Year-in-Review

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This special issue of the Washington Dispatch is a compilation of significant US international tax developments and guidance issued during the period of 1 January through 31 December 2021, addressing inbound and outbound taxation. The material is divided by subject area with most recent events listed first.

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Legislation

Biden Administration's Build Back Better legislation stalls in Congress; Senate Finance Committee releases updated international tax provisions

On 19 December 2021, Senator Joe Manchin (D-WV) said on a Sunday morning news show that he would not support the proposed *Build Back Better Act*, ending consideration of the Biden Administration's marquee climate, tax, and spending proposals, at least for 2021. In a "Dear Colleague" letter that followed Sen. Manchin's announcement, Senate Majority Leader Chuck Schumer (D-NY) said the Senate would vote on a "modified version of the House-passed BBBA" early in the new year.

Before Senator Manchin's announcement, Senate Finance Committee Chair Ron Wyden (D-OR) had released on 11 December 2021, updated text of the Finance Committee's title of the *Build Back Better Act*. The updated text largely retained the international tax proposals from the version of the *Build Back Better Act* released on 28 October 2021 and later passed by the House (the House Bill), but included some significant technical changes to these rules.

The following discusses some of the highlights of the Finance Committee's updated international tax text.

Interest expense limitations

The Finance Committee proposal retains the basic structure of Section 163(n) from the House Bill, limiting deductions for net interest expense of a specified domestic corporation (SDC) to 110% of its net interest expense multiplied by the allowable percentage. The Finance Committee proposal maintains the same definition of SDC and international financial reporting group (IFRG), so Section 163(n) would continue to apply to foreign and US-parented multinationals alike.

Unlike prior iterations of Section 163(n), however, the committee proposal would permit taxpayers to elect to alter how the SDC's allocable share of the IFRG's book net interest expense (a component of the allowable percentage) is computed.

Subpart F and GILTI

The Finance Committee proposal retains, with no substantive modifications, the House Bill's overhaul of the global intangible low-taxed income (GILTI) rules, which would require a US shareholder to compute its GILTI amount on a country-by-country basis, among other things. The Committee proposal also retains the House Bill's changes to the subpart F income regime to generally limit foreign base company sales and services income rules to transactions involving a US tax resident, directly or by way of a branch or pass-through entity.

Consistent with the House Bill, the Committee proposal would, for both GILTI and subpart F income purposes, substantially revise the Section 951 pro rata share rules to address both a change in controlled foreign corporation (CFC) ownership during the year and dividends paid by the CFC during the year.

Dividends from foreign corporations

The House Bill would have limited the Section 245A deduction to dividends received from CFCs, whereas current law allows the deduction for dividends received from "specified 10%-owned foreign corporations" (STFCs). The Finance Committee proposal, in contrast, would allow a Section 245A deduction for dividends from STFCs that are not CFCs but would reduce the amount of the deduction from 100% of dividends received to 65% of dividends received. The Committee proposal would retain the election, included in the House Bill, to permit foreign corporations and their US shareholders to treat foreign corporations as CFCs.

The Committee proposal would also allow a CFC's US shareholder to claim a Section 245A deduction for its pro rata share of subpart F income that is attributable to eligible dividends received by the CFC from an STFC. Considering generally applicable exceptions from subpart F income, the deduction in most cases would equal 65% of the US shareholder's pro rata share of eligible dividends.

Foreign tax credits

The Committee proposal retains, with limited technical corrections, the House Bill's modifications to the foreign tax credit (FTC) rules, including a country-by-country FTC limitation for each separate category, the repeal of the foreign branch category, a GILTI category carryforward, a limitation on the allocation of expenses to the GILTI category for purposes of the FTC limitation, and other changes.

As discussed previously, the Committee proposal would limit the Section 245A dividends received deduction (DRD) to 65% (the applicable percentage under Section 243(a)(1) for a 20%-owned corporation of the foreign-source portion of a dividend received by a US shareholder from an SFTC that is not a CFC). Accordingly, the Committee proposal would amend Section 245A(d) to deny a credit or deduction for foreign taxes paid or accrued with respect to the applicable percentage for which the DRD is allowed.

The Committee proposal also includes a technical correction to the covered asset disposition rules, which would extend the principles of Section 338(h)(16) to transactions treated as asset dispositions for US tax purposes but as stock dispositions (or disregarded) for foreign tax purposes. Although intended to apply solely for FTC purposes, a cross-reference in the House Bill would apply the rule for purposes of all the Code's international income tax provisions.

BEAT

The Finance Committee proposal retains the general framework of Section 59A of the House Bill but would further modify the provision as it relates to COGS and payments with respect to inventory.

Under new Section 59A(d)(5) in the House Bill, the definition of base erosion payment would be expanded to include (i) certain indirect costs that are paid or accrued by the taxpayer to a foreign related party and are required to be capitalized to inventory under Section 263A, and (ii) certain amounts paid to foreign related parties for inventory to the extent the amounts exceed specified direct and indirect costs. The Finance Committee proposal would treat these amounts as base erosion tax benefits, which is relevant for determining modified taxable income and the base erosion percentage.

Corporate alternative minimum tax

Consistent with the House Bill, the Committee proposal would implement a new 15% corporate alternative minimum tax based on book income for companies that report over $1 billion in profits to shareholders. The Committee proposal introduces new adjustments for determining a taxpayer's adjusted financial statement income (the base to which the 15% rate would apply). Notably, taxpayers would disregard any book income, cost, or expense associated with a defined benefit plan.

Anti-inversion rules in Section 7874

The Finance Committee proposal would significantly expand the anti-inversion rules in Section 7874 by reducing the applicable continuing ownership thresholds and by expanding the types of acquisitions subject to these rules (which are known as "domestic entity acquisitions"). The House Bill did not include any expansion of Section 7874.

For the continuing ownership thresholds, the Committee proposal would treat a foreign acquiring corporation as a "surrogate foreign corporation" (potentially subjecting both the shareholders of the foreign acquiring corporation and the acquired domestic entity to adverse consequences) based on continuing ownership of more than 50% by vote or value (as compared to continuing ownership of at least 60% by vote or value under current law). It would also treat a foreign acquiring corporation as a domestic corporation based on continuing ownership of at least 65% by vote or value (as compared to at least 80% by vote or value under current law).

House passes Build Back Better Act budget reconciliation bill; action moves to Senate

The House on 19 November 2021 passed the proposed *Build Back Better Act* (H.R. 5376) reconciliation bill in a 220 to 213 vote, following numerous delays and missed deadlines.

The House-passed *Build Back Better Act* (BBBA) included significant changes to the international tax provisions of the Internal Revenue Code. These and other tax changes are generally intended to fund expanded social programs such as health coverage, affordable housing, universal pre-kindergarten and childcare, clean energy and climate investments, among other proposed spending provisions. Although largely consistent with the House Ways & Means Committee draft that was released on 13 September, the proposed international tax provisions in the House-passed BBBA included important technical changes and updates to the effective dates to make the proposals prospective only.

An EY Global Tax Alert provides a review of the House-passed BBBA's international tax provisions and details the technical and effective date changes as compared to the original proposals released by the House Ways and Means Committee in September 2021.

President Biden signs infrastructure legislation including new cryptocurrency reporting

President Joe Biden signed the long-awaited *Infrastructure Investment and Jobs Act* (H.R. 3684) into law on 15 November 2021, following passage in the House on 5 November and by the Senate last summer.

The legislation cleared the way for about $550 billion in new spending on highway and other projects. Worth noting, the infrastructure bill will impose information-reporting requirements on sales of cryptocurrency and other "digital assets." Cryptocurrency and other "digital assets" sold by customers of "brokers" will be subject to Form 1099-B reporting and cost-basis reporting.

The legislation specifically amends the Internal Revenue Code to make certain changes including expanding the definition of a broker, defining "digital assets," and applying the cost-basis reporting regime for securities to digital assets. The amendments will be effective for information returns filed in 2024 for the 2023 calendar year.

President Biden releases pared down budget reconciliation framework

President Joe Biden on 28 October 2021 announced a new budget reconciliation framework that outlined 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 – was essentially a stripped-down version of the House bill from September 2021 that includes new revenue offsets reflecting Senator Kyrsten Sinema's (D-AZ) opposition to tax rate increases.

A White House press release stated that the package was "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 included 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 did not include a number of social spending programs, such as paid family and medical leave due to opposition from centrist Democrats. It also did 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 proposed tax on billionaires' unrealized gains, due to concerns raised by Senator Joe Manchin (D-WV) and other Democrats.

International tax changes remained in the package. 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 reduced 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 called for "imposing a penalty rate on any foreign corporations based in countries that do not" abide by the OECD/G20's Inclusive Framework Agreement on Global Tax Reform, and in the House bill the BEAT rate would be 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 was dropped, with changes to BEAT proposed instead.

The revised bill retained 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, removed 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 would apply to taxable years beginning after 31 December 2022.

House Ways & Means Committee reports out reconciliation bill with major international tax proposals

The House Ways & Means Committee approved its *Build Back Better Act* tax increase package on 15 September 2021 after a lengthy two-day markup during which Democrats defeated several Republican amendments on international tax issues and adopted none.

On 13 September, the House Ways and Means Committee released the tax portion of its $3.5 trillion budget reconciliation bill (HW&M proposal) and a section-by-section summary of the tax proposals. As with President Joe Biden's Green Book issued in May and Senate Finance Committee Chair Ron Wyden's (D-OR) proposal introduced

in August, the HW&M proposal contains significant changes to the rules for global intangible low-taxed income (GILTI), foreign tax credits (FTC) and the base erosion and anti-abuse tax (BEAT). Additionally, the HW&M proposal contains many additional provisions with far-reaching implications. With important exceptions, most of these provisions would be effective for tax years beginning after 31 December 2021.

While prospects for both the reconciliation bill are unclear (as of the date of this publication), the HW&M proposal offers important details of potential changes that were not included in the Treasury Green Book or in Senator Wyden's discussion.

Many of these provisions would be retroactive to years beginning after 31 December 2017.

The following provides an overview of the proposed international tax-related provisions in the bill.

Rate changes

The HW&M proposal would lower the Section 250 deduction percentage for GILTI from 50% to 37.5%. When combined with the proposed corporate tax rate of 26.5%, the resulting effective rate on GILTI would be 16.5625%. Similarly, the Section 250 deduction percentage for foreign-derived intangible income (FDII) would decrease from 37.5% to 21.875%, yielding an effective FDII rate of 20.7%. The rate changes would generally apply to tax years beginning after 31 December 2021, with special transition rules for fiscal-year taxpayers.

GILTI

The HW&M proposal would require a US shareholder to compute its GILTI inclusion on a country-by-country basis by aggregating the items (e.g., net controlled foreign corporation (CFC) tested income, qualified business asset investment (QBAI), etc.) of taxable units within a single foreign country and computing a separate GILTI amount for each country. Consequently, tested losses in one country would not be allowed to reduce the GILTI inclusion attributable to tested income in another country. However, the HW&M proposal would allow tested losses to be carried forward to the succeeding tax year and offset that year's taxable income, if any.

Other notable changes to the GILTI regime include adding foreign oil and gas extraction income (FOGEI) into tested income and reducing a US shareholder's net deemed tangible return from 10% to 5% of QBAI (except for US possessions like Puerto Rico, whose return would remain 10%).

Foreign tax credit limitation

The HW&M proposal would determine a US shareholder's FTC limitation for all baskets on a country-by-country basis, thus preventing excess FTCs from high-tax jurisdictions from being credited against income from low-tax jurisdictions. The proposal would also repeal the separate limitation category for foreign branch income.

The current 20% haircut under Section 960(d) for foreign taxes attributable to GILTI inclusions would decrease to 5%. When combined with the changes to the US corporate rate and the reduced Section 250 deduction percentage, taxpayers would need to pay an effective foreign tax rate of 17.43% in any given country to avoid paying residual US tax on GILTI inclusions from that country. Any excess FTCs, including excess GILTI FTCs, would be carried forward five years, with no carryback. This contrasts with current law, which prohibits any carryover for GILTI FTCs, while allowing a 10-year carryforward and 1-year carryback for non-GILTI FTCs.

For purposes of determining foreign-source taxable income, only the Section 250 deduction would be allocable to GILTI inclusions; none of the taxpayer's other expenses (such as interest and stewardship) would be allocable to the GILTI basket or reduce the GILTI FTC limitation.

Covered asset dispositions

The HW&M proposal would extend the principles of Section 338(h)(16) to transactions treated as an asset disposition for US tax purposes but as a stock disposition (or disregarded) for foreign tax purposes. Consequently, the source and character of any item resulting from a covered asset disposition would be determined for FTC purposes as if the seller had sold or exchanged stock (determined without regard to Section 1248).

Subpart F and pro rata share

Foreign base company sales and services income currently taxed as subpart F income would be taxed as GILTI tested income unless the transaction involves a US resident, directly or by way of a branch or pass-through. The pro rata share rules in Section 951 would also be substantially revised to provide more detailed rules addressing both a change in CFC ownership during year and dividends paid by the CFC during the year.

