

Rules Committee releases modified “Build Back Better Act” tax proposals

29 October 2021



On October 28, 2021, the House Rules Committee released new proposed legislative text of the “Build Back Better Act” (the [BBBA](#)) to reflect the revised framework announced by President Biden earlier in the day. The BBBA would fund expanded health coverage, affordable housing, universal pre-kindergarten and child care, clean energy and climate investments, in part through significant changes to the international tax rules.

While consistent with the BBA version released on September 13, 2021 (the [HW&M Proposal](#)), by Chairman Neal of the House Ways & Means Committee (see [Tax Alert 2021-9023](#)), the Rules Committee Proposal contains many significant changes. A comparison of significant international tax provisions of the HW&M Proposal and the Rules Committee Proposal follows. Several of the international provisions are still the subject of negotiation, and additional changes are likely in any finally enacted legislation.

	HW&M Proposal	Select modifications in Rules Committee Proposal
GILTI	<ul style="list-style-type: none"> Determines GILTI on a country-by-country (CBC) basis at the taxable unit level Defines a taxable unit separately for CFCs, interests in pass-through entities, and activities of branches Allows country-specific tested losses to be carried forward for the succeeding tax year, allowing these losses to reduce country-specific tested income Reduces QBAI from 10% to 5% for CFCs that are not territories of the United States Reduces Section 250 deduction to 37.5%, resulting in an effective GILTI rate of 16.5% (using a proposed 26.5% corporate rate) Repeals Section 250 taxable income limitation Includes Section 250 deductions in net operating losses Grants Treasury authority regarding effective rate determination, anti-abuse provisions, and proper reflection of income Generally applies to tax years beginning after December 31, 2021 	<ul style="list-style-type: none"> Retains the CBC calculation of GILTI Reduces Section 250 deduction percentage to 28.5%, resulting in an effective GILTI tax rate of 15.02% (based on the corporate rate remaining 21%) Requires a 15.8% foreign tax rate to avoid residual US tax on GILTI inclusions (when combined with the 5% haircut to GILTI FTCs discussed below) Expands the definition of “CFC taxable unit” to include foreign corporations that have a US shareholder Generally applies to tax years beginning after December 31, 2022 Grants Treasury broad regulatory authority for tax years beginning after the date of enactment (DOE)

International tax

	HW&M Proposal	Select modifications in Rules Committee Proposal
Foreign tax credits	<ul style="list-style-type: none"> Determines FTC on a CBC basis for all baskets Reduces 20% haircut on GILTI FTCs to 5% Allows FTCs in all baskets (including GILTI) to be carried forward five years, but not carried back Prevents US expenses from being allocated to the GILTI basket (other than the Section 250 deduction) Repeals the foreign branch income basket Makes foreign taxes associated with tested losses eligible for a deemed paid credit Excludes FTCs associated with PTEP distributions from the Section 78 gross-up Repeals 904(b)(4) Generally applies to tax years beginning after December 31, 2021 	<ul style="list-style-type: none"> Allows a temporary five-year carryforward for GILTI FTCs paid or accrued in tax years beginning after December 31, 2022 and before January 1, 2031 (after which the GILTI carryforward period extends to 10 years) Retains the current 10-year FTC carryforward period for non-GILTI FTCs Applies carryback repeal to all baskets Allocates to US-source income US expenses (other than the Section 250 deduction and associated taxes) that would otherwise be allocated to GILTI, and authorizes Treasury to specify other expenses directly allocable to GILTI Applies the 5% haircut to foreign taxes paid or accrued with respect to distributions of GILTI PTEP in tax years beginning after DOE Authorizes Treasury to determine the allocation of foreign taxes on base differences (currently allocated to foreign branch basket) Generally applies to tax years beginning after December 31, 2022
Repeal of election for one-month deferral in tax year of specified foreign corporations (SFCs)	<ul style="list-style-type: none"> Repeals Section 898(c)(2), which previously allowed the choice of a tax year beginning one month earlier than the majority US shareholder year Applies to tax years of specified foreign corporations beginning after November 30, 2021 	<ul style="list-style-type: none"> Applies to tax years of specified foreign corporations beginning after November 30, 2022 Instructs Treasury to issue rules for allocating foreign taxes that accrue in the first year after the change in tax year (e.g., allocating taxes paid or accrued in the December 1, 2022-December 31, 2022 period for a calendar-year majority US shareholder)
Foreign base company sales income (FBCSI) and services income (FBCSvI)	<ul style="list-style-type: none"> Repeals Section 954(d)(2), (i.e., the branch rule) Amends related-party rules to only include related US entities, so only CFCs buying from or selling to US related parties will generate FBCSI or FBCSvI Applies to tax years of foreign corporations beginning after December 31, 2021 	<ul style="list-style-type: none"> Expands related-party rules to include persons with effectively connected income Applies to tax years of foreign corporations beginning after December 31, 2021 (no change from HW&M's Proposal)

