Building a better working world

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Legislation

US Treasury releases President's plan to overhaul corporate tax system

On 7 April 2021, the Treasury released President Joe Biden's "Made in America Tax Plan." According to the report, the plan's goal "is to make American companies and workers more competitive by eliminating incentives to offshore investment, substantially reducing profit shifting, countering tax competition on corporate rates, and providing tax preferences for clean energy production.

Importantly, the plan would generate new funding to pay for a sustained increase in investments in infrastructure, research, and support for manufacturing, fully paying for the investments in the American Jobs Plan over a 15-year period and continuing to generate revenue on a permanent basis."

According to the plan's summary, "The Made in America Tax Plan" implements a series of corporate tax reforms to address profit shifting and offshoring incentives and to level the playing field between domestic and foreign corporations. These include:

- Raising the corporate income tax rate to 28% percent
- Strengthening the global minimum tax for US multinational corporations
- Reducing incentives for foreign jurisdictions to maintain ultra-low corporate tax rates by encouraging global adoption of robust minimum taxes by replacing the BEAT tax with a regime called SHIELD (Stopping Harmful Inversions and Ending Low-tax Developments) that would deny multinational corporations U.S. tax deductions by reference to payments made to related parties that are subject to a low effective rate of tax
- Enacting a 15% minimum tax on book income of large companies that report high profits, but have little taxable income
- Replacing flawed incentives that reward excess profits from intangible assets with more generous incentives for new research and development
- Replacing fossil fuel subsidies with incentives for clean energy production
- Ramping up enforcement to address corporate tax avoidance

While these are the major elements of the "Made in America Tax Plan," the proposal also contains several additional tax incentives that would directly benefit US corporations, passthrough entities, and small businesses. These include, for example, a marked increase in the resources available through the Low-Income Housing Tax Credit and other housing incentives.

Senators Wyden, Brown and Warner release International Tax Framework

US Senate Finance Committee Chairman Ron Wyden (D-OR) and Senators Sherrod Brown (D-OH) and Mark Warner (D-VA) on 5 April released "Overhauling International Taxation: A framework to invest in the American people by ensuring multinational corporations pay their fair share," which focuses on changes to the *2017 Tax Cuts and Job's Act* (TCJA) international provisions on Global Intangible Low-taxed Income (GILTI), Foreign-derived Intangible Income (FDII), and the Base Erosion and Anti-abuse tax (BEAT).

The framework aims to "reboot the international tax system" to better "focus on rewarding companies that invest in the U.S. and its workers, stop incentivizing corporations to shift jobs and investment abroad, and ensure that big corporations are paying their fair share." The nine-page document leaves several policy options undetermined, does not include legislative language, and in some ways suggests alternative approaches to the Made in America Tax Plan's international changes proposed by President Biden – which also leave many details unspecified.

Proposed GILTI changes under the framework would:

- Repeal the exemption for qualified business asset investment (QBAI, which is intended to be roughly the value of offshore tangible assets)
- Increase the GILTI rate by an unspecified amount. The framework poses the question of whether the GILTI rate should equal the corporate tax rate, creating a worldwide tax system, or should be a percentage of the corporate rate. The framework adds that the rate could "depend heavily on corresponding decisions regarding the U.S. corporate rate, base stripping protections, and other potential incentives or disincentives for U.S. and foreign investment"

- Use a "country-by-country" system for applying GILTI, perhaps through either:
  - Expanding the existing system for foreign tax credits with the use of foreign tax credit baskets determined by jurisdiction
  - Dividing global income into two buckets — low-tax and high-tax buckets with GILTI only applied to income from low-tax jurisdictions; the rate for the low-tax bucket remains open. If this path is chosen, the framework notes that the Trump Administration's final regulations creating a high-tax election under the GILTI rules provide a ready-made framework for a two-bucket approach, albeit one that would be mandatory rather than voluntary

A new "incentive to onshore research and management jobs" called for under the framework would provide relief from US expense allocation rules that currently impact the GILTI foreign tax credits – "expenses for research and management that actually occur in the U.S. should be treated as entirely domestic expenses, eliminating foreign tax credit penalties under GILTI and helping retain these activities in the U.S."

Proposed FDII changes would "repair" the current rules by:

- Repealing the exemption for QBAI
- Replacing FDII's "deemed intangible income" with a new metric, "deemed innovation income," which would be an "amount of income equal to a share of expenses for innovation-spurring activities that occur in the U.S., such as research and development and worker training"
- Equalizing the FDII and GILTI rates (which seems at odds with a GILTI rate that could potentially match the corporate income tax rate). It is notable that the Administration would repeal the FDII rules

Proposed BEAT changes call for more effectively penalizing base erosion through a second-rate bracket such that "regular taxable income would still be subject to a 10% rate, while base erosion payments would be subject to a higher rate." The value of domestic tax credits that currently increase BEAT exposure would be restored and a similar proposal for the loss of value in foreign tax credits could be addressed with an increased BEAT rate.