Specifically, the pro rata share of subpart F income would no longer be determined on the last day of the tax year in which the foreign corporation is a CFC. Instead, the pro rata share would change to potentially cause an inclusion when the

US shareholder does not own shares at the end of the year and, more precisely, reduce inclusions only when dividends during the year are subject to tax. The provision generally would apply prospectively but retroactively for distributions occurring after 31 December 2017.

Interest expense limitations

The HW&M proposal includes a new limitation on interest deductibility for domestic corporations that are members of an international financial reporting group. The proposal is similar to one proposed, but not enacted, under the *Tax Cuts and Jobs Act of 2017*, and is generally intended to limit the interest expense of a multinational group's US operations to its proportionate share of the group's overall interest expense. The US share of the group's interest would generally be determined by comparing a domestic corporation's earnings before interest, taxes, depreciation, depletion and amortization (EBITDA) to the worldwide group's EBITDA. Unlike President Biden's Green Book, proposed Section 163(n) would appear to apply to both US and non-US based multinationals.

Beyond the proposed Section 163(n), the HW&M proposal would modify the existing Section 163(j) limitation to apply at the partner, rather than partnership, level. Additionally, a newly proposed Section 163(o) would limit the carryover period for amounts disallowed under Sections 163(n) or 163(j) to five years. For these purposes, interest would be allowed as a deduction on a first-in, first-out basis.

Dividends from foreign corporations

The HW&M proposal would limit the Section 245A deduction to dividends received from CFCs, whereas current law allows the deduction for dividends received from "specified 10%-owned foreign corporations." The proposal would apply to distributions made after enactment. US shareholders of a foreign corporation could jointly elect, however, to treat a foreign corporation as a CFC, potentially allowing dividends from otherwise non-CFCs to be eligible for the Section 245A deduction. Such an election would subject the US shareholders to GILTI and subpart F inclusions from the foreign corporation.

The HW&M proposal would also authorize Treasury to deny the Section 245A deduction for dividends paid out of earnings generated in (i) certain related-party "gap period" transactions, or (ii) related-party stock transfers that reduced a US shareholder's pro rata share of subpart F or tested income. This authority would apply retroactively to distributions made after 31 December 2017.

Additionally, the HW&M proposal would amend Section 1059 to require US shareholders to reduce their basis in CFC stock (and potentially recognize gain) upon receipt of CFC dividends paid out of earnings and profits earned (or attributable to gain on property that accrued) during a "disqualified period." A disqualified period would be any period during which the foreign corporation was not a CFC or did not have US shareholders.

FDII

The HW&M proposal would retain FDII but reduce the Section 250 deduction percentage. Additionally, the proposal would make certain changes to the definition of deduction-eligible income (DEI), an FDII input. DEI would exclude income that would be foreign personal holding company income if earned by a CFC. The revised definition would be retroactively effective to tax years beginning after 31 December 2017.

BEAT

The HW&M proposal would significantly modify Section 59A while retaining its general framework. Specifically, the proposal would increase the BEAT rate from 10% to 12.5% for tax years beginning after 31 December 2023, and before 1 January 2026; for tax years beginning after 31 December 2025, the rate would increase from 12.5% to 15%. Additionally, the base erosion percentage threshold would be eliminated prospectively for any tax year beginning after 31 December 2023.

The HW&M proposal would modify the definition of a "base erosion minimum tax amount," so that it would equal the excess (if any) of "base erosion tax liability" over regular tax liability for the tax year. Thus, tax credits would be taken into account when determining the base erosion minimum tax.

The proposal would treat certain payments with respect to inventory as base erosion payments and therefore exclude them from the calculation of COGS for purposes of determining modified taxable income. The expanded definition of base erosion payment would generally include certain indirect costs that are paid or accrued by the taxpayer to a foreign related party and are required to be capitalized to inventory under Section 263A. Furthermore, the expanded definition would include certain amounts paid to foreign related parties for inventory to the extent the amounts exceed specified direct and indirect costs incurred by the related party and attributable to the property.

The HW&M proposal would provide an exception from treatment as a "base erosion payment" for payments subject to an effective rate of foreign income tax that equals or exceeds the applicable BEAT rate (currently 10% and 12.5% for tax years after 31 December 2023). The HW&M proposal would also provide an exception from treatment as a "base erosion payment" for payments that are subject to US income tax.

Other issues

Other notable international tax elements of the HW&M proposal include the following:

- Reinstating Section 958(b)(4) to prohibit downward attribution from a foreign corporation, retroactive to 31 December 2017, and adding new Section 951B to more narrowly allow downward attribution only to foreign-controlled US corporations
- Repealing the one-month deferral election under Section 898(c)(2) for foreign corporations with tax years beginning after 30 November 2021
- Delaying the effective date of mandatory capitalization of research and experimental expenditures to tax years beginning after 31 December 2025
- Clarifying that gains from or distributions by a Domestic International Sales Corporation (DISC) or Foreign Sales Corporation (FSC) to a foreign shareholder are treated as effectively connected with a trade or business of a permanent establishment
- Retroactively removing the application of the Section 78 gross-up to Section 960(b)
- Revising Section 905(c) to broaden the scope of a FTC and shorten the time to elect to claim it
- Expanding Section 382(d) to cover carryovers of GILTI net tested losses when ownership changes

Senate Finance Committee Chairman releases partnership tax proposals

Senate Finance Committee Chairman Ron Wyden on 10 September 2021 released draft partnership tax legislation that addresses "partnership tax complexity." The major proposal reportedly would raise $172 billion and is described as being on the "revenue menu" for budget reconciliation. A press release accompanying the draft legislation describes the proposals as closing "loopholes that allow wealthy investors and mega-corporations to use pass-through entities, primarily partnerships, to avoid paying their fair share of taxes."

Senator Wyden had been critical of partnership tax rules and low audit rates during a June hearing with IRS Commissioner Rettig.

The House Ways and Means Committee Build Back Better tax proposals reported out of committee on 15 September also include significant changes to the US partnership tax rules.

Senate Finance Committee Chairman, members release international tax discussion draft

On 25 August 2021, Senate Finance Committee Chairman Ron Wyden (D-OR), along with Senators Sherrod Brown (D-OH) and Mark Warner (D-VA), issued a discussion draft of legislative text (Discussion Draft) detailing their previously released April 2021 international tax framework, which would amend the current rules on global intangible low-taxed income (GILTI), foreign-derived intangible income (FDII), the base erosion and anti-abuse tax (BEAT), and other rules.

The Committee Chairman noted earlier that the Wyden-Brown-Warner international tax framework would be among the proposals the committee would consider in developing a budget reconciliation package.

The Discussion Draft provides important details and the first draft of actual legislative text for potential changes to the US international tax system proposed by Chairman Wyden and other Democrats on the Senate Finance Committee.

Nevertheless, many practical and policy details remain to be determined, including the GILTI tax rate and how the BEAT might be changed to incorporate aspects of the Biden Administration's Stop Harmful Inversions and Ending Low-Tax Developments (SHIELD) proposal.

The Discussion Draft would:

- Establish a mandatory country-by-country high-tax exclusion system for GILTI, subpart F, and foreign branch income
- Potentially extend the foreign tax credit haircut (currently applicable in the GILTI context) to the subpart F and foreign branch income contexts
- Require certain research and experimentation and stewardship expenses to be allocated to US-source income
- Modify the rules for determining BEAT liability such that certain "base erosion income" would be subject to a different, and higher, rate

- Leave open the possibility that certain (currently undefined) modifications to BEAT may be made to incorporate the purposes and policies of the Biden Administration's SHIELD proposal
- Base the FDII regime on certain domestic innovation expenditures

The provisions are generally proposed to be effective for tax years beginning after the date of enactment with the notable exception of the modifications to FDII, for which no proposed effective date is provided.

Infrastructure legislation, FY'22 budget resolution move forward

The Biden Administration's and Senate Democrats' two-track policy to pass infrastructure legislation and an FY2022 budget resolution bore fruit in August. First, after months of negotiation, the Senate on 10 August approved (69-30) the *Infrastructure Investment and Jobs Act* (H.R. 3684), a bipartisan infrastructure package that would provide $550 billion in new spending that, combined with routinely authorized transportation funding, would cost $1 trillion over five years.

The White House and bipartisan Senate negotiators on 28 July 2021 had announced that they had reached agreement on the infrastructure package. The agreement was the culmination of months of talks among the parties. The Senate later that day held a procedural vote to move forward on a bipartisan infrastructure bill (HR 3684); 17 Republicans voted in favor.

The bill makes investments in roads and bridges, broadband, water, and power (paid for with unused COVID funds), IRS cryptocurrency reporting, pension smoothing, healthcare, and other provisions.

On 11 August, after a marathon 15-hour voting session, the Senate approved (50 to 49) the FY2022 budget resolution with reconciliation instructions (S. Con. Res. 14), clearing the way for the drafting of a $3.5 trillion package of Democratic priorities that can pass with a simple majority vote in the Senate.

The resolution set revenue and spending targets for a budget reconciliation bill but did not prescribe policy details. Those details were to be worked out by various Senate and House Committees within the confines of their reconciliation instruction targets. The Budget Resolution provided a target date of 15 September for the committees to submit their reconciliation legislation, though there was no penalty for missing the deadline.

In response to the Senate action, the House returned to Washington from its summer recess and adopted the Senate-passed FY2022 budget resolution on 24 August. The final House vote (220-212, along party lines) reflected a last-minute agreement among House Democratic leadership and House Democratic moderates that called for a vote on the trillion-dollar Senate-passed infrastructure bill by 27 September.

Senate-passed infrastructure bill would impose information-reporting requirements on sales of cryptocurrency, other digital assets

Cryptocurrency and other "digital assets" sold by customers of "brokers" would be subject to Form 1099-B reporting and cost-basis reporting if the *Infrastructure Investment and Jobs Act* (the bill) becomes law. The bill, which passed the Senate on 10 August 2021, would amend the Internal Revenue Code to:

- Expand the definition of a broker
- Define "digital assets"
- Apply the cost-basis-reporting regime for securities to digital assets
- Require brokers to report the basis of digital assets transferred to their customers or other non-brokers to the IRS
- Require digital assets to be treated as "cash" when received in the course of a trade or business

The amendments would be effective for information returns filed in 2024 for the 2023 calendar year.

Given the considerable discussion in the Senate in regard to the crypto provision, there may be further efforts by Congress in the future to address a difficult-to-understand issue that is attracting increasing political heft.

Finance Committee Chairman introduces bill that would change tax treatment of financial derivative transactions

On 5 August 2021, Senate Finance Committee Chairman Ron Wyden (D-OR) introduced the *Modernization of Derivatives Act* (MODA), which would change the tax treatment of financial derivative transactions. Senator Wyden has previously introduced similar bills.

Financial derivatives instruments (Derivatives, as defined under MODA) are contracts that have a value based on underlying property or benchmarks. The most common types of Derivatives are options, forwards, futures, and notional principal contracts (NPCs or "swaps").

The current tax rules governing Derivatives were developed in a piecemeal fashion over time, in tandem with the development of new financial derivative instruments. This piecemeal development resulted in complex tax rules, which create tax-planning opportunities.

Given the patchwork design of applicable tax regimes, derivatives can be structured or combined to be economically similar to other types of derivatives but with different tax consequences.

The proposed legislation generally aims to replace many of the current statutes and regulations addressing the tax treatment of specific Derivatives with a new regime that uses one timing rule, one character rule and one sourcing rule for all transactions. Under the proposed legislation, MODA would make the following changes to Derivatives:

- Require annual mark-to-market accounting for all transactions
- Treat all gains or losses from Derivatives and certain related assets as ordinary
- Determine the source of tax items based on the taxpayer's country of residence, incorporation or organization
- Introduce the Investment Hedging Units (IHUs) concept

Specifically, MODA would repeal Code Sections 1233, 1234, 1234A, 1234B, 1236, 1256, 1258, 1259 and 1260 (and associated regulations). In their place, MODA would add Section 491, Rules for Treatment of Derivatives; Section 492, Investment Hedging Units; Section 493, Derivative Defined; and Section 494, Tax Treatment of Contract Similar to Derivatives.

While the certainty of a unitary character and timing regime described in the MODA proposals may seem appealing, the definition of Derivative is quite broad and appears to include transactions not historically viewed as financial derivative transactions.

The broad scope of MODA would require newly affected taxpayers to: (1) develop and implement policies and systems to compute gain or loss that is based on valuations in the absence of a transfer or termination; and (2) comply with the annual mark-to-market requirement or determine the delta relationship between two positions for purposes of the IHU and revised straddle rules proposals under MODA.

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 Treasury Green Book released this spring (see next page), 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.

House passes corporate disclosure package requiring CbC tax reporting for multinationals

The 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 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."

Treasury Green Book offers new details on international tax proposals

Treasury on 28 May 2021 released its FY2022 explanation of the Biden Administration's revenue proposals (the Green Book), offering new details on the various proposals included in the President's "Made in America" tax plan.

