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Legislation

Bipartisan infrastructure deal reached, but road to passage uncertain

President Joe Biden and a bipartisan group of Senators on 24 June 2021 announced a roughly $1 trillion infrastructure deal that omits most of the Administration's tax increase proposals but does call for investment toward reducing the tax gap and reinstating Superfund fees for chemicals. Agreement reportedly was reached on the cost, the scope and how to pay for the infrastructure package, which includes $579 billion in new spending.

President Biden soon muddied the waters, however, when he said that he agreed with House Speaker Nancy Pelosi (D-CA) that the bipartisan infrastructure bill must move with a Democratic reconciliation bill that is expected to address issues like health care, caregiving, and climate change, and tax increases on corporations and high-income individuals aimed at paying for those changes. "If this is the only thing that comes to me, I'm not signing it. It's in tandem," the President said.

Following Republican furor at the linkage, the President backed down from his remarks, saying he was committed to passage of the bipartisan infrastructure legislation without preconditions. Congressional Republicans generally accepted President Biden's revised comments in which he said the "impression" he would veto the bipartisan legislation was "clearly not my intent."

Notwithstanding the President's about face, Speaker Pelosi on 29 June reportedly told a closed-door meeting of her caucus that she plans to withhold a House vote on the bipartisan infrastructure bill until the Senate passes a "human" infrastructure bill in the Senate. Across the Capitol, Senator Joe Manchin (D-WV), an important voice in Democrats' plans to pass both bipartisan infrastructure and reconciliation legislation, said that he supports a larger, Democratic-only infrastructure bill that would use reconciliation for passage. Senator Manchin said, however, that the reconciliation infrastructure bill should not be linked to the bipartisan infrastructure bill he helped negotiate.

House passes corporate disclosure package requiring CbC tax reporting for multinationals

The US House of Representatives on 15 June 2021 narrowly passed (215-214) a package of measures (HR 1187) intended to improve corporate governance by requiring a number of new disclosures by public companies.

Notably, the package included a measure based on HR 3007 which would direct the Securities and Exchange Commission (SEC) to issue regulations requiring larger multinational corporations to publicly disclose country-by-country financial information for each of their subsidiaries, including profits, taxes paid, employees and tangible assets.

More specifically, the bill would require businesses that are part of larger multinational enterprises to publicly disclose aggregate or consolidated financial activities for each tax jurisdiction where a subsidiary resides, including: (1) Revenue generated from transactions with other business units; (2) Profit or loss before income tax; (3) Total income tax paid on a cash basis to all jurisdictions; (4) Total accrued tax expenses recorded on taxable profits or losses; and (5) Net book value of tangible assets, excluding cash or cash equivalents, intangibles, and financial assets.

HR 1187 also includes the following bills that had been approved individually by the House Financial Services Committee earlier this year:

- HR 1187, the *ESG Disclosure Simplification Act*, whose bill number was used for the overall package
- HR 1087, the *Shareholder Political Transparency Act*
- HR 1188, the *Greater Accountability in Pay Act*
- HR 2570, the *Climate Risk Disclosure Act*

The Biden Administration indicated its support for HR 1187 in a statement of administration policy.

Given Republican opposition, HR 1187 would likely have to surpass a difficult 60-vote threshold in the Senate if considered under regular order. Democrats conceivably could include the country-by-country tax reporting and other disclosures in a 51-vote budget reconciliation bill, but their lack of substantial revenue or spending effects could subject the provisions to being challenged and stripped from such a bill under the "Byrd rule."

US government issues discussion document on cryptocurrency

The US Treasury released a document in June 2021 that discusses information reporting proposals with regard to virtual currencies (including cryptocurrency). The proposals call for using existing tax regimes "by treating certain virtual currency similarly to other similar assets, as appropriate." The document specifically looks to using Section 6045 (Broker Reporting), 6050I ("Cash" Reporting) and Section 6038D (Specified Foreign Financial Asset Reporting) in the virtual currency area. According to Treasury, these proposals would complement "the Administration's proposal to require information reporting by financial institutions."

Biden Administration's proposed 15% minimum tax could come with requirement to disclose book-tax differences

A Treasury official in mid-June 2021 was quoted as saying that the Biden Administration's proposed 15% minimum tax on book earnings could include a requirement for companies to publicly disclose book-tax differences. Responding to criticism of the proposed minimum tax, the official said it should be seen as a backstop to the corporate tax system, adding "We've really thought through the contours of this proposal."

According to the recently released Green Book, companies with a calculated base in excess of $2 billion would make an additional payment to the IRS for the excess of up to 15% on their book income over their regular tax liability. Companies would be given credit for taxes paid above the minimum book-tax threshold in prior years, for book net operating loss deductions, for general business tax credits and for foreign tax credits.