In contrast, the Biden Administration has called for repealing the BEAT and replacing it with a new anti-base erosion regime, the Stopping Harmful Inversions and Ending Low-tax Development (SHIELD) that is more akin to the undertaxed payment rule being developed by the OECD as a backstop to its global minimum tax regime.

President Biden lays out $1.8 trillion American Families Plan proposal

President Joe Biden on 28 April 2021 addressed a joint session of Congress where he laid out his American Families Plan, proposing $1 trillion in new spending and $800 billion in new tax credits. According to a White House Fact Sheet released earlier in the day, when combined with the American Jobs Plan, all of the investments would be fully paid for over the next 15 years.

President Biden addresses joint session of Congress

President Joe Biden addressed a joint session of Congress on 28 April, calling for action on the American Jobs Plan's traditional infrastructure proposal and detailing the American Families Plan's human infrastructure proposal. On taxes, President Biden said corporations "benefit from tax loopholes and deductions that allow for offshoring jobs and shifting profits overseas. That's not right. We're going to reform corporate taxes so they pay their fair share – and help pay for the public investments their businesses will benefit from."

The President said, "we're going to reward work, not wealth," including by taking the top tax bracket "for the wealthiest 1% of Americans – those making $400,000 or more – back up to 39.6%." He also said, "We're going to get rid of the loopholes that allow Americans who make more than $1 million a year pay a lower rate on their capital gains than working Americans pay on their work," and said that "the IRS will crack down on millionaires and billionaires who cheat on their taxes."

President Biden said the *Tax Cuts and Jobs Act* "was supposed to pay for itself and generate vast economic growth. Instead it added $2 trillion to the deficit. It was a huge windfall for corporate America and those at the very top." The pandemic has made the pay gap between CEOs and their workers worse, he said, with millions of workers having lost their jobs, while "the roughly 650 Billionaires in America saw their net worth increase by more than $1 Trillion."

A senior administration official said President Biden's plan "is about cutting taxes for middle-class families, for childcare, for healthcare, and for families. And he believes that we should do that in a fiscally responsible way, first and foremost, by making sure the wealthiest Americans actually pay the taxes they already owe."

Among the highlights, the plan proposes investments of over $500 billion in early childhood and post-secondary education, $225 billion to address child care affordability and workforce sustainability, $225 billion to create a national paid leave program, and $45 billion for nutrition programs. It also includes extensions of enhanced tax credits included in the American Rescue Plan including those for *Affordable Care Act* (ACA) premium tax credits and the Child Tax Credit (CTC), Child and Dependent Care Tax Credit (CDCTC), and Earned Income Tax Credit (EITC).

The plan proposes paying for the investments in part through increasing taxes on the wealthy, including a top marginal individual income tax rate of 39.6% and a 39.6% capital gains rate. It would also end a variety of other tax breaks and "loopholes" for high-income Americans while promising that no one making $400,000 per year or less would see their taxes go up.

Senate Finance Committee chairman reintroduces clean energy legislation

Senate Finance Committee Chairman Ron Wyden (D-OR) on 21 April 2021 reintroduced the *Clean Energy for America Act*, which proposes to eliminate fossil fuel tax incentives and replace the dozens of energy tax incentives currently in the Internal Revenue Code with a simpler set of provisions that encourage clean electricity and transportation and energy efficiency. The bill would provide an emissions-based, technology-neutral tax credit for clean electricity production and investments in grid improvements like stand-alone energy storage and high-capacity transmission lines qualifying for the full-value investment tax credit.

For fossil fuels, the bill would reinstate the current taxation of multinational oil companies' non-extraction income and would "ensure multinational oil companies are not specially exempted from the 2017 tax law's global minimum tax."

Digital Taxation

Treasury Secretary proffers BEPS 2.0 Pillar One proposal to Inclusive Framework

US Treasury Secretary Janet Yellen on 8 April 2021 presented an OECD BEPS 2.0 Pillar One proposal to the steering group of the Inclusive Framework on BEPS. Described as a "comprehensive scoping" idea, the proposal reportedly would be based on revenue and profitability to limit Pillar One's impact to a narrower group of multinational corporations. According to the reports, the Biden Administration is calling its comprehensive scoping proposal the "simplest and most principled of administrable options," noting it would eliminate the need for business line segmentation.