The Made in America tax plan was first released in March 2021 and was followed by a Treasury report detailing the Administration's corporate tax proposals, including increasing the corporate tax rate from 21% to 28% and significant changes to international tax provisions. The major international tax proposals include:

- Increased tax rates and other changes to the regime for global intangible low-taxed income (GILTI)
- Country-by-country limitations on foreign tax credits (FTCs)
- Repeal of the deduction for foreign-derived intangible income (FDII)
- Replacement of the base erosion and anti-abuse tax (BEAT) with a newly proposed "SHIELD" (Stopping Harmful Inversions and Ending Low-tax Developments)
- Expanded rules targeting inversions
- A new minimum tax on book income
- Limits on interest deductions for disproportionate borrowing in the US
- Treatment of dispositions of "specified hybrid entities" as stock sales for certain purposes

Most of the proposals would be effective for tax years beginning after 31 December 2021, though several are proposed to be effective for transactions completed after the date of enactment. The proposal to repeal BEAT and introduce SHIELD would be effective for tax years beginning after 31 December 2022.

GILTI/Subpart F

The Made in America tax plan would increase the tax rate on GILTI from 10.5% to 21% by reducing the Section 250 deduction to 25% from 50%. Furthermore, the plan would eliminate the exemption from GILTI of a net deemed tangible income return (qualified business asset investment), currently equal to 10% of a US shareholder's share of CFC adjusted basis in qualified business asset investments.

The Green Book description would repeal the high tax exception for both GILTI and subpart F. It would also expand Section 265 to disallow deductions allocable to foreign gross income that is exempt from tax (such as income eligible for a dividends-received deduction under Section 245A) or foreign gross income subject to a lower rate through a deduction (such as a Section 250 deduction on GILTI).

Country-by-country FTC limitation

The Green Book would determine a US shareholder's GILTI inclusion and FTC limitation on a country-by-country basis, thus preventing excess foreign tax credits from high-tax jurisdictions from being credited against GILTI inclusions from low-tax jurisdictions. The Green Book would also expand the country-by-country limitation to branch income.

For a foreign parented controlled group, the Green Book would allow US shareholders to take into account taxes paid by a foreign parent under an income inclusion rule that is consistent with an OECD/Inclusive Framework Pillar Two agreement if a final consensus is reached at the OECD.

FDII and jobs incentives

The Green Book would repeal the FDII deduction and replace it with tax-based incentives for research and development (R&D) in the United States. No details are provided on how domestic R&D would be incentivized under the Green Book proposal, though the budget scoring indicates new incentives would match the revenue raised by eliminating FDII.

The Green Book also proposes to create a new 10% general business credit for eligible expenses incurred in connection with onshoring to the US a trade or business that is currently conducted outside the US. Conversely, the Green Book would disallow deductions for expenses paid or incurred at the US or CFC level in connection with offshoring a US trade or business if the offshoring would result in a loss of US jobs.

Replacement of BEAT with SHIELD

The Green Book proposes to repeal the BEAT and replace it with SHIELD. SHIELD would deny deductions "by reference to all gross payments that are made (or deemed made)" to related entities whose income is subject to a low effective rate of tax (ETR). The threshold rate of tax for disallowance would be the GILTI rate of 21% until the adoption of a multilateral agreement on global minimum tax rates under the OECD's BEPS initiative. Treasury proposed on 20 May that the global minimum tax rate should be at least 15% and that discussions should continue to push that rate higher. The Green Book provides these additional details on SHIELD:

- ETR is determined based on (1) income earned (in the aggregate, taking into account both related and unrelated party income), and (2) taxes paid or accrued with respect to income that is earned in that jurisdiction. Both income earned and taxes paid or accrued are based on separate or disaggregated financial statements on a country-by-country basis.
- Treasury could provide special rules to address differences (both permanent and temporary) between the relevant income tax base and the base as determined under financial accounting. It could also provide rules to account for net operating losses in a jurisdiction.
- Deductible payments made by a domestic corporation or branch directly to low-tax members would be subject to the SHIELD rule in their entirety. Payments for other types of costs (such as cost of goods sold), as well as other deductions (including unrelated-party deductions), would be disallowed up to the amount of the payment.
- Payments made to non-low-tax members would be partially subject to the SHIELD rule to the extent that other group members are subject to an ETR below the designated minimum tax rate in any jurisdiction.

SHIELD would apply to financial reporting groups with greater than $500 million in global annual revenues, although Treasury could exempt payments to domestic and foreign members that are investment funds, pension funds, international organizations, or non-profit entities, and take into account payments by partnerships.

Anti-inversion/Section 7874

The Green Book proposal would modify current inversion rules by generally treating a foreign acquiring corporation as a US corporation if former shareholders in an acquired US corporation own 50% of the foreign acquiring corporation after the combination (instead of 80%).

The Green Book proposal would also expand the inversion rules to apply regardless of the level of shareholder continuity if:

- The fair market value of the domestic entity is greater than the fair market value of the foreign acquiring corporation immediately before the acquisition
- The expanded affiliated group is primarily managed and controlled in the United States after the acquisition
- The expanded affiliated group does not conduct substantial business activities in the country in which the foreign acquiring corporation is created or organized

The proposal would expand the scope of acquisitions covered by the inversion rules and also cover certain distributions of foreign corporation stock by a domestic corporation or a partnership. The expansion of the inversion rules would be effective for transactions that are completed after the date of enactment.

Minimum book tax

The Made in America tax plan would introduce a minimum book tax on certain large multinational corporations. According to the Green Book, a 15% minimum tax would apply to the company's book income that is generally reported to investors. In-scope companies, those 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 (including research, clean energy, and housing tax credits) and for foreign tax credits.

Interest limitation for disproportionate borrowing in the US

The Green Book introduces a new limitation on interest deductions that would apply to an entity that is a member of a multinational group preparing consolidated financial statements in accordance with US Generally Accepted Accounting Principles or International Financial Reporting Standards. The provision is similar to Section 163(n), which was proposed, but never enacted, in the run-up to the *Tax Cuts and Jobs Act of 2017*.

A member's interest deduction would be limited if the member's net interest expense for financial reporting purposes is greater than the member's proportionate share of the financial reporting group's net interest expense reported on the group's consolidated financial statements.

Dispositions of specified hybrid entities

The Green Book proposes to limit the ability to claim foreign tax credits in respect of gain from the sale of entities that are treated as corporations under foreign law but as partnerships or disregarded entities for US tax purposes (specified hybrid entities). Specifically, it would treat the source and character of any item resulting from the disposition of a specified hybrid entity, for FTC purposes, as if the seller had sold or exchanged stock of a corporation instead of the assets owned by the specified hybrid entity.

Senate hearing discusses Biden Administration's international tax proposals

The Senate Finance Committee hearing on four Treasury nominations on 25 May 2021, including for Lily Batchelder as Assistant Treasury Secretary for Tax Policy, featured significant discussion of international tax changes proposed by President Biden as well as the OECD BEPS 2.0 negotiations. Senator Rob Portman (R-OH) expressed concern about the Administration's proposal to double the global intangible low-taxed income (GILTI) rate to 21% – which, with the proposed retention of the 20% foreign tax credit haircut for GILTI, would make the rate 26% – noting its impact on US competitiveness.

Ranking Member Mike Crapo (R-ID) expressed concerns about changing the GILTI rate ahead of an OECD agreement and, in a 24 May letter asked Treasury Secretary Janet Yellen for more information regarding the OECD BEPS 2.0 Pillar One negotiations, including how many US companies would be affected, which companies would be treated as "in scope," the magnitude of profits that would be reallocated, and the effect on US tax revenues. Other senators on the committee asked about the effect of the 10% deemed return for tangible assets for companies building factories in high-tax jurisdictions and the importance of a global minimum tax, as well as voiced concerns about potential exemptions or carve-outs for some countries.

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.

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* premium tax credits and the Child Tax Credit, Child and Dependent Care Tax Credit, Earned Income Tax Credit.

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 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.

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."

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.

The Biden Administration asserted that 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%
- 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.

Senators Wyden, Brown and Warner release International Tax Framework

Senate Finance Committee Chairman Ron Wyden (D-OR) and Senators Sherrod Brown (D-OH) and Mark Warner (D-VA) on 5 April 2021 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 global intangible low-taxed income (GILTI), foreign-derived intangible income (FDII), and the base erosion and anti-abuse tax (BEAT), all international provisions enacted in the 2017 tax legislation commonly known as the *Tax Cuts and Jobs Act*.

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 leaves many details unspecified.

Proposed GILTI changes under the framework would:

- Repeal the exemption for qualified business asset investment (QBAI, which is intended to approximate 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" would provide relief from US expense allocation rules that currently impact the GILTI foreign tax credits. In contrast to current law, "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 Biden 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 $2 trillion infrastructure plan to be paid for with tax increases

President Joe Biden on 31 March 2021 delivered a speech in Pittsburgh where he sketched out his ambitious $2 trillion-plus infrastructure proposal. The President laid out his arguments for the American Jobs Plan, which calls for increased infrastructure investment over 8 years extending to the power grid, electric vehicles, and broadband, among other areas. The plan would be paid for with revenue from, among other things, increasing the corporate tax rate and changing the international provisions of the *Tax Cuts and Jobs Act*.

The President provided the inspirational context, saying the plan calls for "investing in American-based companies and American workers" to fix roads that businesses rely upon, providing safe drinking water and access to the Internet, and making the US competitive in markets like battery technology, biotechnology, computer chips, and clean energy.

The President said: "We have to move now. Because I am convinced that if we act now, in 50 years people are going to look back and say, this was the moment that America won the future."

Prior to the speech, the White House outlined the proposed package, indicating it would be paid for with tax increases that, for the most part, were discussed during the Presidential campaign.

More specifically, the American Jobs Plan calls for a renewed electric grid, and high-speed broadband for all; creating jobs and raising wages and benefits for essential home care workers; and revitalizing manufacturing, securing US supply chains, investing in R&D, and providing training for "the jobs of the future." The latter category calls for $50 billion in semiconductor manufacturing and research, as called for in the bipartisan *CHIPS Act*. The plan also calls for a $174 billion investment in electric vehicles.

Specific details of the tax increase proposals will likely be included in the President's FY2022 budget plan. However, according to a White House fact sheet released on 31 March, the Made in America Tax Plan, proposed alongside the American Jobs Plan, would:

- Increase the corporate tax rate from 21% to 28%
- Increase the global intangible low-taxed income (GILTI) rate to 21%, calculate it on a country-by-country basis, and eliminate the deemed 10% return on tangible assets
- Encourage other countries to adopt strong minimum taxes on corporations
- "Deny deductions to foreign corporations on payments that could allow them to strip profits out of the United States if they are based in a country that does not adopt a strong minimum tax"
- "Further replace an ineffective provision in the 2017 tax law that tried to stop foreign corporations from stripping profits out of the United States"
- Make it "harder for U.S. corporations to invert"
- Deny companies expense deductions for offshoring jobs and provide a credit for expenses for onshoring
- Eliminate the foreign-derived intangible income (FDII) deduction
- Impose a 15% minimum tax on corporations based on "book income"
- Eliminate tax preferences for fossil fuels, and
- Strengthen business tax enforcement

"If passed alongside President Biden's Made in America corporate tax plan, it [infrastructure plan] will be fully paid for within the next 15 years and reduce deficits in the years after," the fact sheet states.

The second part of the Build Back Better plan, focused on social spending such as health care, childcare, and education, will include additional tax proposals, according to White House Press Secretary Jen Psaki on 31 March.

Senate Finance Committee holds international tax hearing

The Senate Finance Committee on 25 March 2021 held an international tax hearing that highlighted the opposing positions of (on the one hand) congressional Democrats, who favor a dramatic overhaul of the international tax provisions in the *Tax Cuts and Jobs Act* (TCJA), and (on the other) congressional Republicans and the business community.

Democrats generally voiced support for raising revenue by changing the global intangible low-taxed income (GILTI) provisions, the base erosion and anti-abuse tax (BEAT), and the foreign derived intangible income (FDII) rules. Democratic witnesses made the case for international tax changes to fund priorities such as infrastructure and other proposals in President Joe Biden's Build Back Better plan, and made the argument that the TCJA created incentives for US companies to move tangible assets and jobs outside the United States. Other witnesses and Republican committee members suggested there is no need to change the provisions.

The committee hearing underscored fundamental disagreement over US international tax policy. Finance Committee Chairman Ron Wyden (D-OR) made clear in his closing remarks that he has always supported tax reform that would tax the foreign earnings of US companies at the full US rate, while the TCJA represented an effort to move to a more territorial system in which the US largely does not tax the active foreign earnings of US global companies. The hearing also focused on whether FDII constitutes an export incentive, and whether the BEAT is doing enough to prevent erosion of the US tax base.

Kimberly Clausing, US Treasury Deputy Assistant Secretary (Tax Analysis), said that post-TCJA "the use of tax havens to avoid tax continues unabated" and a "stronger minimum tax, stronger measures to tackle the profit shifting of foreign multinational companies, and close cooperation with our allies all have an important role to play."

She said while under the GILTI minimum tax, the first 10% return on tangible assets is free of US tax and subsequent income is taxed with a 50% deduction, "our tax system would benefit from a much stronger minimum tax." Under questioning, she added that the BEAT should be revisited and that the Biden Administration is studying what changes should be made, noting the Congressional Joint Committee on Taxation (JCT) estimates that the BEAT is not raising near the revenue originally estimated and that it creates a disincentive to invest in clean energy projects because of the interaction between the BEAT and tax credits.

