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Legislation

President Biden releases pared down budget reconciliation framework

President Joe Biden on 28 October announced a new budget reconciliation framework that outlines the Democrats' $1.75 trillion package. This was followed hours later by the release of legislative text. The rewrite of the *Build Back Better Act* (H.R. 5376) – which originally was proposed at $3.5 trillion – is essentially a stripped-down version of the House bill from September with new revenue offsets reflecting Senator Kyrsten Sinema's (D-AZ) opposition to tax rate increases.

A White House press release states that the package is "fully paid for and will reduce the deficit" through various tax provisions, including a 15% corporate alternative minimum tax on corporate profits and a 15% global minimum tax. The framework also includes a surcharge on high income individuals, estates and trusts (5% on modified adjusted gross income above $10 million and an additional 3% tax on modified adjusted gross income above $25 million) and an overhaul of tax administration.

The revamped budget reconciliation bill does not include a number of social spending programs, such as paid family and medical leave due to opposition from centrist Democrats. It also does not include free community college, a program aimed at pushing utilities to generate more clean energy, nor a series of top marginal corporate or individual tax rate increases. The package also left out a recently proposed tax on billionaires' unrealized gains, due to concerns raised by Senator Joe Manchin (D-WV) and other Democrats.

The tax items in the coming budget reconciliation bill are not completely settled. Senate Finance Committee Chairman Ron Wyden (D-OR) said: "This is not done," adding that the Administration "acknowledged that there is more work to do."

International tax changes remain in the package and the global intangible low-taxed income (GILTI) rate would increase to 15% with a country-by-country application of the GILTI regime. The revised bill reduces the Section 250 deduction for foreign derived intangible income (FDII) to 24.8% and GILTI to 28.5%, yielding a 15% GILTI rate and a 15.8% FDII rate, with changes effective for taxable years beginning after 31 December 2022.

The bill would permit the carryforward of excess foreign tax credits with respect to the GILTI category to five succeeding taxable years for taxes paid or accrued in taxable years beginning after 31 December 2022 and before 1 January 2031. For taxable years beginning after 31 December 2030, the carryforward period for excess GILTI category taxes would be 10 years.

The new Biden framework calls for "imposing a penalty rate on any foreign corporations based in countries that do not" abide by the OECD agreement, and in the House bill the BEAT rate has been increased to 12.5% in 2023, 15% in 2024, and 18% in 2025 and later. The tax press quoted a House Democratic staffer as saying that the Biden Administration's "Stopping Harmful Inversions and Ending low-tax Developments" (SHIELD) proposal has been dropped, with changes to BEAT proposed instead.

The revised bill retains the proposal to add Section 163(n) to limit the interest deduction of certain domestic corporations that are members in an international financial reporting group to the "allowable percentage" of 110% of the net interest expense. The revised bill, however, removes the 5-year carryforward limitation for interest expense disallowed under Sections 163(j) or (n) that was originally proposed under Section 163(o)(2). New regulatory authority was also granted to address certain items of income and expense under subpart F, taxpayers with interests in fiscally transparent entities, and potential adjustments to interest income and expense. The revised proposal applies to taxable years beginning after 31 December 2022.

Senate Majority Leader Chuck Schumer (D-NY) reportedly told Democratic members they have about a week to negotiate things back in or out of the reconciliation framework released on 28 October. It remains unclear, however, when the House and Senate will take up the latest iteration of the reconciliation package.

Digital economy

G20 leaders confirm commitment to global tax changes under BEPS 2.0

The leaders of the G20 during their 30-31 October 2021 summit affirmed their commitment to the agreement reached in the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) on global tax changes in connection with the BEPS 2.0 project.

The G20 Leaders' declaration described the agreement as a historic achievement and called for swift action as contemplated in the implementation plan included in the agreement, with the aim of ensuring that the new rules come into effect globally in 2023.

On 8 October 2021, the OECD released a statement reflecting the agreement reached by 136 out of the 140 Inclusive Framework member jurisdictions on core design features of the two pillars of the BEPS 2.0 project . It also included an implementation plan setting out the additional work to come and the timeline for the new rules to come into effect.

This statement was endorsed by the G20 Finance Ministers in the communiqué issued on 13 October 2021 at the close of their meeting in Washington.

The two-pillar project to address the tax challenges arising from the digitalization of the economy contemplates significant changes in the overall international tax architecture under which multinational businesses operate. The confirmation by the G20 leaders of the political agreement on key components of the two pillars and their call for swift action is intended to encourage jurisdictions to move quickly to implement the new rules.

There is still significant work to be done in the Inclusive Framework on BEPS to develop the technical details and coordination of the new rules.

Looking ahead, companies will need to monitor activity in relevant countries related to the implementation of the agreed rules through changes in domestic tax law and bilateral or multilateral agreements.