The US Government reportedly would be flexible with respect to nexus thresholds to address the concerns of developing countries. The proposal also includes a requirement for a "binding nonoptional dispute prevention and resolution process" as well as the need for a "precise definition of relevant unilateral actions."

Pascal Saint-Amans, OECD Director of the Center for Tax Policy and Administration, was optimistic about the latest US proposal. He was quoted as saying the proposal addresses concerns about complexity as well US opposition to limiting the effects of Pillar One to a narrow group of generally US-based multinationals, adding that it is "rebooting the negotiations."

IRS news

IRS issues proposed regs to coordinate WHT and gain deferral for certain foreign persons and partnerships investing in QOFs, clarify working capital safe harbor

The IRS released proposed regulations (REG-121095-19) in April 2021 that would allow certain non-US persons and non-US-owned partnerships, including private equity, real estate, and other alternative and private capital funds, to reduce or eliminate withholding imposed under Sections 1445, 1446(a) and 1446(f) on eligible gains deferred and invested in a qualified opportunity fund (QOF) provided certain requirements are met. These persons or partnerships must timely obtain from the IRS an "eligibility certificate" and meet certain specified requirements to include their "security-required gains" in their QOF gain deferral election.

PTEP guidance not expected until late summer, early fall

Long-delayed previously-taxed earnings and profits (PTEP) proposed regulations are now expected to be released in multiple packages, according to a senior Treasury official, with the first piece expected to be issued by early fall. The official reportedly said the initial guidance is far along but requires additional work with regard to the implementation of Section 961(c), and its application. Sometime later, the second installment of PTEP guidance will address partnerships.

The proposed regulations also clarify the requirements for Qualified Opportunity Zone Businesses (QOZBs) receiving up to an additional 24 months under the working capital safe harbor because of a federally declared disaster.

Although an eligibility certificate requirement could present an administrative hurdle, the ability to reduce or eliminate Sections 1445 and 1446 withholding is expected to facilitate inbound investment into OZs. Private equity, real estate and other alternative private capital funds with non-US investors looking to invest in OZs are expected to benefit from this taxpayer favorable change. Security-required persons should be mindful that, to the extent a QOF investment exceeds the permitted deferral amount under an eligibility certificate, the excess investment will not constitute a qualified QOF investment and will result in "mixed fund" treatment. It will be incumbent on funds and non-US persons to timely obtain, and the IRS to timely provide, these eligibility certificates.

The proposed regulations relating to covered transfers, including the requirements for eligibility certificates, would apply to any covered transfer that occurs after the date that the regulations are published as final regulations in the Federal Register. Taxpayers are not permitted to submit applications for eligibility certificates before the date of publication.

IRS releases FAQs on ICAP program for US multinational enterprises

The IRS recently released new frequently asked questions (FAQs) and answers on the International Compliance Assurance Program (ICAP). The FAQs are directed at US multinational enterprises (MNEs) that may be considering the program.

ICAP is a voluntary risk assessment and assurance program designed to facilitate open and cooperative multilateral engagement between large MNE groups and tax administrations in jurisdictions where the MNE groups have business activities.

ICAP was originally developed under the framework of the OECD Forum on Tax Administration (FTA) Large Business and International Programme, with the first ICAP pilot launched in January 2018, with eight FTA member jurisdictions, including the US. To aid in its implementation, in February 2021, the FTA released a handbook for tax administrations and taxpayers potentially interested in participating in ICAP.

In March 2021, the IRS posted FAQs with additional information, noting that the FAQs are meant to provide helpful, informal guidance and are not official pronouncements of law or directives and cannot be used, cited or relied upon as such.

The 12 recently updated FAQs provide additional clarifying information for taxpayers who are entering or are considering ICAP. Among other topics, the FAQs provide information on how to apply, when to apply and who would benefit from the program.

There is no application or participation fee. The first three submission deadlines are 30 September 2021; 31 March 2022; and 30 September 2022.

The IRS indicated that acceptance to ICAP is not guaranteed but based on the anticipated availability of IRS personnel and whether the IRS believes that the US MNE is suitable for ICAP. In determining suitability, the IRS may consider, among other factors: (i) the MNE group's footprint in the US; (ii) the type and materiality of the MNE group's covered transactions; (iii) whether the MNE group has a history of "transparent and cooperative engagement" with the IRS; and (iv) the MNE group's transfer pricing examination history. MNEs under an ongoing IRS examination are still eligible to participate, but it will be a "relevant factor" in the IRS's decision making (including the tax years and issues under examination).