Ahead of the hearing, the staff of the JCT released a document that discussed the legal and economic background of US taxation of cross-border activity, with particular attention on provisions newly enacted or substantially revised in the TCJA. In an opening statement at the international hearing, Chairman Wyden called the JCT report "jaw-dropping" for finding that the TCJA reduced the average US tax rate paid by the largest US corporations by more than half.

Congressional Democrats introduce international tax legislation

On 11 March 2021, Rep. Lloyd Doggett (D-TX) and Senators Sheldon Whitehouse (D-RI) and Elizabeth Warren (D-MA), (among others), introduced the *No Tax Breaks for Outsourcing Act* (H.R. 1785/S. 714). Among other things, the bills would eliminate the deductions for global intangible low-taxed income (GILTI) and foreign-derived intangible income (FDII); exclude certain high-taxed income from the GILTI computation (thereby denying United States shareholders to use the associated foreign income tax credits to offset lower-taxed income); and eliminate the exclusion for 10% of the basis of certain qualified tangible property (the QBAI exclusion).

Rep. Doggett and Senator Whitehouse also introduced the *Stop Tax Haven Abuse Act* (H.R. 1786/S. 725) that includes changes to the base erosion and anti-abuse tax (BEAT) to lower the applicability threshold to $100 million in gross receipts (as opposed to the current $500 million); include certain capitalized amounts as base erosion payments; and eliminate the 3% base erosion percentage gating threshold.

While the bills are not expected to pass in their current form, individual provisions are an indicator of current thinking by some House and Senate Democrats and could be included in some form in future legislation.

President Biden signs $1.9 trillion American Rescue Plan Act of 2021

President Joe Biden on 11 March 2021 signed into law the *American Rescue Plan Act of 2021* (H.R. 1319), a $1.9 trillion COVID-19 stimulus/relief package. The Senate passed the bill on 6 March and the House approved the Senate-amended version of the legislation on 10 March.

The legislation includes provisions on taxes, health care, unemployment benefits, direct payments, state and local funding and other issues. About half of the $1.9 trillion bill comprises revenue provisions that fall under jurisdiction of the congressional tax-writing committees, and over half of that is attributable to direct payments of $1,400 and an advanceable child tax credit expansion that takes the form of periodic payments from the IRS. The final bill also includes repeal of the Section 864(f) worldwide interest expense allocation election. (The Section 864(f) election was added to the code in 2004, but its effective date had been deferred numerous times.)

House tax leader says no Democratic consensus on taxation of US multinationals

House Ways and Means Committee Chairman Richard Neal (D-MA) indicated in mid-February 2021 that there is no consensus among Democrats in Congress on the approach to take in terms of US taxation of multinationals – some consider it a revenue source while others want to reexamine *Tax Cuts and Jobs Act* provisions. The Chairman added that in the end, "Congress will work closely with the Administration to secure favorable outcomes for the U.S. businesses headquartered right here."

On the topic of a corporate rate increase, Chairman Neal said harmonization of rates with the OECD makes some sense and, while nothing has been decided, the economic downturn "ought to cause us to be careful." The Chairman also indicated that he objects to retroactive taxation and noted the importance of putting the pandemic and recession behind us.

He said it is clear after meeting with President Biden on 5 February that, as soon as the current round of coronavirus relief is put in place, Democrats plan to proceed with an infrastructure initiative that includes a revival of the Build America Bonds program.

Treasury Secretary Janet Yellen has suggested that a corporate tax rate increase to 28% could be proposed in what is expected to be the infrastructure-plus "Build Back Better" package, but the intention to pay for the bill has since become less certain. There are press reports that Biden Administration officials and congressional Democrats may be open to an infrastructure bill that does not include tax increases and is instead paid for with debt.

US Treasury Secretary says no new taxes for now, commits to OECD BEPS discussions

US Treasury Secretary Janet Yellen was sworn into office on 26 January 2021, the day after the Senate approved her nomination to be the first woman to hold the post.

During her Senate Finance Committee confirmation hearings on 19 January, Yellen confirmed that the Biden Administration plans to delay tax increases for now due to the coronavirus pandemic.

Yellen noted that Biden had said that eventually, as part of a larger package with spending and investment proposals, the President would want to repeal parts of the 2017 tax cuts that benefited the wealthy and large companies, and reverse incentives for companies to offshore operations and profits. However, Yellen reported that Biden has been clear that he does not want to completely repeal the *Tax Cuts and Jobs Act*.

Yellen also testified that the United States will work with other countries in negotiations to stop a "race to the bottom" on corporate taxation and, within that process, ensure competitiveness of American corporations. She affirmed that it is important for US companies to be globally competitive and said the OECD negotiations are important for that reason.

The new Treasury Secretary spoke with her UK and German counterparts on 27 January, saying she was "committed to active U.S. participation in the ongoing OECD discussions on international taxation to forge a timely international accord," according to a readout of the call.

A Treasury statement released after one of the calls reiterated the message that Secretary Yellen plans to "re-engage actively in the ongoing OECD discussions on international taxation."

Pascal Saint-Amans, Director of the OECD Centre for Tax Policy and Administration noting Yellen's testimony at her Senate Finance Committee confirmation hearingsaid that the US appears to have a "strong appetite" for the OECD Base Erosion and Profit Shifting (BEPS) 2.0 Pillar Two proposals regarding a minimum tax.

During a keynote speech in late January, Saint-Amans said: "What we can anticipate is a much more constructive approach" from the new Biden Administration with respect to the BEPS 2.0 negotiations.

In regard to last year's US proposal to implement Pillar One as a safe harbor, Saint-Amans said "I don't see it has any chance to prosper anytime soon."

Tax Cuts and Jobs Act

Section 163(j) interest expense limitation

New final regulations address application of Section 163(j) limitation to CFCs and partnerships, while reserving on certain provisions

Treasury and the IRS on 5 January 2021 issued final regulations (TD 9943, the 2021 Final Regulations) that provide guidance on applying the limitations on the deductibility of business interest expense under Section 163(j) (the Section 163(j) limitation), which was significantly modified by the *Tax Cuts and Jobs Act*, and further modified by the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act).

The 2021 Final Regulations retain the same basic structure as the proposed regulations released in July 2020 (the 2020 Proposed Regulations) and include certain definitions and rules for applying the Section 163(j) limitation to controlled foreign corporations (CFCs) and partnerships.

While the 2021 Final Regulations adopt much of the 2020 Proposed Regulations, they also include significant revisions and clarifications. Additionally, the 2021 Final Regulations reserve on certain important provisions of the 2020 Proposed Regulations that the IRS continues to study, including: (i) the treatment of interest expense from debt-financed acquisitions of, and distributions from, passthrough entities; (ii) rules on partnership and partner

basis adjustments upon partner dispositions; (iii) rules on the treatment of excess business interest expense in tiered partnerships; (iv) the computation of a US shareholder's adjusted taxable income when a CFC group election is in place; and (v) the treatment of foreign persons with effectively connected income.

The 2021 Final Regulations explicitly provide that taxpayers are not required to make the CFC grouping election within the first 60 days after the regulations are published as final but may make the election in subsequent years.

The 2021 Final Regulations largely reject comments seeking to modify the safe-harbor election, though the safe-harbor election was modified to apply to CFCs with net business interest income. Although a transition rule is provided that may be beneficial in certain circumstances, Treasury rejected comments seeking to modify SRLY rules as applicable to pre-group disallowed business interest expense carryforwards. As a result, taxpayers must carefully examine the attributes of each potential CFC group member before making a CFC group election to avoid unintended consequences.

The 2021 Final Regulations apply to tax years beginning on or after 22 March 2021. Except as otherwise provided, taxpayers may apply the Final 2021 Regulations to a tax year beginning after 31 December 2017, and before 22 March 2021, provided that they consistently apply the 2021 Final Regulations and the 2020 Final Regulations to that tax year and each subsequent tax year.

For tax years for which the 2021 Final Regulations do not apply, taxpayers may rely on the rules in the 2020 Proposed Regulations to the extent provided therein.

Section 965 transition tax

IRS releases Section 965 practice unit

The IRS in late March 2021 released a practice unit (IRC 965 Transition Tax Overview) on the Section 965 transition tax. Practice unit materials serve as job aids and training materials for IRS staff and provide helpful insight into how the IRS may interpret various areas of taxation. The practice unit materials are a great resource for a quick refresh on the provision and issues that may arise.

Section 59A base erosion and anti-abuse tax (BEAT)

IRS announces plans to amend BEAT regarding qualified derivative payment reporting

Treasury and the IRS on 10 June 2021 issued Notice 2021-36, announcing their plans to amend the final base erosion and anti-abuse tax (BEAT) 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 QDPs, 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.

Murillo tapped as Treasury Deputy Assistant Secretary for International Tax Affairs

The US Treasury Department on 2 March 2021 announced that Jose Murillo had accepted the position of Deputy Assistant Secretary for International Tax Affairs in the Office of Tax Policy. Most recently, Murillo was the Director of the International Tax and Transaction Services practice in EY's National Tax Department in Washington, DC.

Section 245A dividend received deduction

IRS allows taxpayer to reverse GILTI 'gap period' transaction through late CTB election

In a private letter ruling (PLR 202135006) released in September 2021, the IRS permitted a taxpayer effectively to undo planning undertaken during a so-called gap period. (The gap period refers to the period: (i) beginning after 31 December 2017 (the second E&P measurement date for purposes of the Section 965 transition tax) and (ii) ending on the last day of the CFC's last tax year beginning before 1 January 2018 (the last year to which the global intangible low-taxed income regime did *not* apply).)

After many taxpayers implemented gap period strategies in 2018, Treasury and the IRS in 2019 issued regulations (the extraordinary disposition regulations) under Sections 245A and 954(c)(6) that retroactively neutralized, and in some cases penalized, gap period strategies. In the newly released PLR, the IRS granted the taxpayer's request to make a late entity-classification election (i.e., a check-the-box election) that would cause the relevant transaction to become disregarded. The PLR is unique insofar as the taxpayer's stated motivation for requesting relief was to mitigate the "negative tax consequences" attributable to the extraordinary disposition regulations. Before PLR 202135006 was issued, it was not clear whether the IRS would permit taxpayers to "unwind" gap period transactions.

Tax compliance

Biden Administration expects increased IRS enforcement to generate more revenue

The Biden Administration in early July 2021 continued to emphasize its focus on increased tax compliance and enforcement by citing a reduced tax gap as a funding source.

Since April 2021, President Biden has released several proposals about increasing IRS enforcement. The American Families Plan, released in April 2021, includes a proposal to increase investment in IRS enforcement to allow for greater focus on large corporations, businesses, estates and higher-income individuals.

On 28 April 2021, the Treasury Department issued a press release detailing the government's plan to improve tax compliance by directing $80 billion in increased funding to the IRS over the next 10 years to: (1) improve technology; (2) increase the hiring and training of auditors to focus on complex investigations of large corporations, partnerships and global high-wealth individuals; and (3) increase enforcement against high-income individuals.

The Biden Administration's FY2022 budget and Treasury Green Book, released in May 2021, also focus on increased compliance and enforcement by, among other things, infusing the IRS with additional funding from FY2022 through FY2031.The proposal includes enhancing information technology capabilities, implementing the proposed financial information reporting regime and improving taxpayer service, as well as increased enforcement against those with incomes over $400,000.

If the funding increase is enacted, the IRS will add significant numbers of employees to its enforcement ranks, invest in technology and data analytics to detect noncompliance, and enhance risk assessment capabilities and mechanisms. Given the Administration's continued proposals and bipartisan support for increased IRS funding, taxpayers should consider doing a "health check" (i.e., examine their value chain to identify areas of risk around their current positions and consider any course corrections that might be needed to mitigate those risks going forward). Taxpayers may also want to assess benefits offered by Advance Pricing Agreements and other mechanisms that provide certainty so that they can focus their resources and attention on their business instead of potential tax issues.

IRS releases FAQs on ICAP program for US multinational enterprises

The IRS in mid-April 2021 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 United States. 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 updated FAQs released in April 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 (APA), Mutual Agreement Procedures (MAP) 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.

Foreign tax credit

Treasury releases final foreign tax credit regulations

Treasury and the IRS on 28 December 2021 released final regulations (T.D. 9959) significantly restricting the ability to credit certain foreign taxes. The final regulations address a wide range of topics, including the definition of a foreign income tax, the disallowance of a credit or deduction for certain foreign income taxes, the allocation and apportionment of foreign income taxes, when foreign income taxes accrue, and related rules under the Internal Revenue Code.

IRS issues final regulations on treatment of qualified improvement property and provides guidance on foreign tax credits

The IRS on 21 September 2021 issued final regulations (TD 9956) under Sections 250 and 951A that address how to calculate qualified business asset investments for qualified improvement property under the alternative depreciation system. Transition rules in TD 9956 address the impact that NOL carrybacks allowed under the CARES Act have on loss accounts.

Taxpayers affected by the final regulations include US shareholders of controlled foreign corporations; domestic corporations eligible for deductions for foreign-derived intangible income and global intangible low-taxed income; and taxpayers claiming credits or deductions for foreign income taxes.