Target deadlines

Pillar One

- Early 2022 – Text of a Multilateral Convention (MLC) and an Explanatory Statement to implement Amount A of Pillar One
- Early 2022 – Model rules for domestic legislation necessary for the implementation of Pillar One
- Mid 2022 – High-level signing ceremony for the MLC
- End 2022 – Finalization of work on Amount B for Pillar One

Pillar Two

- November 2021 – Model rules to define scope and mechanics for the Global anti-Base Erosion (GloBE) Rules
- November 2021 – Model treaty provision to give effect to the subject to tax rule (STTR)
- Mid 2022 – Multilateral instrument (MLI) for implementation of the STTR in relevant bilateral treaties
- End 2022 – Implementation framework to facilitate coordinated implementation of the GloBE Rule
- 2023 – Implementation of the Two-Pillar Solution

Six country Joint Statement on transitional approach to existing unilateral measures during period before Pillar One is in effect

On 21 October 2021, a Joint Statement from Austria, France, Italy, Spain, the United Kingdom and the United States was released describing a compromise reached by the countries on a transitional approach to the treatment of existing digital services taxes (DSTs) and other relevant similar measures during the interim period before new BEPS Pillar One rules come into effect. The interim period is the period beginning on 1 January 2022 and ending on the earlier of the date that the Pillar One multilateral convention comes into force or 31 December 2023.

Under the compromise, the five European countries, which are not required to withdraw their existing DST regimes until Pillar One takes effect, have agreed to allow a portion of taxes accrued by a multinational enterprise (MNE) under their DSTs or any other unilateral measures before Pillar One takes effect to be credited against the MNE's future Pillar One Amount A tax liability when Pillar One rules are in effect.

The US has agreed to terminate its proposed trade actions against the five countries with respect to their existing DSTs and commits not to impose further trade actions with respect to such countries and their DSTs during this interim period. Finally, the six countries are to remain in close contact to ensure there is a common understanding of the agreement and to endeavor to resolve any differences of view.

It should be noted that it is not clear whether the agreement covers any measures in any of the five countries other than their DSTs. The agreement also does not provide any credit for DST liability to an MNE that is not subject to liability under Pillar One in the particular country within four years after Pillar One comes into effect in such country. Thus, under the agreement, MNEs that are not within scope of Pillar One would not receive relief for DST liability accrued during the interim period.

Treasury and IRS news

IRS rules gains and losses arising from commodity hedges may be sourced by reference to the underlying hedged inventory property

The IRS ruled in [PLR 202140016]() that a taxpayer (Taxpayer) can source gains or losses arising from certain commodity derivative hedging transactions (Commodity Derivatives) by reference to the source of gains or losses derived from the sale of the underlying inventory property being hedged. The IRS made its ruling by analogy to the inventory sourcing rules.

In ruling that gains and losses from the Commodity Derivatives may be sourced by reference to the underlying hedged inventory property, the IRS, relying on *Bank of America*, focused on the substance of the transactions at issue. In doing so, the IRS highlighted that a residence-based sourcing outcome under Section 865(a) would result in US-sourced gain or loss on the Commodity Derivatives, and either US- or foreign-source gain or loss on the underlying hedged inventory property. The IRS stated this result would be inconsistent with the substance of the Commodity Derivatives as IRC Section 1221(a)(7) hedges of the underlying inventory property.

Although PLR 202140016 solely addresses hedges of inventory property, the ruling may provide insight on the source of gain or loss from hedges of other types of property. In focusing on the substance of the transaction at issue, the IRS dismissed application of rules that would have created inconsistencies in the sourcing of any items of income or loss from the Commodity Derivatives compared to sourcing those items on the underlying hedged transactions.

This is consistent with the general matching rules for character and timing found in Section 1221(a)(7) and Reg. Section 1.446-4. Because those provisions relate to character and timing, respectively, the IRS did not specifically rely on these authorities as support for its conclusion. Instead, the IRS primarily relied on the Supreme Court's characterization of similar contracts as surrogates for inventory property. While that analysis may not apply to all hedging transactions, sourcing gains and losses from hedging transactions by reference to the rules for the underlying hedged item is a sensible result that is consistent with the matching principles applicable to hedging transactions.

IRS revises Forms W-8ECI, W-8BEN-E, W-8BEN

The IRS has updated Forms W-8ECI, W-8BEN-E, W-8BEN (the Forms W-8) and their accompanying instructions. The Forms W-8 have October 2021 revision dates and are final. Form W-8IMY remains in draft.

The Forms W-8 reflect changes to the Chapter 3 regulations, which were introduced in final regulations issued in December 2019 (TD 9890), following updates of the forms in June and July 2017.