Note that ICAP differs from existing cross-border dispute resolution processes such as advance pricing agreements (APAs), Mutual Agreement Procedures (MAPs) and arbitration, all of which are intended to eliminate rather than simply lessen risk. However, the ability for MNEs to receive outcome letters within 24 to 28 weeks following delivery of their main documentation package and a single round of risk assessment/issue resolution by the covered tax authorities, which is generally less information than required during an APA, tax audit, or MAP, may be viewed by some MNEs as being a significant benefit of the ICAP process.

IRS extends time for submitting APA and MAP requests with e-signatures

The IRS has extended the date by which advance pricing agreement (APA) and mutual agreement procedure (MAP) requests may be filed electronically with digital signatures until 31 December 2021.

On 15 April 2021, the IRS released an updated memo on e-signature requirements. The new memo is the same as an earlier memo issued 1 December 2020 (which had an expiration date of 30 June 2021).

These modifications affect the procedures for filing MAP request documents under Revenue Procedure 2015-40 and for filing APA requests and annual APA reports under Revenue Procedure 2015-41.

Under the modifications, documents requiring the taxpayer's signature under Revenue Procedure 2015-40 or Revenue Procedure 2015-41 may be submitted instead with either (1) a scanned or photographed image of the taxpayer's signature or (2) the taxpayer's digital signature created using encryption techniques.

In addition, taxpayers may electronically file submissions required under Revenue Procedure 2015-40 or Revenue Procedure 2015-41 rather than submitting paper copies.

OECD developments

OECD releases consultation document with proposed changes to Commentaries to OECD Model Tax Convention on Article 9 (Associated Enterprises) and related articles

On 29 March 2021, the OECD Committee of Fiscal Affairs (CFA) released as a public consultation document a discussion draft proposing changes to the Commentaries on the OECD Model Tax Convention (OECD Model). The document contains the recommendations on the interpretation and application of Article 9 (Associated Enterprises) and other related articles of the OECD Model, made by Working Party 1 in consultation with Working Party 6 and the Forum on Tax Administration's Mutual Agreement Procedure (MAP) Forum.

In essence, the proposed changes would specify that the conditions for the deductibility of expenses are a matter to be determined by domestic law. Under the proposed changes, if domestic law rules would result in fewer expenses being deductible than the arm's-length amount, this would not be considered to cause economic double taxation of the type that the provisions of the OECD Model seek to eliminate and there would be no obligation on the other Contracting State to make corresponding adjustments under Article 9 of the OECD Model in these circumstances.

The proposed changes would mean that domestic law limitations on deductibility of expenses, even if such limitations are applied exclusively to controlled transactions and not to similar uncontrolled transactions, would not be considered to lead to economic double taxation that would be subject to relief under Article 9 of the OECD Model.

The OECD invites interested parties to submit comments on the discussion draft before 28 May 2021.

EY comments on EU Public Consultation for a Fair & Competitive Digital Economy – Digital Levy

EY on 12 April 2021 submitted a comment letter on the European Union (EU) Public Consultation for a Fair & Competitive Digital Economy – Digital Levy. The letter provides EY's perspective on the considerations raised in the consultation for the design of an EU digital levy. The European Commission launched a public consultation on a new digital levy on 18 January 2021, the aim of which is to "ensure fair taxation in the digital economy, while at the same time contributing to Europe's recovery."

OECD publishes Arbitration Profiles for 30 countries under MLI, clarifies entry into effect

The OECD in late March 2021 published the Arbitration Profiles of 30 jurisdictions applying Part VI (mandatory binding arbitration) of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the MLI).

The Arbitration Profiles provide taxpayers with additional information on the application of Part VI of the MLI for each jurisdiction that chose to apply arbitration. They also allow jurisdictions to make publicly available clarifications on their position on arbitration under the MLI.

On the same date, the OECD announced that on 15 March 2021, the Conference of the Parties to the MLI adopted an opinion (the Opinion) regarding the entry into effect of the MLI with respect to taxes withheld at source in specific cases. The Opinion confirms the conclusion reached by the OECD Secretariat in November 2018 on the same issue.

It is important to note that the Arbitration provision included in the MLI is just one source of binding arbitration. There are numerous jurisdictions that have bilaterally implemented a "mandatory binding arbitration" provision in their tax treaties, including certain tax treaties of the United States not covered by the MLI. Moreover, there are two additional sources of binding arbitration in the European Union (EU): (i) the EU Arbitration Convention; and (ii) the EU Directive on Tax Dispute Resolution.