The final regulations follow the proposed regulations published on 12 November 2020, but include several notable changes. Highlights of the final regulations include the following:

- The final regulations overhaul the requirements that a foreign tax must satisfy to be claimed as a credit. The most significant change is that a foreign tax must satisfy a new "attribution requirement" (known as the "jurisdictional nexus requirement" under the proposed regulations) for the tax to be creditable under Sections 901 or 903. Under the attribution requirement, foreign taxes are not generally creditable unless the foreign tax law requires a sufficient nexus between the foreign country and the taxpayer's activities or investments. For example, a foreign tax may satisfy the attribution requirement if its sourcing rules are reasonably similar to US sourcing rules.
- The final regulations clarify the attribution requirement in several respects. When foreign law and US law characterize gross income or gross receipts differently, the final regulations provide that the foreign law characterization governs (except for the sale of a copyrighted article). This clarification should be particularly significant for cloud-computing and technology-enabled (including digital) transactions, which may be characterized as licenses under foreign law.
- The final regulations defer application of the attribution requirement to Puerto Rico's expanded effectively-connected-income regime and excise tax on certain goods and services. The attribution requirement applies to those taxes when they are paid or accrued in a tax year beginning on or after 1 January 2023. In contrast, the attribution requirement applies to other foreign income taxes when paid or accrued in tax years beginning on or after 28 December 2021.
- The final regulations follow the proposed regulations' rules for allocating and apportioning foreign income taxes imposed on (i) disregarded payments made between "taxable units;" (ii) dispositions of stock and partnership interests; and (iii) distributions by partnerships. Treasury rejected comments requesting a delayed applicability date for those provisions. Accordingly, those rules apply to tax years beginning after 31 December 2019 and ending on or after 2 November 220.
- The final regulations overhaul the proposed regulations under Section 245A(d), which disallow a credit or deduction for foreign income taxes attributable to "section 245A(d) income" and "non-inclusion income." As revised, the final regulations apply to a broader range of transactions than the proposed regulations, including certain remittances from a disregarded entity.
- Treasury declined to finalize certain provisions in the proposed regulations, including (i) an election to capitalize and amortize R&E and advertising expenditures for purposes of apportioning interest expense under Reg. Section 1.861-9 and (ii) rules addressing the allocation and apportionment of interest expense incurred by certain foreign bank branches.

Taxpayers should carefully consider how the new requirements for crediting a foreign tax, particularly the attribution requirement, affect their abilities to claim a credit for foreign taxes incurred. Many novel extraterritorial taxes, such as digital services taxes and equalization levies, whether or not creditable under prior law, are likely to fail the attribution requirement. But the scope of the final regulations is far broader, even though they were formulated in response to novel extraterritorial taxes. Many taxes that are less novel — particularly withholding taxes imposed on royalties and services — may not be creditable under the final regulations, particularly withholding taxes imposed in many emerging markets where there may be no double tax treaty relief. Those changes will have far-reaching implications for taxpayers across all industries.

The final regulations' rules on allocating and apportioning foreign income taxes are complex, and pose significant compliance challenges. Although the rules provide detailed guidance, difficult interpretational issues arise in many common scenarios. The rules can lead to surprising results, including the loss of foreign tax credits in certain cases.

Final foreign tax regulations to be released in two parts

A senior Treasury official in September 2021 said that the final foreign tax credit regulations will be released in two parts, with the first tranche of the final rules released toward the end of 2021. The official also confirmed that while the coming final foreign tax credit (FTC) regulations will maintain the jurisdictional nexus requirement in the proposed regulations, they will clarify and "maybe make a little more flexible" the requirement that the foreign law be similar to US law. The first tranche will also contain the original "core" ideas of the proposed regulations.

The proposed FTC regulations (REG-101657-20), issued in the fall of 2020, provided rules that would fundamentally revamp how to determine the creditability of a foreign tax under Internal Revenue Code Section 901 by requiring a foreign tax to meet a jurisdictional-nexus requirement (which would generally deny a credit for certain extra-jurisdictional taxes).

Capital markets

IRS issues final rules on tax consequences of transition from LIBOR and other interbank offered rates in certain financial contracts

Treasury and the IRS on 30 December 2021 released final regulations (TD 9961) that provide guidance on the elimination of and pending transition away from the use of certain interbank offered rates (IBOR), including the London interbank offered rate (LIBOR), in certain financial contracts, including debt instruments, derivatives, and other contracts. The final regulations address whether a modification of the terms of a contract to replace an existing IBOR with a new reference rate results in a taxable event and the realization of income, deduction, gain, or loss.

The final regulations adopt, with certain changes, proposed regulations issued by Treasury on 9 October 2019, and incorporate, where relevant, additional guidance regarding recommended fallback language in certain financial contracts issued in Revenue Procedure 2020-44 on 9 October 2020.

Publication of all currency and term variants of LIBOR (with the exception of certain USD LIBOR tenors, and certain "synthetic" British sterling and Japanese yen LIBORs) ceased publication immediately following 31 December 2021. The publication of the overnight, one-month, three-month, six-month, and 12-month USD LIBOR is scheduled to cease immediately following 30 June 2023, and the publication of the "synthetic" LIBORs will continue until the end of 2022.

The recently released final regulations share many of the same fundamental rules as the proposed regulations. However, the structure of the final regulations differs significantly from the proposed regulations and is primarily intended to simplify the operative rules. For example, the proposed regulations separately state rules applicable to debt and non-debt contracts, whereas the final regulations contain a broad definition of a "contract," which includes not only debt and derivative instruments, but also insurance contracts, stock, leases, and other contractual relationships. In addition, the final rules make use of certain defined terms to streamline references to concepts frequently used in the operative rules. The term "covered modification" is the cornerstone of these rules and serves to restructure several of the fundamental rules set forth in the proposed regulations.

In one significant substantive change from the proposed regulations, the final rules replace the fair market value requirement under the proposed regulations with rules that describe specific modifications that are excluded from the definition of a covered modification (excluded modifications).

The final regulations, principally contained in Reg. Section 1.1001-6, apply to any modification of the terms of a contract that occurs on or after 7 March 2022. A taxpayer may choose to apply the final regulations to modifications of the terms of a contract prior to the applicability date, provided that the taxpayer and all related parties (within the meaning of Sections 267(b) or 707(b)(1)) apply the final regulations to all modifications of the terms of contracts that occur before that date.

The final regulations provide much-needed final guidance and clarity on most issues regarding the transition from and elimination of IBORs, including USD LIBOR. Despite the substantive structural changes to the rules, the thrust of the final rules is generally consistent with the guidance issued in the proposed regulations and Rev. Proc. 2020-44. As a result, taxpayers that have previously identified and modified IBOR-related contracts while adhering to that guidance may be able to retroactively apply the final regulations without adverse US tax consequences, as long as the rules are consistently applied.

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

In mid-October 2021 the IRS ruled in PLR 202140016 that a taxpayer (Taxpayer) can source gains or losses arising from certain commodity derivative hedging transactions (Commodity Hedges) by reference to the source of gains or losses derived from the sale of the underlying inventory property being hedged. The IRS, relying on *Bank of America* (*Bank of Am. v. U.S.*, 680 F.2d 142, 147 (Ct. Cl. 1982)), focused on the substance of the transactions at issue. The IRS highlighted that a residence-based sourcing of the Commodity Hedges under Section 865(a) would result in US-sourced gain or loss, but the underlying hedged inventory property could be either US- or foreign-source gain or loss. The IRS determined this result would be inconsistent with the substance of the Commodity Hedges as 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 underlying transaction, the IRS dismissed an application of the rules that would have created inconsistencies between the sourcing of the Commodity Hedges and the sourcing of those items underlying the hedges or otherwise being hedged.

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 here. Instead, the IRS primarily relied on the Supreme Court's characterization of similar hedging 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 hedged item is a sensible result that is consistent with the matching principles applicable to hedging transactions.

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

The IRS in October 2021 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.

IRS financial services campaign will not target specific transactions

An IRS official in August 2021 commented on the new IRS campaign aimed at financial service entities engaged in a US trade or business that was announced in June. She said the campaign will take a broad exploratory approach, not targeting specific types of transactions, and indicated that audit coverage in this area has been rare in the past. The IRS is in the process of reviewing returns to determine those which will be audited.

US government issues discussion document on cryptocurrency

The US Treasury in mid-June 2021 released a document 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), Section 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."

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 a nonfunctional currency 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 have held Bitcoin for a long time or have a low-cost basis in the asset, ordinary income treatment on the sale of that asset could prove costly.

If Bitcoin were adopted as legal tender, forward transactions in Bitcoin could also 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 cryptocurrencies being treated as nonfunctional currency, Sections 988 and 1256 would not apply. Given the possible new legal tender status of Bitcoin in El Salvador, however, taxpayers should consider the potential tax implications for Bitcoin transactions in the United States and the uncertainties that still exist under IRS guidance.

IRS opens initiative on virtual currency

The IRS Office of Fraud Enforcement has begun a new initiative focused on financial crime and fraud that involves virtual currency. Speaking in March 2021, the director of the Office said the initiative, Operation Hidden Treasure, "is basically an umbrella operation for all of our virtual currency omitted-income cases."

Another IRS official explained that Operation Hidden Treasure "is all about finding, tracing, and attributing crypto to U.S. taxpayer[s]." She added that taxpayers should be aware that virtual currency transactions are not anonymous.

Tax treaties

Senate Foreign Relations Committee Republicans urge vote on 2010 US-Chile tax treaty

Eighteen Republican members of the Senate Foreign Relations Committee on 7 December 2021 sent a letter to the Chairman and Ranking Member of the committee urging the committee to hold a vote on the proposed 2010 US-Chile income tax treaty. The treaty has been stalled in committee for nearly 12 years and repeatedly stymied by Senator Rand Paul (R-KY), who has blocked consideration of a number of pending US tax treaties – including the Chilean accord – due to privacy concerns. The senators wrote, "Without ratification of the Treaty, Chilean tax rates are due to increase on U.S. companies' Chilean operations and could reach a rate of 44.45 percent."

IRS lists jurisdictions with US information exchange agreements that allow reporting of certain deposit interest

The IRS in late September 2021 issued Rev. Proc. 2021-32, providing an updated list of those jurisdictions with which the US government has an information exchange agreement for purposes of reporting certain deposit interest paid to those jurisdictions. The reporting requirement is found in Reg. Sections 1.6049-4(b)(5) and 1.6049-8(a). The revenue procedure also provides an updated list of those jurisdictions with which there would be automatic exchange of the deposit interest information collected.

US, France agree to exchange CbC reports for FYs 2020 and 2021

The US and France signed a joint statement on the spontaneous exchange of country-by-country reports for fiscal years beginning in 2020 and 2021. The exchange will be based on Article 27 of the 1994 US-France income tax treaty, as amended by protocols signed in 2004 and 2009.

US, Germany agree on exchange of CbC reports

The US and Germany reportedly agreed in July 2021 on implementation of spontaneous exchange of multinationals' country-by-country (CbC) reports for the period 1 January 2020 through 1 January 2021. The agreement is based on Article 26 of the 1989 US-Germany tax treaty, as amended in 2006.

The information that is exchanged reportedly will be subject to confidentiality and other safeguards found in the tax treaty, including the provisions that restrict the use of the exchanged information. According to the press, the parties were negotiating a competent authority arrangement to address the issue and the recent agreement was an interim measure.

US, UK competent authorities sign agreements re treaty LOB provision

United States and United Kingdom (UK) competent authorities on 26 July 2021 signed two arrangements regarding the interpretation of the terms "North American Free Trade Agreement (NAFTA)" and "resident of a Member State of the European Community" for purposes of the Limitation on Benefits (LOB) provision in the US-UK income Tax Treaty.

The first arrangement clarifies that references to NAFTA in the LOB provision of the US-UK Treaty will be understood as references to the *Protocol Replacing the North American Free Trade Agreement with the Agreement between the United States of America, the United Mexican States, and Canada* (USMCA). The second arrangement clarifies that a "resident of a Member State of the European Community" continues to include a resident of the UK for purposes of the derivative benefits test in the LOB provision of the US-UK Treaty.

The competent authorities of Switzerland and the United States entered into a similar arrangement in June 2020 regarding the interpretation of the term NAFTA in the US-Switzerland Treaty.

The two competent authority arrangements provide helpful guidance for interpreting the US-UK Treaty. Although the IRS and Treasury had previously announced that, once the USMCA enters into force, they will interpret references in US income tax treaties to the NAFTA as references to the USMCA, the first arrangement confirms that the UK competent authority will similarly interpret references to the NAFTA as references to the USMCA. Likewise, the second arrangement puts an end to any uncertainty that may have existed with respect to defined terms in the US-UK Treaty as a result of the UK's withdrawal from the European Union.

IRS releases 2021-2-22 Priority Guidance Plan

Treasury and the IRS on 9 September 2021 issued the 2021–2022 Priority Guidance Plan in Notice 2021-28, which contains a total of 193 projects that are priorities for allocating resources during the plan year. The IRS indicated that this year's plan periodically will be updated to reflect new priorities and legislative initiatives.

US, Japan reach agreement on tax treaty arbitration process

The IRS released Announcement 2021-5 in March 2021, indicating that the US and Japan competent authorities had reached agreement on the US-Japan tax treaty arbitration process. The agreement implements the arbitration process in paragraphs 5, 6 and 7 of Article 25 of the 2003 US-Japan income tax treaty, as amended.