International tax (continued)

	HW&M Proposal	Select modifications in Rules Committee Proposal
Dividends from foreign corporations	<ul style="list-style-type: none"> Limit the Section 245A dividends received deduction (DRD) to distributions received from CFCs after the DOE Treat certain Section 245A-eligible dividends from CFCs as “extraordinary dividends,” resulting in basis reduction and potential gain recognition for distributions after the DOE Applies extraordinary dividend rule to dividends paid out of earnings and profits accrued (or attributable to built-in gain arising) before the subpart F income and GILTI rules applied to the stock on which the dividend was paid 	<ul style="list-style-type: none"> Consistent with HW&M’s Proposal
Downward attribution	<ul style="list-style-type: none"> Retroactively reinstates the rule turning off “downward attribution” under Section 958(b)(4) Applies to the last tax year of foreign corporations beginning before January 1, 2018 	<ul style="list-style-type: none"> Applies to tax years of foreign corporations beginning after the DOE
Section 951(a)(2) pro rata share rules	<ul style="list-style-type: none"> Retroactively modifies the “pro rata share” rules in a manner that would increase the amount of subpart F income and GILTI included in a US shareholder’s income for certain changes in a CFC’s ownership Applies to tax years beginning after December 31, 2017 	<ul style="list-style-type: none"> Applies to tax years beginning after December 31, 2021
Section 961(c) basis adjustments	<ul style="list-style-type: none"> Amends Section 961(c) to treat certain basis adjustments as arising for all purposes and causes gain to be recognized to the extent a CFC distributes PTEP to another CFC in excess of the shareholder’s basis Applies to tax years beginning after December 31, 2021 	<ul style="list-style-type: none"> Amends Section 961(c) to enumerate the basis adjustments arising under that section, but (as under current law) treats those adjustments as applying only for purposes of determining Section 951 inclusions Applies to tax years beginning after December 31, 2021
R&D expensing	<ul style="list-style-type: none"> Delays mandatory R&D capitalization requirement from 2022 to 2026 	<ul style="list-style-type: none"> Consistent with HW&M’s Proposal

International tax (continued)

	HW&M Proposal	Select modifications in Rules Committee Proposal
Corporate minimum tax	<ul style="list-style-type: none"> N/A 	<ul style="list-style-type: none"> Establishes a 15% minimum tax on a corporation's adjusted financial statement income Allows offset for AMT foreign tax credits Applies to corporations (other than an S corporation, RIC, or REIT) with average annual adjusted financial statement income greater than \$1 billion over any applicable three-tax-year period that precedes such tax year Applies to tax years beginning after December 31, 2022
FDII	<ul style="list-style-type: none"> Reduces deduction percentage to 21.875% (from 37.5%), yielding an effective FDII tax rate of 20.7% (if the corporate rate increased to 26.5%) Generally applies to tax years beginning after December 31, 2021 Adds new categories of gross income excluded from total gross income to derive deduction eligible income (DEI), including income "of a kind that would be foreign personal holding company income" (FPHCI) as defined in Section 954(c) Retroactively applies new categories of excluded income to tax years beginning after December 31, 2017 	<ul style="list-style-type: none"> Changes deduction percentage to 24.8%, yielding an effective FDII tax rate of 15.8% (if the corporate rate remained 21%) Generally applies to tax years beginning after December 31, 2022 Makes new DEI exclusion categories prospective only, for tax years beginning after the DOE Replaces additional DEI exclusion category defined by reference to FPHCI with a new category generally corresponding to passive category income for purposes of Section 904 Adds gains from the sale or other disposition of property giving rise to rents or royalties derived in the active conduct of a trade or business as an additional DEI exclusion category
Effectively connected income	<ul style="list-style-type: none"> Amends Section 996(g) to treat gains from the sale or exchange of, and distributions by, a DISC or FSC to a foreign shareholder as effectively connected with the conduct of a trade or business conducted through a permanent establishment deemed to be had by the shareholder in the United States Applies to gains and distributions on or after December 31, 2021 	<ul style="list-style-type: none"> Consistent with HW&M's Proposal

International tax (continued)