OECD releases fourth batch of Stage 2 peer review reports on dispute resolution

On 15 April 2021, the OECD released the fourth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation of the BEPS minimum standard on dispute resolution under BEPS Action 14 by Australia, Ireland, Israel, Japan, Malta, Mexico, New Zealand, and Portugal (the assessed jurisdictions).

These Stage 2 reports focus on evaluating the progress made by the assessed jurisdictions in addressing any recommendations that resulted from the Stage 1 peer review reports that were released on 30 August 2018. In addition, jurisdictions can request feedback on their adoption of best practices. Australia, Japan, Malta, and New Zealand made such a request and therefore the OECD also released four accompanying best practices reports.

The outcomes of the Stage 2 peer review process demonstrate overall positive changes across the assessed jurisdictions. Australia, Ireland, Japan, Malta, and New Zealand addressed most of the deficiencies identified in the Stage 1 peer review and Mexico and Portugal addressed some of them. According to the peer review report, Israel meets most of the elements of the Action 14 minimum standard but it has not yet addressed any of the deficiencies identified in the Stage 1 peer review.

IMF and OECD release joint report on carbon pricing

On 7 April 2021, the International Monetary Fund (IMF) and the OECD released a joint report, Tax Policy and Climate Change (the Report), discussing the current and potential use of carbon pricing and actions that jurisdictions can take to advance global coordination of a climate solution. The Report was drafted to inform discussions at the second meeting of the G20 Finance Ministers and Central Bank Governors held on the same day, on the role of greenhouse gas emissions pricing in climate change mitigation policy packages.

The Report describes greenhouse gas pricing, including carbon pricing, "as an indispensable tool in any cost-effective climate change mitigation strategy," and details the strengths of carbon pricing.

The Report is the latest in a growing number of climate, energy, and carbon policy papers focused on the need for governments and businesses to work together in reducing greenhouse gas emissions. Carbon pricing, including carbon tax, is widely touted by economists and policymakers as an efficient tool in reducing emissions while raising revenue to drive innovation and offset regressivity.

Green policy measures are complex and multifaceted, and as they continue to proliferate, it is important for businesses to model the impact of existing carbon regimes, likely-to-be-enacted proposals, and the interplay between unilateral measures in the form of BCAs, and to factor the impacts into their sustainability transformation plans.

OECD releases third annual peer review report and revised peer review documents on BEPS Action 6 relating to prevention of treaty abuse

On 1 April 2021, the OECD released two documents relevant for the implementation of the minimum standard on BEPS Action 6 relating to prevention of treaty abuse. The first document is the third annual peer review report (the Report) on compliance with the minimum standard by members of the Inclusive Framework on BEPS. The OECD also released revised peer review documents on BEPS Action 6 which will be used to carry out the peer review process beginning in 2021.

The Report includes information available as of 30 June 2020 (the cut-off date) and covers the 137 jurisdictions that were members of the Inclusive Framework by that date. Overall, the Report concludes that the majority of the Inclusive Framework members are translating their commitment to prevent treaty abuse into actions and are modifying their treaty networks.

The Report covers 2,295 agreements in force among members of the Inclusive Framework, of which over 350 complied with the minimum standard by the cut-off date. In addition, over 1,300 of the 2,295 agreements were in scope of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS* (MLI) and were thereby set to become compliant with the minimum standard; further 17 agreements are being updated bilaterally.

As of 30 March 2021, 95 jurisdictions have signed the MLI, 65 jurisdictions have deposited their instrument of ratification and 1,700 tax treaties are covered by the MLI. By requiring Inclusive Framework members to develop specific plans to modify their non-compliant treaties and by offering assistance in the renegotiations, the OECD is enhancing compliance with the Action 6 minimum standard.

United Nations

UN tax committee approves new digital taxation article for UN model tax treaty

The United Nations (UN) Committee of Experts on International Cooperation in Tax Matters on 20 April 2021 approved the final text of a new digital taxation article for the UN Model Treaty that would allow for source country taxation of revenue from certain automated digital services. New Article 12B (Income from Automated Digital Services) would allow a contracting state to tax gross automated digital services income earned by a beneficial owner that is resident in the other contracting state. The new provision would also provide an option to be taxed on a net basis. Automated digital services is defined as "any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider" and includes online advertising services, online search engines, digital content services, online gaming, and cloud computing services. New Article 12B does not specify specific tax rates, which would be established through bilateral negotiations.

UN releases new Transfer Pricing Manual

The United Nations on 27 April 2021 released the third edition of the UN Transfer Pricing Manual aimed at developing countries. The new third edition includes a major revision of the section on profit splits and contains new guidance on financial transactions, centralized procurement functions and comparability issues. It also includes a new country specific section on Kenya.

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