Withholding

New IRS tool supports withholding agents' compliance with Form 1042-S

The IRS on 15 November 2021 launched a new online tool that is designed to support US withholding agents' compliance with reporting and withholding required with respect to IRS Form 1042-S (Foreign Person's U.S. Source Income Subject to Withholding). An IRS news release states that the tool performs a quality review of data before it is submitted to the IRS. An IRS tutorial is available on how to use the tool. According to the IRS, use of the tool is voluntary, "but the IRS will take into account a withholding agent's use of the tool when making enforcement and penalty determinations."

IRS extends to 1 January 2023 applicability date for W/H on certain transfers, distributions related to PTP interests

In late August 2021 the IRS announced in Notice 2021-51 that it will amend the regulations under Section 1446(a) and Section 1446(f) to defer the applicability date of certain provisions by one year to 1 January 2023. The affected provisions relate to withholding: (1) on transfers of interests in publicly traded partnerships (PTPs); (2) on distributions made with respect to PTP interests; and (3) by non-publicly traded partnerships on distributions to transferees who failed to withhold properly.

Taxpayers may rely on the modified applicability dates immediately.

Section 1446(f) is a collection mechanism for Section 864(c)(8). It generally requires transferees purchasing interests in such partnerships from non-US transferors to deduct and withhold a 10% tax from the amount realized. The regulations on transfers of PTP interests require the tax to be withheld by the transferor's broker.

The IRS released final regulations (TD 9926) under Section 1446(f) in October 2020. The regulations originally were supposed to apply to withholding on certain transfers and distributions on and after 1 January 2022.

There are many unique challenges in implementing Section 1446(f) on PTP interest transfers, and the securities industry can put the additional time to good use. The extension also buys critical time for the IRS to complete additional guidance and for the industry to incorporate that guidance into its procedures.

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

Treasury and the IRS released proposed regulations (REG-121095-19) in late 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.

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 Opportunity Zones (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.

The proposed regulations relating to the flexibility for expending working capital safe harbors would apply to tax years beginning after the date the regulations are published as final regulations in the Federal Register. According to the Preamble, taxpayers may rely on this part of the proposed regulations for tax years beginning after 31 December 2019.

Transfer pricing

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

In mid-October 2021 the IRS indicated it was maintaining its stance on telescoping but studying ways that it could 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.

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."

IRS memo addresses CSA and inclusion of stock-based compensation costs

The IRS office of Chief Counsel in mid-July 2021 released a generic legal advice memorandum (GLAM) (AM 2021-004) that addressed its views on the treatment of stock-based compensation (SBC) costs in cost sharing agreements (CSA) that include a "reverse claw-back" provision, but do not share SBC costs (non-SBC CS agreements).

The IRS asserted that it can make certain allocations to make the cost sharing transactions consistent with an arm's length result. The IRS discussed how to treat those allocations for SBC costs and the timing of the adjustments.

More specifically, the IRS takes the position that SBC should be included in the cost pools under the cost sharing regulations. The IRS further asserts that it can adjust the results of a cost-sharing transaction (CST) in the year in which the intangible development costs (IDCs) were incurred under Reg. Section 1.482-7(i)(2) regardless of whether there is a reverse claw-back provision. In support of this position that it can ignore the terms of reverse claw-back provisions, the IRS argues in the GLAM that excluding SBC would result in an imbalance between IDC shares and reasonably anticipated benefit (RAB) shares in any given year of exclusion.

In the GLAM, the IRS specifically addresses the following issues that may arise when the IRS makes the adjustment: (1) the correct year to include the SBC costs in the cost pool; (2) whether the adjustment affects the taxpayer's true-up obligation amount; and (3) whether the IRS can make an adjustment in a different year if it is unable to do so in the year the IDCs were incurred because the period of limitations on assessments has expired.

IRS seeing $1 billion MAP cases

An IRS official in the Large Business and International (LB&I) division in mid-September 2021 said the agency is seeing a significant increase in mutual agreement cases that are over $1 billion, a trend that has magnified the challenges associated with complex case resolution. The official was quoted as saying that such large mutual agreement procedure (MAP) cases are "really difficult to handle in the dispute resolution setting" and LB&I is considering how to prevent such cases from getting into the MAP inventory.

The IRS concludes that under Reg. Section 1.482-7(i)(2) it may make allocations to adjust the results of a CST so that each controlled taxpayer's IDC share for each tax year is equal to its RAB share. The IRS argues that the allocation must be reflected for tax purposes in the year in which the IDCs were incurred. The IRS reasons in the GLAM that its allocations should be treated as reducing the amount of the taxpayer's reverse claw-back true-up obligation by a corresponding amount in order to avoid an overpayment of the SBC costs. The IRS further asserts in the GLAM that if the adjustments cannot be made in the year the IDCs were incurred, the IRS may make other adjustments in the year of the taxpayer's triggering event to reflect the contract or ensure that the non-SBC CS agreement produces results that are consistent with an arm's length result.

This GLAM is the second significant IRS administrative guidance concerning CSAs with SBC since the conclusion of *Altera v. Commissioner*. The IRS's positions set forth in the GLAM suggest that the IRS will likely continue to strongly pursue SBC inclusions under the 2003 SBC regulation. In addition, the GLAM shows that the IRS intends to make SBC adjustments in the years in which the IDCs were incurred regardless of the language contained in taxpayers' reverse claw-back provisions, and will revert to enforcing the terms of a reverse claw-back provision only if a year-by-year adjustment is unavailable. The IRS's positions in the GLAM are likely to be of interest to taxpayers.

While the GLAM may be relevant in evaluating the likelihood that the IRS may challenge a taxpayer's treatment of SBCs, it is not precedential authority for determining the level of comfort supporting a taxpayer's inclusion of SBC costs based on its facts and circumstances.

PR Treasury issues guidance for complying with the requirement to submit a transfer pricing study

The Puerto Rico Treasury Department (PRTD) in mid-May 2021 issued guidance (Administrative Determination (AD) 21-05) for complying with the requirement to submit a transfer pricing study to claim expenses paid to related entities that do not carry out operations in Puerto Rico or have a home office located outside of Puerto Rico (intercompany charges) on the income tax return.

Under Section 1033.17(a)(16) and (17) of the Puerto Rico Internal Revenue Code of 2011 (PR Code), as amended, taxpayers cannot deduct 51% of intercompany charges on the income tax return. The limitation does not apply to income derived from operations covered by a decree, resolution or a tax exemption grant.

For tax years beginning after 31 December 2018, the 51% limitation does not apply if the taxpayer files a transfer pricing study with its income tax return, including an analysis of the operations carried out in Puerto Rico. The transfer pricing study must be prepared in accordance with the requirements established in IRC Section 482 of the US Internal Revenue Code.

Under AD 21-05, the 51% limitation will not apply for tax years beginning 31 December 2018, if the deduction is based on a transfer pricing study that is issued and available when the income tax return is filed.

Additionally, AD 21-05 allows taxpayers to reasonably rely on a certified transfer pricing study for previous years, provided the taxpayer's facts and circumstances and relevant transactions in the tax year have not substantially changed since the certification of the transfer pricing study.

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

In mid-April 2021 the IRS 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.

IRS APMA Program releases annual APA update

The IRS Advance Pricing and Mutual Agreement (APMA) Program issued the 22nd annual Advance Pricing Agreement (APA) report (the Report) on 23 March 2021, in Announcement 2021-06. The Report discusses the APMA Program, including its activities and structure for calendar year 2020, and gives useful insights into the operation of the APA Program.

The number of APA filings remained the same in 2020 as in 2019, with taxpayers filing 121 APA requests each year. The total number of APAs concluded, however, increased from 120 to 127 and the median amount of time to finalize an APA decreased from 38.8 months in 2019 to 32.7 months in 2020.

IRS APMA program director discusses taxpayers' treatment of COVID-related costs

The IRS Advance Pricing and Mutual Agreement (APMA) Program is seeing "questionable treatment of COVID-related costs," according to the program director.

Speaking at a virtual tax conference on 5 March 2021, APMA director John Hughes said that APMA is seeing the following COVID-related issues: (i) taxpayers are classifying costs as nonoperating items to improve the controlled party's operating profitability for purposes of a comparable profits method or transactional net margin method analysis, which may result in a compensating adjustment; and (ii) taxpayers with an Advance Pricing Agreement nearing the end of its term are raising COVID-related issues prematurely, which may complicate bilateral competent authority negotiations.

Another IRS official added that he is seeing taxpayers invoking force majeure to terminate arrangements. "If there is reason to believe that unrelated parties in the same circumstances would not invoke force majeure, it raises questions," the official said. The arm's-length standard may require one of the parties to compensate the other for terminating the arrangement, he added.

Taxpayers should be cautious when taking non-conventional transfer pricing positions as a result of COVID-19. Although many of these issues have not yet been challenged, the comments by the APMA director make it clear that they are on the IRS's radar.

Furthermore, taxpayers that already have advance pricing agreements should consider all complications that may arise before attempting to raise COVID-related issues prematurely or invoking force majeure to terminate the arrangement entirely.

Treasury to consider reviving expired transfer pricing aggregation regulations

Treasury indicated it plans to open a project to revive transfer pricing aggregation regulations under Section 482 that were issued in temporary form in 2015, but that expired in 2018 without being finalized, according to a report in the tax press in early February 2021.

As background, in July 1994, the Treasury published final transfer pricing regulations under Reg. Section 1.482-1, which included a set of rules on the aggregation of interrelated transactions in determining arm's-length transfer pricing. The relevant portion of the regulation states:

> The combined effect of two or more separate transactions (whether before, during, or after the [tax] year under review) may be considered, if such transactions, taken as a whole, are so interrelated that consideration of multiple transactions is the most reliable means of determining the [arm's-length] consideration for the controlled transactions. Generally, transactions will be aggregated only when they involve related products or services, as defined in [Reg. Section] 1.6038A-3(c)(7)(vii) ... .

This regulation and its four subsequent examples provided guidance to taxpayers until it was replaced by new Temporary Reg. Section 1.482-1T(f)(2)(i) in 2015. The 2015 temporary regulation was built on the foundation of its 1994 predecessor with modifications and clarification that the arm's-length standard must be satisfied when both Sections 482 and 367 apply. The result was a more rigid aggregation principle with less taxpayer flexibility in pricing intercompany transactions that are interrelated.

Treasury initially planned to finalize the 2015 temporary regulation before it expired in 2018, but the project became less urgent after the *Tax Cuts and Jobs Act* (TCJA) amended the statutory text of Section 482 to explicitly allow aggregation for intangible transfers.

When the 2015 temporary regulation expired in September 2018, taxpayers were left with a statutory aggregation rule under Section 482 without further guidance for intangible property transfers occurring after 14 September 2018.

Although the IRS has generally considered the aggregation principle to be the most reliable means of determining arm's-length consideration for controlled intangible property transactions, the lack of current regulations on the application of aggregation to intangibles transfers generally leaves taxpayers with greater transactional flexibility.

If Treasury does revive the 2015 temporary regulations, it is unknown how the new regulations will be issued. While it may be possible for Treasury to use the prior proposed regulations to directly promulgate final regulations, it is more likely that the new regulations would be issued as part of a larger regulation package so that Treasury can solicit comments, and respond to those comments in the Preamble to the final regulations to avoid an *Administrative Procedures Act* challenge (similar to the *Altera v. Commissioner* case).

It is also possible that, given the comprehensive international tax overhaul from the TCJA, Treasury will start from scratch and draft a more comprehensive overhaul of the transfer pricing regulations to incorporate other statutory changes from the TCJA, such as the new statutory definition for intangible property contained in Section 367(d)(4).

IRS continues APA/MAP case closures despite COVID restrictions

The IRS Advance Pricing and Mutual Agreement Program (APMA) has adapted well to the virtual environment resulting from the COVID-19 pandemic, according to a senior IRS official. Douglas O'Donnell, Commissioner of the IRS Large Business and International Division, in February 2021 was quoted as saying that case closures have been "surprisingly robust" despite the fact the work has become completely virtual.

In May 2020, the IRS announced modifications for filing advance pricing agreement (APA) and mutual agreement procedure (MAP) requests to allow for electronic filing and digital signatures. In the same announcement, the IRS also addressed questions about how the current economic environment affects the handling of pending and executed APAs by the APMA.

Consistent with O'Donnell's remarks, EY's National Tax transfer pricing practice has observed an increase in MAP and APA case completions due to APMA's technological modifications and increased collaboration amongst taxing authorities. APAs and MAPs are critical tax dispute resolution tools for taxpayers to consider as tax controversies will likely increase due to tax authorities' responses to the global pandemic.

BEPS 2.0 (US)

India, US agree on transitional approach for 2% Equalization Levy prior to implementation of Pillar One rule

On 24 November 2021, the Government of India issued a Press Release stating that India and the US agreed on a transitional approach to the treatment of the current Indian e-commerce Equalization Levy (EL) during the interim period before the new BEPS Pillar One rules come into effect.

The transitional treatment includes the continuation of the 2% EL charge by India, subject to a partial future credit to the multinational enterprise (MNE) against that MNE's future "Pillar One Amount A" tax liability. The US Government agreed to terminate its proposed trade actions against India with respect to the current 2% EL.

