and the jurisdictions that are in negotiations for a CAA.

Most recently, the IRS added Singapore to the list of countries with which the US has signed a CAA for the automatic exchange of CbC reports. The US Competent Authority also released a joint statement with the French Competent Authority, explaining that France is negotiating a CAA with the US to allow for the automatic exchange of CbC reports. The Joint Statement indicates that with respect to fiscal years of multinational enterprise groups commencing on or after 1 January 2019 and before 1 January 2020, the Competent Authorities intend to spontaneously exchange CbC reports.

IRS reviewing stock-based compensation in cost-sharing context

A senior IRS official in November 2020 was quoted as saying that the Government is working on new guidance related to stock-based compensation in relation to cost sharing arrangements that will address the *Altera v. Commissioner* decision. The guidance reportedly will cover the effects of sharing stock-based compensation on the calculation of the buy-in payment or platform contribution transaction, entity-level effects, the timing of an inclusion, and the impact of the *Tax Cut and Jobs Act's* Section 965 transition tax and GILTI provisions. The official indicated the guidance is a high priority and said that “hopefully we’re able to get something out at some point relatively soon.”

Although *Altera* is only effective in areas within the Ninth Circuit’s purview, IRS officials believe the “case will help the Service and the government and availing in other circuits,” with one goal being to avoid a split in the circuits.

OECD developments

OECD will hold virtual public consultation on BEPS 2.0 Pillar 1 and Pillar 2 in mid-January 2021

The OECD will hold a two-day virtual public consultation on the BEPS 2.0 Pillar 1 and Pillar 2 Blueprints on 14-15 January 2021, according to Pascal Saint Amans, director of the OECD’s Centre for Tax Policy and Administration. The OECD director was quoted as saying in late November that while the overall architecture of the Pillars has been agreed upon, certain aspects may be overly complicated and the public consultation may be an opportunity to simplify some of that complexity.

Public comments on the blueprints are due by 14 December 2020. The Inclusive Framework on BEPS reportedly will meet at the end of January 2021 to move the project forward, although Saint Amans said further progress may not be possible if the new US delegation is not in place by that time. The overall plan remains for agreement on the two pillars to be reached by mid-2021.

OECD releases Consultation Document on 2020 review of BEPS Action 14

The OECD on 18 November 2020 released a public [Consultation Document](#) on the review of the minimum standard on dispute resolution under BEPS Action 14. The [assessment methodology](#) for the peer review process of the Action 14 minimum standard included a planned evaluation of this process in 2020 in light of the experience in conducting peer monitoring.

Based on this experience, the 2020 review also presents an opportunity to re-examine what is viewed to be working well in the mutual agreement procedure (MAP) process and what issues could be further improved. The Consultation Document therefore seeks stakeholder input on proposals for the 2020 review of the Action 14 minimum standard regarding the following items:

- ▶ Experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with MAP in those jurisdictions that obtained a deferral within the peer review process

- ▶ Additional measures that may strengthen the Action 14 minimum standard
- ▶ Additional measures that may strengthen the MAP Statistics Reporting Framework

The proposals included in the Consultation Document do not represent the consensus views of the OECD's Committee on Fiscal Affairs, the Inclusive Framework or its subsidiary bodies, but are intended to provide stakeholders with substantive proposals for analysis and comment. The [press release](#) highlights that while many jurisdictions expressed support for most of the proposals, several jurisdictions also raised strong concerns with some of them.

Interested parties are invited to submit their comments on the questions raised in the Consultation Document by 18 December 2020. A [public consultation meeting](#) on the 2020 review of BEPS Action 14 will be held in early 2021.

OECD releases 2019 mutual agreement procedure statistics, 2019 mutual agreement procedure awards

On 18 November 2020, the OECD held its second OECD Tax Certainty Day as a virtual event. During the event, the OECD published the [2019 statistics on Mutual Agreement Procedures \(MAP\)](#) and the [2019 MAP awards](#).

For 2019, the statistics include information from all OECD and G20 members and from those members of the OECD/G20 Inclusive Framework on BEPS that joined the Inclusive Framework prior to 2020 - for a total of 105 jurisdictions, an increase from the 89 jurisdictions covered in 2018 data. The 2019 data covers almost all MAP cases worldwide. Separate statistics are provided for transfer pricing cases and for "other cases" (i.e., non-transfer pricing) for 2019.

The 2019 MAP statistics include the number of MAP cases that each jurisdiction has with each of its treaty partners and each reporting jurisdiction's performance with respect to key indicators for each type of case can be compared through an [interactive tool](#).

In addition, at the event, the OECD announced the 2019 MAP awards recognizing the particular efforts of competent authorities across a range of metrics.

OECD releases report on taxing virtual currencies

The OECD/G20 [Inclusive Framework on Base Erosion and Profit Shifting \(BEPS\)](#) in October 2020 released a report ([the Report](#)) on taxing virtual currencies that provides a cross-jurisdictional overview of the tax treatment and emerging tax policy issues in relation to virtual currencies. The jurisdictional overview is based on a questionnaire to identify domestic variations in taxation of crypto-assets, focusing in particular on the treatment of virtual currencies for purposes of income tax, property tax and Value Added Tax (VAT).

The Report was presented to the meeting of G20 Finance Ministers and Central Bank Governors and covers three main areas:

1. Key concepts and definitions of blockchain and crypto-assets, looking at the characterization, legality and valuation of virtual currencies and analyzing the tax consequences across the different stages of their lifecycle, from creation to disposal.
2. Tax policy implications of several emerging issues related to the taxation of virtual currencies, including the rise of stablecoins (e.g., Libra, Tether) and "Central Bank Digital Currencies" (CBDC), as well as the evolution of the consensus mechanisms used to maintain blockchain networks (e.g., the increasing use of Proof-of-Stake rather than Proof-of-Work) and the rise of decentralized finance (DeFi).
3. Identification of key tax policy considerations based on a comparative overview across more than 50 countries of the tax treatment of virtual currencies from the perspective of income, consumption and property taxation. These policy considerations are not intended as recommendations or best practices, but rather are observations that domestic legislators and policymakers may take into consideration when strengthening their regulatory framework for taxing virtual currencies.

The Report is the first formal report of the OECD and its Inclusive Framework on BEPS that is specific to taxing virtual currencies and the related emerging tax policy issues. Although the Report does not explicitly contain recommendations, it is expected that the OECD will do more work on this topic. As such, the Report should be viewed as a first important step towards more clarity and guidance on several areas in relation to virtual currencies where policymakers currently face challenges.

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