Treasury and IRS news

IRS announces plans to amend BEAT regarding qualified derivative payment reporting

Treasury and the IRS on 10 June issued Notice 2021-36, announcing the Government's plans to amend the Base Erosion and Anti-abuse Tax (BEAT) final regulations under Sections 59A and Section 6038A with respect to qualified derivative payment (QDP) reporting. The Notice defers the applicability date of certain provisions relating to QDP reporting until taxable years beginning on or after 1 January 2023.

The IRS issued final and proposed BEAT regulations in December 2019 and additional final regulations in October 2020. The preamble to the latter regulations noted a public comment requesting that the Government address the interaction of the QDP, the BEAT netting rule and QDP reporting requirements found in the 2019 final regulations. Treasury and IRS are continuing to study the issue and therefore are extending the transition period.

US taxpayers should consider certain tax provisions with respect to bitcoin following recent legislation in El Salvador

On 8 June 2021, El Salvador's Legislative Assembly approved legislation to adopt bitcoin as legal tender in the country. Under the key provisions of the approved bill, businesses and lenders would be required to accept bitcoin as payment for any monetary obligation. Taxpayers could make tax remittances to the El Salvador Government in cryptocurrency.

The possible adoption of bitcoin as legal tender by El Salvador prompts several questions for US taxpayers holding the cryptocurrency, particularly around income and loss characterization.

Under IRS Notice 2014-21 and the October 2019 IRS Frequently Asked Questions, cryptocurrency is generally considered "virtual currency" and treated as property. Tax principles related to property transactions apply to transactions involving cryptocurrency. To the extent that bitcoin is held for investment purposes, it is generally treated as a capital asset, and any resulting gains and losses are characterized as capital.

Bitcoin adoption as legal tender

If more countries adopt bitcoin as legal tender, the US federal income tax treatment of bitcoin could change. Instead of being treated as an investment that is a capital asset, bitcoin could be treated as generating ordinary income under Section 988.

Section 988 treats as ordinary income exchange gains or losses arising from transactions that are denominated in a currency other than the taxpayer's functional currency or that are determined by reference to the value of one or more nonfunctional currencies. For US taxpayers that hold bitcoin for a long time and have a low-cost basis in the assets, ordinary income treatment on the sale of those assets could prove costly.

If bitcoin were adopted as legal tender, forward transactions in bitcoin could be deemed "IRC Section 1256 contracts." Section 1256 requires gains or losses from "IRC Section 1256 contracts" to be marked to market annually, as if those contracts were sold on the last day of the tax year. The statute defines "IRC Section 1256 contracts" as "any foreign currency contract." Under Section 1256(a)(3), gain or loss on the deemed sale of the contract is treated as 60% long-term capital gain and 40% short-term capital gain (60/40 treatment). Under Section 1256(f)(2), however, 60/40 treatment does not apply to any gain or loss that would otherwise be ordinary (e.g., Section 988 gain or loss).

It should be underscored that the IRS has not changed its current position on bitcoin. Without further guidance from the IRS on what is considered a nonfunctional currency, it is unclear whether Sections 988 and 1256 would apply if bitcoin is treated as currency. Given the possible new legal tender status of bitcoin in El Salvador, taxpayers should consider the potential tax implications for bitcoin transactions in the United States and the uncertainties that still exist under IRS guidance.

Digital Taxation

USTR announces 25% punitive tariffs on six countries in response to DSTs; suspends tariffs for 180 days

On 2 June 2021, the US Trade Representative (USTR) announced the imposition of 25% punitive tariffs on goods from Austria, India, Italy, Spain, Turkey, and the United Kingdom (UK) in response to the countries' Digital Services Tax (DST) regimes. In the same announcement, the USTR suspended the imposition of tariffs for 180 days, with collection of the duties not beginning until 29 November 2021, in an effort to provide additional time for the ongoing multilateral negotiations among the nations regarding international taxation at the OECD.

Companies that import goods into the US originating in Austria, India, Italy, Spain, Turkey, and/or the UK, which may be impacted by these actions should begin planning.

US distributors who purchase from related parties should consider transfer price impacts by the imposition of any new Section 301 duties. Along with the strategic importance of mitigating duty impact while aligning the income tax and customs approaches, mechanics for reporting any transfer pricing adjustments to US Customs should also be reviewed.

US, EU suspend punitive tariffs on wide range of products for five-year period; transfer pricing implications

On 15 June 2021, the US Trade Representative (USTR) and European Union (EU), in a joint statement, announced a cooperative framework to address the 17-year large civil aircraft dispute. The statement pronounced that both sides would suspend all existing punitive tariffs imposed in relation to the large civil aircraft subsidies for a period of five years.

The five-year suspension follows a joint announcement in March 2021 to postpone punitive measures for four months, which was designed to provide additional time for ongoing negotiations and set to expire on 11 July 2021. The new agreement for the five-year suspension will now go into effect on 11 July 2021 and will relieve punitive tariffs of 15% to 25% levied under Section 301 of the *Trade Act of 1974* (Section 301) on EU-origin products.