US, Turkey announce joint statement on unilateral digital tax compromise

The United States and Turkey issued a joint statement on 22 November announcing that the same terms in the Unilateral Measures Compromise reached in October 2021 among the US and five European countries with respect to digital services taxes (DSTs) and US trade actions, would also apply in the US-Turkey context. (See the following article for details on the October 2021 Joint Statement involving Austria, France, Italy, Spain, the United Kingdom and the United States.)

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, 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 agreed to terminate its proposed trade actions against the five countries with respect to their existing DSTs and committed not to impose further trade actions with respect to such countries and their DSTs during this interim period. Finally, the six countries agreed 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.

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.

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 proposes 15% global corporate minimum tax to BEPS 2.0 Steering Group

US Treasury officials and members of the Steering Group of the OECD Base Erosion and Profit Shifting (BEPS) Inclusive Framework met for two days in mid-May in Washington DC, during which the US Government proposed that the global corporate minimum tax rate (Pillar Two) should be at least 15%.

According to a Treasury read out of the meetings, Treasury underscored that the 15% rate was a floor and that "discussions should continue to be ambitious and push that rate higher." Treasury officials were "heartened" by the positive reception they received at the meeting regarding their global minimum tax proposal.

According to Treasury, it is "imperative to work multilaterally to end the pressures of corporate tax competition and corporate tax base erosion." The "race to the bottom" in regard to corporate tax rates has undermined the ability of the US and other countries to raise the necessary revenue for critical investments, the Treasury statement read. Treasury contends that a global corporate minimum tax would "ensure the global economy thrives based on a more level playing field in the taxation of multinational corporations," resulting in greater innovation, growth and prosperity.

Treasury proffers BEPS 2.0 Pillar One proposal to Inclusive Framework

Treasury 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 as 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."

Treasury Secretary says US no longer supports BEPS Pillar One as safe harbor

Treasury Secretary Janet Yellen on 26 February 2021 said during a virtual G20 finance ministers and central bank governors meeting that the US would no longer push for BEPS 2.0 Pillar One to be implemented on a safe harbor basis. Trump Administration Treasury Secretary Steven Mnuchin had made the proposal in late 2019, suggesting that companies could opt into the Pillar One regime at their discretion. That position was generally opposed by US trading partners involved in the discussions.

On Capitol Hill, Democrats on the congressional tax writing committees may not be that far apart from their Republican counterparts in terms of the Pillar One discussions. Democrats on the Finance Committee and the House Ways and Means Committee reportedly share opposition to unilateral Digital Services Taxes and generally agree with the Trump Administration's position on Pillar One, according to a senior Ways and Means staff member. Any support among Democrats for a proposed multilateral solution on Pillar One will be based on the revenue effects and positions taken by stakeholders, the official was quoted as saying.

Addressing the BEPS discussions at his 23 February 2021 Senate Finance Committee confirmation hearing to be the next Deputy Treasury Secretary, Adewale "Wally" Adeyemo did not break new ground beyond what Treasury Secretary Yellen has said previously. Adeyemo told the committee that US companies must be able to compete globally, and the US will work internationally through the OECD and G20 tax process to create a more level playing field for US companies with regard to taxation.

USTR finds DSTs adopted by six nations discriminatory; suspends DST-related punitive tariff actions on French goods

The US Trade Representative (USTR) in early January 2021 released findings in its investigations of the Digital Services Tax (DST) regimes adopted by India, Italy, Turkey, Austria, Spain and the UK, initiated under Section 301. The USTR determined each DST to be discriminatory against US companies, inconsistent with prevailing principles of international taxation, and burdensome or restrictive to US commerce.

The USTR announced that no specific actions would be taken at this time. Separately, the USTR announced the suspension of punitive tariffs on certain French origin goods in relation to the Section 301 investigation of France's DST that were set to take effect on 6 January 2021.

Foreign Account Tax Compliance Act (FATCA)

IRS updates FATCA FAQs

The IRS in mid-May 2021 updated its frequently asked questions (FAQs) for the *Foreign Account Tax Compliance Act* (FATCA). Specifically, updated FAQ 23 under General Compliance extends penalty relief for the 2020 and 2021 calendar years for withholding agents that withhold and report on Form 1042 and 1042-S by 15 September 2021 (for 2020) or 15 September 2022 (for 2021) a dividend-equivalent payment made with respect to a derivative referencing a partnership.

IRS forms

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

In mid-October 2021 the IRS 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.

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 may 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.

IRS issues early draft instructions for Schedules K-2 and K-3 for 2021 Forms 1065, 1120-S, and 8865

The IRS issued early draft instructions for amended Schedules K-2 (Partners' Distributive Share Items – International) and K-3 (Partner's Share of income, Deductions, Credits – International) for Forms 1065, 1120-S, and 8865 for tax year 2021 (filing season 2022). The drafts of the instructions offer a preview of what is coming before final versions are issued. The new Schedules K-2 and K-3 were released on 3 and 4 June 2021. The schedules are meant to provide greater clarity for partners and shareholders to compute their US income tax liability with regard to items of international tax relevance, including deductions and credits.

IRS allows remote signing and submission of authorization Forms 2848 and 8821

The IRS in late January 2021 announced (IR-2021-20) that a new online option is now available for the submission of Form 2848, *Power of Attorney and Declaration of Representative*, and Form 8821, *Tax Information Authorization*. The new online tool, which is an interim solution in advance of the Tax Pro Account that is expected to be launched this summer, will allow tax professionals to submit authorization forms to the IRS electronically.

After creating a Secure Access account, tax professionals can access the new "Submit Forms 2848 and 8821 Online" option on the IRS.gov/taxpro page. The fax and mail options for submitting Forms 2848 and 8821 are still available, however signatures on such forms must be handwritten.

While the new online submission option represents a step in the right direction, its benefits are somewhat limited. Because using the system will not accelerate the current five-week timeline for processing authorizations through the IRS Central Authorization File, or "CAF" system, the only benefit over the traditional fax and mail options is the ability to use electronic signatures.

Miscellaneous

FinCEN again extends certain signature authority reporting (FBAR, Form 114) over foreign financial accounts

In Notice 2021-1 (released 13 December 2021), the Financial Crimes Enforcement Network (FinCEN) further extended the filing deadline for certain individuals who previously qualified for an extension of time to file the Report of Foreign Bank and Financial Accounts (FBAR) regarding signature authority under Notice 2020-1 and previous guidance.

The Notice pertains only to individuals who were initially granted extensions of time to report signature authority under FinCEN Notices 2011-1 and 2011-2 (most recently extended by FinCEN Notice 2020-1). Under the Notice, individuals have until 15 April 2023, to file deferred FBARs, subject to any potential further extension. Any persons not covered by the Notice for 2021 will have until 15 April 2022 – automatically extended six months to 17 October 2022 – to file their FBARs for the 2021 calendar year.

No extension (beyond the automatic six-month extension) is available for financial interest filing obligations.

FINCEN publishes proposed rules requiring entities to file reports on beneficial ownership

Treasury's Financial Crimes Enforcement Network (FINCEN) on 8 December 2021 published proposed regulations that would require certain entities to file reports with FinCEN regarding beneficial ownership, as required by the *Corporate Transparency Act*, which was enacted in January 2021. The purpose of the information reporting is to "help prevent and combat money laundering, terrorist financing, tax fraud, and other illicit activity." The proposed regulations address who must file, when they must file, and what information they must provide to the US Government.

Initial proposed PTEP regs expected in 2022

In early November 2021, a senior Treasury official said that proposed regulations on previously taxed earnings and profits (PTEP) are approximately a month or two from completion as to core aspects of the package but will then require considerable review. The first set of proposed PTEP regulations are expected to be released in 2022.

The official conceded that provisions in the House's proposed *Build Back Better Act* could affect the first set of PTEP regulations currently in process, pointing to proposed changes to Section 961(c) basis adjustments.

FinEN 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 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 offered relief to these individuals by extending the filing deadline to 31 December 2021, for calendar year 2020 FBARs.

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

IRS articulates five-factor test in determining income inclusion of reimbursement payments

The IRS in a Chief Counsel Advice Memorandum (CCA 202132009) issued in September 2021 concluded that an affiliated group's joint and several liability for the payment of a branded prescription drug fee is not solely determinative in deciding whether the remitting member may exclude any reimbursement of the fee from its gross income. The IRS provided several factors that should be considered in determining whether the remitting member benefits from the payment of the fee and, therefore, may not exclude the reimbursement from its gross income.

The taxpayer is a US corporation and member of an affiliated group that develops, manufactures and distributes branded drugs and other medical care products. The foreign members of the group manufacture the drugs and own the intellectual property related to the branded drugs. Under an intercompany agreement with the foreign members, the taxpayer distributes the drugs in the United States and receives a fixed profit margin resulting from the sales. The taxpayer's transfer pricing method allocates excess profits or losses beyond the specified operating profit margin to the foreign members.

The five-factor test articulated in the CCA is helpful because it provides insight as to how the IRS may analyze intracompany reimbursements. The five-factor test does not articulate new principles; instead, it distills authorities from the reimbursement doctrine, capital contribution principles, and direct-and-proximate-benefit principles on which taxpayers rely when analyzing reimbursement payments.

Although the CCA focused on whether a reimbursement was includible in gross income, the five-factor test may also be helpful in determining whether the reimbursing party or the party receiving the reimbursement may claim a deduction for the reimbursed expense.

IRS modifies guidance on accounting method changes for certain foreign corporations

The IRS in late May 2021 issued Revenue Procedure 2021-26, establishing procedures under Section 446(e) for certain foreign corporations to obtain automatic consent to change their method of accounting to the alternative depreciation system (ADS) under Section 168(g). The

revenue procedure also (i) provides additional terms and conditions applicable to Section 481(a) adjustments arising from accounting method changes of foreign corporations; and (ii) clarifies an existing rule that limits audit protection for certain foreign corporations (the 150% rule).

Section 951A requires a US shareholder of any controlled foreign corporation (CFC) to include the shareholder's global intangible low-taxed income (GILTI) in gross income. GILTI is the excess of the shareholder's net tested income over its net deemed intangible return for the tax year. Very generally, the net deemed intangible return is the excess of 10% of the shareholder's qualified business asset investment (QBAI) over its pro rata shares of certain interest expense from all its CFCs. QBAI is determined by reference to CFCs' adjusted bases in specified tangible property as determined by using ADS under Section 168(g).

When computing tested income and earnings and profits (E&P), taxpayers may use depreciation methods other than ADS. Given the requirement to use ADS to determine the adjusted basis for purposes of calculating QBAI, CFCs not otherwise required to use ADS to compute their income and E&P may want to change to ADS for tangible property to conform their income, E&P and QBAI computations.

Revenue Procedure 2021-26 temporarily permits CFCs on an impermissible non-ADS method, as well as CFCs on a permissible non-ADS method, to obtain automatic consent to change their method of accounting for depreciation to ADS when determining their gross and taxable income under Reg. Section 1.952-2 and E&P under Sections 964 and 986(b).

This change is effective for a Form 3115 filed on or after 11 May 2021 for a CFC's tax year ending before 1 January 2024.

IRS says assumption of reinsurance agreement does not result in base erosion payments

In mid-March 2021, the IRS concluded in PLR 202109001 that a domestic taxpayer (Taxpayer) did not make a base erosion payment when it and two related foreign corporations (FC1 and FC2) entered into an agreement (Agreement) under which FC1 will be substituted for FC2 as retrocessionaire. Taxpayer had previously retroceded the risks to FC2 after originally assuming them from a related domestic insurer (Corp A). According to the IRS, the Agreement did not increase Taxpayer's liability under the base erosion and anti-abuse tax (BEAT) imposed by Section 59A.

The IRS also indicated that amounts paid or accrued by Taxpayer under its original reinsurance agreements will remain base erosion payments if they meet the definition of a base erosion payment under Section 59A and its regulations.

The IRS did not particularly elaborate in the PLR on what payment or deemed payment could be subject to BEAT. Presumably, the potential BEAT issue underlying the PLR is whether, under US federal income tax principles, the Agreement results in a deemed payment from Taxpayer to FC2 from the accrued value that may be embedded in either the insurance or investment assets supporting the reserve liabilities.

The following articles are OECD BEPS-related developments over the period 1 January - 31 December 2021.

OECD

BEPS 2.0

OECD releases Model Rules on Pillar Two Global Minimum Tax

The OECD on 20 December 2021 released the Model Rules on the Pillar Two Global Minimum Tax, as approved by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). The Model Rules cover the scope and mechanics of the Income Inclusion Rule and the Undertaxed Payments Rule, collectively referred to as the Global Anti-Base Erosion (GloBE) rules.

Together with the Model Rules, the OECD also released a summary of the rules (The Pillar Two Model Rules in a Nutshell), an overview of the key operating provisions of the GloBE rules (Fact Sheets) and a Frequently Asked Questions document.

The OECD press release indicates that it expects to release the Commentary relating to the Model Rules and to address the interaction with the United States (US) global intangible low-taxed income (GILTI) rules in early 2022. In addition, the Inclusive Framework is developing the model treaty provision for the Subject to Tax Rule, which is the third element of the Pillar Two global minimum tax framework, and a multilateral instrument for its implementation, which the OECD expects to release in the early part of 2022 with a public consultation

event on it to be held in March 2022. Finally, the OECD notes the work to be done on development of an implementation framework addressing administration, compliance and coordination matters related to Pillar Two and announces that a public consultation event on the implementation framework will be held in February 2022.