	HW&M Proposal	Select modifications in Rules Committee Proposal
BEAT	<ul style="list-style-type: none"> • Applies a 10% BEAT rate to tax years beginning before January 1, 2024, a 12.5% rate to tax years beginning after December 31, 2023 and before January 1, 2026, and a 15% rate thereafter • Retains the higher BEAT rate applicable to banks and securities dealers and expands the scope of taxpayers subject to this rule • Broadens the definition of base erosion payment to include (i) certain indirect costs that are paid or accrued by the taxpayer to a foreign related party and must be capitalized to inventory under Section 263A, and (ii) the portion of the invoice price of inventory that is purchased from a foreign related party and exceeds the sum of (a) the direct costs of that property (subject to a look-through rule), plus (b) indirect costs that would be capitalizable under Section 263A and are paid or accrued to a US person or an unrelated party, or (c) amounts otherwise subject to US tax • Allows taxpayers to make a simplifying election relating to these indirect costs • Clarifies that the current exception for payments subject to the services cost method under Section 482 does not include any mark-up for the service • Provides an exception from treatment as a "base erosion payment" for (i) payments on which US income tax is imposed, and (ii) payments subject to "sufficient foreign tax," defined as an effective rate of foreign income tax that equals or exceeds the applicable BEAT rate (currently 10% increasing to 15% over time) 	<ul style="list-style-type: none"> • Accelerates the increase in the BEAT rates from 10% to 12.5% for tax years beginning after December 31, 2022 and before January 1, 2024; from 12.5% to 15% for tax years beginning after December 31, 2023; and from 15% to 18% for tax years beginning after December 31, 2024 • Terminates the higher BEAT rate applicable to banks and securities dealers for any tax year beginning after December 31, 2024 • Retains the HW&M Proposal's expanded definition of base erosion payments relating to inventory • Adds a new rule that would treat a taxpayer, and any of its successors, as an "applicable taxpayer" (and thus possibly subject to BEAT) for each of the 10 succeeding years if a taxpayer were an applicable taxpayer for any tax year beginning after December 31, 2021 • Adds two new provisions clarifying an exception for payments on which US tax is imposed: (i) new Section 59A(i)(1)(B), which would treat US tax as imposed without regard to any deduction allowed under Sections 241-250; and (ii) new Section 59A(i)(1)(C), which would determine amounts that are not treated as a base erosion payments under this exception under rules similar to former Section 163(j)(5), as in effect before the TCJA • Refines the "sufficient foreign tax" exception to except amounts from treatment as base erosion payments if they are subject to an effective foreign income tax rate that is not less than the lesser of (i) 15%, or (ii) the BEAT rate in effect for that tax year, so that a 15% effective foreign income tax rate would be considered "sufficient foreign tax" even when the BEAT rate increases to 18% in tax years beginning after December 31, 2024

International tax (continued)

	HW&M Proposal	Select modifications in Rules Committee Proposal
BEAT (cont.)	<ul style="list-style-type: none"> Changes the treatment of net operating losses (NOL) under the BEAT by (i) requiring the NOL deduction to be determined without regard to any deduction that is a base erosion tax benefit, and (ii) applying the 80% limitation on the NOL deduction to MTI Provides corresponding modifications for measuring the remaining amount of the NOL deduction available in subsequent carryforward years Repeals the base erosion percentage test (3% generally and 2% for banks and broker dealers) for tax years beginning on or after January 1, 2024 Retains the “services cost method” exception to the definition of base erosion payment in current law 	<ul style="list-style-type: none"> Applies an anti-abuse rule to certain back-to-back payments between foreign related parties Retains the HW&M Proposal’s repeal of the base erosion percentage test
Limitations on deduction for interest expense	<ul style="list-style-type: none"> Adds new Section 163(n), which would limit the deductibility of interest expense of the US operations of a multinational that is part of an international financial reporting group (IFRG) to its proportionate share of the group’s interest expense, with proportionate share generally determined by reference to the US share of IFRG EBITDA Limits deductible interest expense to 110% x the allowable percentage x net interest expense Generally applies to all specified domestic corporations (SDC) of foreign-parented and US multinational groups Requires the more restrictive provision of Section 163(n) or Section 163(j) to apply Requires disallowed interest carryforwards to expire after five years Authorizes Treasury to issue certain guidance, including rules allowing or requiring adjustment of amounts reported on financial statements and the application of the provision to partnerships Applies to tax years beginning after December 31, 2021 	<ul style="list-style-type: none"> Removes five-year carryforward limitation, allowing for indefinite carryforward of disallowed interest Authorizes additional regulatory guidance on (i) treating subpart F income of a CFC and any of the CFC’s interest expense that is related to that income as the SDC’s interest income and expense, (ii) preventing the omission, inclusion or duplication of any item or amount of interest income or interest expense, and (iii) domestic corporations that own interests in fiscally transparent entities Generally applies to tax years beginning after December 31, 2022

International tax (continued)

	HW&M Proposal	Select modifications in Rules Committee Proposal
Portfolio interest exception	<ul style="list-style-type: none"> • Modifies the definition of “10-percent shareholder,” whose interest is exempt from portfolio interest • Renders any person who owns 10% or more of the total vote or value of a corporation ineligible for the portfolio interest exemption for obligations issued by that corporation 	<ul style="list-style-type: none"> • Consistent with HW&M's Proposal

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