The other updates primarily relate to new withholding requirements under Section 1446 on sales of interests in publicly traded partnerships (PTPs) and distributions made by PTPs. The release of the updated Forms W-8 began after the Treasury Department and IRS released Notice 2021-51, which delayed the effective dates of certain parts of the Section 1446 regulations, including the new PTP withholding requirements, to 1 January 2023 (from 1 January 2022).

Withholding agents can continue to accept the prior versions of Forms W-8 until the end of six full months after the revision date shown on the updated Form W-8 (unless the IRS provides otherwise). Based on the timing of the updated Forms W-8 and the October revision date, updated Forms W-8 must be used beginning 1 May 2022, absent guidance to the contrary. Forms obtained before the cutoff date continue to be valid for the usual validity period.

Due to the timing of the final versions, withholding agents may continue to receive the prior version of Forms W-8 from clients during early 2022 and can continue relying on unexpired prior-version forms. The Section 1446 updates to Forms W-8IMY and W-8ECI are needed for purposes of the PTP withholding requirements on payments made after 31 December 2022.

Therefore, withholding agents making payments subject to Section 1446 withholding may need to consider a Section 1446-specific solicitation in 2022 to obtain updated Forms W-8 from withholding agents' clients who have not provided the latest version of their form.

FinCEN provides FBAR relief to victims of recent natural disasters giving them until 31 December 2021 to file

On 5 October 2021, the Financial Crimes Enforcement Network (FinCEN) released FinCEN Notice 2021-10, further extending the filing deadline for the Reports of Foreign Bank and Financial Accounts (FBARs) for certain individuals who live in, have businesses in, or have records in areas affected by certain specified recent natural disasters.

The Notice does not purport to address entity filings, but individuals working on entity filings may call FinCEN, which indicated that it will work with any filers not explicitly covered by the Notice. The disasters referenced by the Notice include Hurricane Ida, the California wildfires, Tennessee severe storm and flooding, Michigan severe storms, flooding and tornadoes, and Tropical Storm Fred. FinCEN is offering relief to these individuals by extending the filing deadline to 31 December 2021, for calendar year 2020 FBARs.

The 2020 FBAR otherwise would be due on or before 15 October 2021.

Transfer pricing news

IRS maintaining policy on 'telescoping' in APA and MAP cases while trying to alleviate administrative burden, official says

The IRS is maintaining its stance on telescoping but studying ways that it can alleviate the taxpayers' administrative burden, according to an October 2021 article in the tax press quoting John Hughes, director of the IRS's Advance Pricing and Mutual Agreement Program (APMA).

In October 2020, APMA updated the parameters that it follows in mutual agreement procedure (MAP) and advance pricing agreement (APA) cases, which significantly restricted the use of "telescoping" of results in MAPs and APAs.

Telescoping means reflecting an income tax adjustment in a year other than the year to which the adjustment relates. Taxpayers sometimes request this departure from annual accounting in a MAP or APA to relieve them from the administrative burden of filing multiple amended federal and state income tax returns.

The Tax Cuts and Jobs Act (TCJA) changed substantive provisions of the Internal Revenue Code beginning in 2018, so different tax rates and other rules may apply to similar related-party transactions, depending on which year they occur. Under the new APMA parameters, taxpayers must generally amend the applicable years federal income tax returns rather than reflect the changes to taxable income in the most current tax year. For cases with pre- and post-TCJA years, the IRS said in its 2020 update that changing the US taxpayer's taxable income under a competent authority resolution would likely impact the substantive calculation of tax, so APMA's updates to the telescoping parameters were intended to promote compliance with the TCJA's changes to US tax law.

According to the APMA director, "If it's a relatively modest amount that's involved, then we're able to collapse some of the past years into that pre-2018 period … [b]ut if the amounts are substantial, then the ramifications for attributes and rate differentials are such that we need to be hewing closer to the kind of year-by-year accounting that is so important for TCJA."

Telescoping results from pre-TCJA years into post-TCJA years continues to be limited to situations where the change to the US taxpayer's taxable income resulting from a competent authority resolution is $10 million or less.

Final Section 987 foreign currency regulations, certain related final regulations deferred by one additional year

The IRS in October announced in Notice 2021-59 its intention to defer by one additional year the applicability date of final regulations under Section 987 and certain related final regulations. The affected regulations will be amended to apply to tax years beginning after 7 December 2022.

Cyprus clarifies US-Cyprus CAA for exchange of CbC reports

The Cypriot Tax Department on 7 October 2021 publicly announced that the US-Cyprus bilateral Competent Authority Agreement (CAA) for the exchange of Country-by-Country (CbC) reports, which is still under negotiation, is expected to be effective for Reporting Fiscal Years (RFYs) starting on or after 1 January 2021.