US distributors who purchase EU-origin goods from related parties which have been subject to Section 301 duties will likely have transfer prices impacted by the suspension of Section 301 duties. Along with the strategic importance of aligning the income tax and customs approaches, mechanics for reporting any transfer pricing adjustments to US Customs should also be reviewed. This process may be particularly complex when duties are present for only a portion of the year, and in many cases, actions need to be taken in advance of importations.

EU distributors of US goods subject to the punitive tariffs will face similar transfer pricing challenges in their jurisdictions. Rules for reporting transfer pricing adjustments vary among EU Member States. This highlights the need for careful planning to manage volatile supply chain costs like the punitive tariffs in each jurisdiction of operations.

OECD developments

G7 leaders affirm commitment to global tax changes under BEPS 2.0

On 11-13 June, the leaders of the G7 countries met in Cornwall under the United Kingdom Presidency of the G7. The communiqué issued at the conclusion of the summit endorsed the strong support earlier voiced by the G7 Finance Ministers for the global tax changes being developed in the G20/OECD Inclusive Framework project on addressing the tax challenges of the digitalization of the economy (the BEPS 2.0 project). (See the follwoing article regarding the G7 Finance Ministers' statement.)

With the encouragement of this G7 support, attention now turns to the upcoming July meeting of the G20 Finance Ministers and the ongoing effort to achieve agreement among the 139 jurisdictions of the Inclusive Framework in connection with that meeting.

More specifically, the communiqué issued on 13 June 2021 at the close of the G7 Leaders Summit included a statement on the global tax changes being developed under Pillar One (relating to new nexus and profit allocation rules) and Pillar Two (relating to new global minimum tax rules) of the BEPS 2.0 project:

> *We need a tax system that is fair across the world. We endorse the historic commitment made by the G7 on 5 June. We will now continue the discussion to reach consensus on a global agreement on an equitable solution on the allocation of taxing rights and an ambitious global minimum tax of at least 15 per cent on a country-by-country basis, through the G20/OECD inclusive framework and look forward to reaching an agreement at the July meeting of G20 Finance Ministers and Central Bank Governors. With this, we have taken a significant step towards creating a fairer tax system fit for the 21st century, and reversing a 40-year race to the bottom. Our collaboration will create a stronger level playing field, and it will help raise more tax revenue to support investment and it will crack down on tax avoidance.*

G7 Finance Ministers express strong support for global tax changes under BEPS 2.0

On 4-5 June 2021, Finance Ministers and Central Bank Governors of the G7 countries met in London under the UK Presidency of the G7. A communiqué, issued at the meeting's conclusion, expressed strong support for ongoing work of the G20/OECD Inclusive Framework on BEPS 2.0 project. It also included information regarding the G7 Finance Ministers' perspectives on some key parameters of the new rules being developed in the BEPS 2.0 project.

US Treasury Secretary Janet Yellen made a statement focused on global minimum tax rules:

> *The G7 Finance Ministers have made a significant, unprecedented commitment today that provides tremendous momentum towards achieving a robust global minimum tax at a rate of at least 15%. That global minimum tax would end the race-to-the-bottom in corporate taxation, and ensure fairness for the middle class and working people in the U.S. and around the world. The global minimum tax would also help the global economy thrive, by leveling the playing field for businesses and encouraging countries to compete on positive bases, such as educating and training our work forces and investing in research and development and infrastructure.*

Current activity in the BEPS 2.0 project is focused on efforts to reach conceptual agreement in the Inclusive Framework on both Pillar One and Pillar Two in connection with the 9-10 July 2021 meeting of the G20 Finance Ministers and Central Bank Governors and to finalize that agreement in connection with October G20 meetings. The specific parameters reflected in the G7 communiqué with respect to profit allocation and coordination with Digital Services Taxes under Pillar One and with respect to the global minimum tax rate under Pillar Two are matters that are the subject of intensive negotiations in the Inclusive Framework. It remains to be seen what specifics will be included in any agreement that is reached in the Inclusive Framework.

OECD publishes model rules for information exchange for digital platforms

The OECD on 22 June 2021 published "Model Reporting Rules for Digital Platforms: International Exchange Framework and Optional Module for Sale of Goods." The new rules reflect the interest of a number of jurisdictions to have information exchange relating to digital platforms.

The OECD developed an international legal framework, the Multilateral Competent Authority Agreement on Automatic Exchange of Information on Income Derived through Digital Platforms, to that end. The framework is meant to support "annual automatic exchange of information by the residence jurisdiction of the platform operator with the jurisdictions of residence of the sellers (and, with respect to transactions involving the rental of immovable property, the jurisdictions in which such immovable property is located), as determined on the basis of the due diligence procedures." The OECD also developed an optional module to cover the sale of goods and the rental of means of transportation."

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