According to the release from the Cypriot Tax Department, "in the case where the Ultimate Parent Entity of a Multinational Group of Enterprises (MNEs) is tax resident in the United States of America, the secondary filing mechanism should be triggered for Reporting Fiscal Years starting on or after 1 January 2020 and before 1 January 2021."

OECD developments

MLI Conference of the Parties issues two opinions re MAP implementation and entry into effect of arbitration rules

On 30 September 2021, the OECD published two opinions of the Conference of the Parties of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (MLI). The opinions of the Conference of the Parties seek to address questions arising as to the interpretation or implementation of the MLI to ensure its proper interpretation and application.

The first opinion addresses the application of the MLI provisions on the Mutual Agreement Procedure (MAP) where questions were raised on the compatibility of existing treaty rules with those provisions. The second opinion addresses the application of the entry into effect of Part VI (Arbitration) and seeks to clarify when the provisions of Part VI will apply to existing cases in specific situations.

OECD releases outcomes of fourth phase of peer reviews on BEPS Action 13

On 18 October 2021, the OECD released the compilation of the outcomes of the fourth phase of peer reviews (the Compilation) of the minimum standard on Action 13 (*Transfer Pricing Documentation and Country-by-Country Reporting*) of the BEPS project.

Where legislation is in place, the implementation of CbCR has been found to be largely consistent with the Action 13 minimum standard. However, 33 jurisdictions have received a general recommendation to either put in place or finalize their domestic legal or administrative framework. Of the jurisdictions that have already introduced the legislation, 43 jurisdictions received one or more recommendations to make improvements to specific areas of their framework. Moreover, 83 jurisdictions have multilateral or bilateral competent authority agreements in place, which results in more than 3,000 exchange relationships. In addition, 84 jurisdictions have provided detailed information about the use of CbC reports, enabling the Inclusive Framework to obtain sufficient assurance that measures are in place to ensure the appropriate use.

The Compilation highlights the significant progress made with respect to implementation of CbCR requirements around the world and the increased sharing of tax and financial data among tax authorities as a result. Taxpayers should therefore expect that information provided to one tax authority through the filing of a CbC report will be shared with other relevant jurisdictions.

In addition, plans for future deployment of OECD risk assessment tools, together with the existing use of CbCR data analytics by many tax authorities, underscores the need for MNEs to be confident that their data governance approach is sufficient to meet both current and future demands.

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

On 18 October 2021, the OECD released the seventh batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Brazil, Bulgaria, China, Hong Kong, Indonesia, Russia, and Saudi Arabia (the assessed jurisdictions) of the BEPS minimum standard on dispute resolution under Action 14 of the BEPS project.

The Stage 2 reports include four main sections: (i) preventing disputes; (ii) availability and access to MAP; (iii) resolution of MAP cases; and (iv) implementation of MAP agreements. They cover any relevant developments from the assessed jurisdictions between 1 January 2019 and 31 July 2020.

The Stage 2 reports focus on evaluating the progress made by the assessed jurisdictions in addressing any of the recommendations that resulted from the Stage 1 peer review reports that were released on 28 November 2019. The reviews reflect that Brazil and Hong Kong have addressed none of the deficiencies identified in the Stage 1 review. Apart from the limited progress in Brazil and Hong Kong, the outcomes of this batch of Stage 2 peer review reports generally demonstrate positive changes across the assessed jurisdictions.

According to the peer review reports, Bulgaria, Indonesia and Saudi Arabia have addressed most of the deficiencies identified in the Stage 1 peer review. China and Russia addressed some of the identified deficiencies.

OECD releases PRC Stage 2 peer review report on implementation of Action 14 minimum standard

The OECD on 18 October 2021 released the Stage 2 peer review report of the People's Republic of China relating to the outcome of the peer monitoring of the implementation of the BEPS minimum standard under Action 14 on improving tax dispute resolution mechanisms.

Overall, the report concludes that China meets most of the elements of the Action 14 minimum standard. Where it has deficiencies, China has worked to address some of them, which has been monitored in Stage 2 of the process. In this respect, China has resolved some of the identified deficiencies.

United Nations

UN releases MAP and Tax Dispute Resolution Handbook

In October 2021, the United Nations (UN) Committee of Experts on International Cooperation in Tax Matters (the Committee) launched, among other documents, a Handbook on the Avoidance and Resolution of Tax Disputes (the Handbook). The Handbook is available in electronic form in English and Spanish. It provides a comprehensive guide to various mechanisms for avoiding and resolving tax disputes.

The Handbook has been drafted with a focus on the least developed countries and their particular challenges. However, it can be a useful guide for all tax administrations, as well as for taxpayers interested in a deeper dive into tax dispute resolution mechanisms.

While the Handbook is not a binding legal instrument, it can serve as a primer on tax dispute resolution and offers valuable interpretative guidance, as well as insight into the challenges that tax authorities in developing countries are facing when dealing with tax disputes.

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