These Model Rules provide a substantial update to the Pillar Two Blueprint. Implementation of the Model Rules will lead to significant changes to the overall international tax rules under which businesses operate and will introduce new filing obligation that will require gathering additional data and adaption of companies' internal processes and systems.

It is important for companies to evaluate the potential impact of the proposed global tax changes and monitor activity in relevant countries related to the implementation of new rules through changes in domestic tax rules and bilateral and multilateral agreements, especially given the very ambitious implementation timeline. In particular, companies should monitor developments in the US with respect to the GILTI rules as well as the announced plans for implementation of Pillar Two in the European Union (EU) through an EU Directive.

OECD remains committed to BEPS Pillars in effect by end of 2023

G20 leaders' endorsement at the end of October 2021 of the Inclusive Framework agreement on key parameters of the BEPS 2.0 project will require swift action to ensure that the new rules come into effect globally as soon as possible. Grace Perez-Navarro, deputy director of the OECD's Centre for Tax Policy and Administration, on 18 November was quoted as saying the OECD is committed to having both BEPS Pillars in effect by the end of 2023. The OECD official said this will require the Pillar One multilateral convention to be completed by mid-2022.

Earlier, officials said model rules on the BEPS Pillar Two 15% global minimum tax framework were expected to be released by the end of November. Global minimum tax legislation is pending in the US Congress in the proposed *Build Back Better Act*, but is facing ongoing legislative hurdles, and work has begun on a European Union directive on global minimum tax rules.

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.

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.

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

- Early 2022 – Commentary on the model GloBE rules
- Early 2022 – Model treaty provision to give effect to the subject to tax rule (STTR)
- Early 2022 – Multilateral instrument (MLI) for implementation of the STTR in relevant bilateral treaties
- End 2022 – Implementation framework to facilitate coordinated implementation of the GloBE rules
- 2023 – Implementation of the Two-Pillar Solution

Majority of Inclusive Framework agree to core features of BEPS 2.0 Pillars

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. (Mauritania joined the Inclusive Framework in November 2021, bringing the total number of countries to 137.) 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.

OECD announces conceptual agreement in BEPS 2.0 project; endorsed by G20 Finance Ministers and Central Bank Governors

Most of the countries that make up the OECD's 139-member Inclusive Framework on 1 July 2021 endorsed a high-level BEPS 2.0 agreement that was two years in the making. The agreement addressed how the largest and most profitable multinational enterprises (MNEs) should allocate their taxable profits to customer jurisdictions under Pillar One of the OECD's project and a global minimum tax model that would ensure that MNEs pay a minimum level of tax, no lower than 15%, in all the jurisdictions in which they operate, under Pillar Two.

On 9-10 July 2021, the G20 Finance Ministers and Central Bank Governors met in Venice and endorsed the key components of the agreement. They also called on the Inclusive Framework to swiftly address the remaining issues, finalize the design elements within the agreed framework and provide an implementation plan for the two pillars by the October 2021 G20 Finance Ministers meeting.

The agreement provided that under Pillar One, countries that have digital sales taxes are committing to drop those levies when the agreement is implemented. According to a released statement (here): "This package will provide for appropriate coordination between the application of the new international tax rules and the removal of all Digital Service Taxes and other relevant similar measures on all companies." The agreement on Pillar One included relatively new metrics for determining the largest MNEs subject to a formulary approach for allocating their profits among jurisdictions and scoping in MNEs based on their revenues and profits, with explicit exclusions for financial services and extractive industries.

Under Pillar Two, Inclusive Framework members are committing to enact in their domestic laws a minimum tax on the foreign source earnings of MNEs headquartered in their countries, along with a backstop rule aimed at ensuring those companies pay the minimum level of tax even if the minimum tax itself, called the income inclusion rule, is not adopted.

The Inclusive Framework statement declared that "final decisions on design elements" of both Pillars should be agreed upon by October 2021. The statement released by the Inclusive Framework endorses an implementation plan for both Pillars. Under Pillar One, "The multilateral instrument through which Amount A is implemented will be developed and opened for signature in 2022, with Amount A coming into effect in 2023." Under Pillar Two, the implementation plan stated that Inclusive Framework members should bring the Pillar Two rules into law in 2022, with application starting in 2023. The statement suggested a multilateral instrument could be used to coordinate implementation of Pillar Two.

Treasury Secretary Janet Yellen released a statement (here) saying, in part, "Today's agreement by 130 countries representing more than 90% of global GDP is a clear sign: the race to the bottom is one step closer to coming to an end. In its place, America will enter a competition that we can win; one judged on the skill of our workers and the strength of our infrastructure. We have a chance now to build a global and domestic tax system that lets American workers and businesses compete and win in the world economy."

There were several countries that dissented from the IF agreement, including Ireland and Hungary.

OECD BEPS 2.0 multilateral convention and model legislation set for end of 2021, early 2022

The OECD indicated in July 2021 that it plans to complete work on a multilateral convention and model domestic legislation by the close of 2021 or early next year in order for countries to begin to implement BEPS 2.0 Pillar One and Pillar Two in 2023. Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy, made the comment during an OECD podcast on 16 July 2021. Saint-Amans said that the G20 Finance Ministers made clear that action must be taken quickly on implementation while there is political momentum.

He said during the podcast that Pillar One will shift $100 billion of profit from low-tax jurisdictions to jurisdictions "where the clients are," whereas Pillar Two (global corporate minimum tax) will generate $150 billion in revenue per year.

G7 leaders affirm commitment to global tax changes under BEPS 2.0

On 11-13 June 2021, 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 on 4-5 June 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).

More specifically, the communiqué 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.*

OECD Inclusive Framework political leaders promote global consensus following OECD's public consultation on Pillar One and Two Blueprints

On 27 and 28 January 2021, the OECD/G20 Inclusive Framework on BEPS held a public meeting to provide an update on its ongoing international tax work. The agenda included discussion of the future of international taxation in connection with the ongoing G20/OECD project titled "Addressing the Tax Challenges of the Digitalisation of the Economy" (the BEPS 2.0 project).

At the meeting, finance ministers from six jurisdictions stressed the importance of reaching a consensus solution by mid-2021 and expressed their confidence that a positive outcome will be achieved.

The meeting followed the public consultation meeting hosted by the OECD on 14-15 January 2021 on the Pillar One and Pillar Two Blueprints. These Blueprints were released by the OECD on 12 October 2020 to reflect the progress made on both elements of the BEPS 2.0 project.

The public consultation meeting, which was held virtually, focused on the key questions posed in the consultation document and addressed the written comment submissions that were received from stakeholders as part of the consultation process. Representatives from business, labor groups, non-governmental organizations, academia and other interested parties participated in the consultation to discuss their perspectives. EY submitted a comment letter and a global team from EY participated in the consultation.

The Secretariat Director noted what he saw as the main takeaways from the consultation:

- Pillar One needs to be simplified, particularly with respect to segmentation and double tax relief.
- The major issue around the scope of Pillar One is largely a political issue.
- Pillar Two requires enhanced coordination of the rules, noting that countries can move on their own in this area so that the existence of this aspect of the project is necessary for rule coordination.

Tax compliance

OECD publishes jurisdictions currently participating in the International Compliance Assurance Programme

On 22 March 2021, the OECD Forum on Tax Administration (FTA) published a list of 19 jurisdictions (Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Russia, Singapore, Spain, the United Kingdom and the United States) that confirmed their participation in the next phase of the International Compliance Assurance Programme (ICAP).

The OECD indicated that the list will be updated as additional tax administrations confirm their participation. The announcement of the list follows the release of the new ICAP Handbook on 18 February 2021.

The list of participating jurisdictions was accompanied on the OECD website by a spreadsheet providing additional information regarding each participating tax administration's approach to ICAP implementation and operation. The OECD indicates that this spreadsheet will be updated as further information is received.

ICAP is a voluntary tax risk assessment and assurance program designed to facilitate open and co-operative multilateral engagement between large multinational enterprise (MNE) groups that are willing to engage actively and transparently with tax administrations in multiple jurisdictions where the group has business activities. It utilizes a group's Country-by-Country reports, transfer pricing master file and local files and other information provided by the group and aims to provide an efficient, effective, clear and coordinated approach to achieving early tax certainty and assurance for MNEs.

For MNE groups interested in joining the program, the parent company should contact its local tax administration where it is tax resident to discuss possible ICAP participation in advance of the first deadline for submission. The upcoming dates to submit an application to participate were 30 September 2021, 31 March 2022, and 30 September 2022. Future deadlines will be released in due course.

Dispute resolution

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, People's Republic of 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 in 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 not yet addressed the deficiencies identified in the Stage 1 review. Apart from this, the outcomes of this batch of Stage 2 peer review reports generally demonstrate positive changes across the assessed jurisdictions.

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 was 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 Border Carbon Adjustments, and to factor the impacts into their sustainability transformation plans.

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 another peer review on BEPS Action 14 dispute resolution

On 26 July 2021, the OECD released the sixth batch of Stage 2 peer review reports on the implementation by Argentina, Chile, Colombia, Croatia, India, Latvia, Lithuania, South Africa of the BEPS Action 14 minimum standard on dispute resolution. The outcomes of the Stage 2 peer review process demonstrate overall positive changes across most of the assessed jurisdictions.

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.

OECD releases 10th batch of peer review reports on BEPS Action 14 related to improving dispute resolution

On 16 February 2021, the OECD released the 10th batch of peer review reports, which relate to the implementation by Aruba, Bahrain, Barbados, Gibraltar, Greenland, Kazakhstan, Oman, Qatar, Saint Kitts and Nevis, Thailand, Trinidad and Tobago, United Arab Emirates (UAE), and Vietnam of the BEPS Action 14 minimum standard on dispute resolution.

Overall, the reports conclude that most of the assessed jurisdictions meet almost all or the majority of the elements of the Action 14 minimum standard, with the exception of Kazakhstan and Vietnam which meet less than half of the elements of the Action 14 minimum standard.

OECD holds public consultation on review of minimum standard on dispute resolution under BEPS Action 14

On 1 February 2021, the OECD held a public consultation with respect to the review of the minimum standard on dispute resolution under BEPS Action 14. The proposals on which the OECD was seeking comments were outlined in an earlier Consultation Document. (EY was one of 33 professional service providers, businesses, industry associations, and individuals that provided comments on the Consultation Document. EY submitted a comment letter and a global team from EY participated in the consultation.)

While the majority of comments made by panelists and other participants in the public consultation were broadly in line with the recommendations made by the OECD, there was some divergence in opinion on key proposals relating in particular to their implementation in developing countries.

The public consultation on improving dispute resolution was held at a time of increasing complexity in tax audits and disputes as well as the disruption wrought by the COVID-19 pandemic – the latter of which has already had wide-ranging impacts on transfer pricing generally. In such circumstances, the need to increase the accessibility, efficiency, and efficacy of cross-border dispute resolution programs is critical to the proper operation of the international tax system.

Tax treaties

Parties to OECD MLI release interpretative opinion

The Conference of the Parties to the OECD Multilateral Instrument (MLI) in mid-May 2021 approved an opinion that provides guidance on the interpretation and implementation of the MLI. The OECD reported that the MLI currently covered 95 jurisdictions and had been ratified by 65 jurisdictions. The published opinions of the Conference of the Parties to the MLI are also available.

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; a further 17 agreements are being updated bilaterally.

As of 30 March 2021, 95 jurisdictions had signed the MLI, 65 jurisdictions had deposited their instrument of ratification and 1,700 tax treaties were 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.

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 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 the 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.

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.

Updated OECD CRS rules addressing 'cryptoassets' coming in early 2022

Pascal Saint-Amans, the Director of the OECD's Centre for Tax Policy and Administration, indicated in early May 2021 that the OECD will publish updated common reporting standard (CRS) rules that address "cryptoassets" sometime in early 2022. Officials earlier had said an implementation package for a new cryptoasset framework would be delivered to the G20 later in 2021. Saint-Amans said the project, which is being delayed due to the focus on BEPS 2.0, is critical to avoid a "new black hole[s] emerging."

Final version of Platform for Collaboration on Tax treaty negotiation toolkit released

The Platform for Collaboration on Tax (PCT) – a joint initiative of the International Monetary Fund, OECD, United Nations and World Bank Group – in March 2021 issued the final version of their Toolkit on Tax Treaty Negotiations. The toolkit is aimed at helping developing countries in regard to their tax treaty negotiations. Five other PCT toolkits are available here.

OECD Secretariat issues updated guidance on tax treaties and impact of COVID-19 pandemic

The OECD on 21 January 2021 published on its website an *Updated guidance on tax treaties and the impact of the COVID-19 pandemic* (the guidance). This guidance revisits the guidance published on 3 April 2020 by the OECD Secretariat.

The updated guidance provides an analysis of some of the treaty-related issues that may arise due to the COVID-19 pandemic and is intended to provide more tax certainty to taxpayers. The guidance represents the OECD Secretariat's views on the interpretation of the provisions of tax treaties (i.e., each jurisdiction may adopt its own guidance to provide tax certainty to taxpayers). However, the document indicates that the guidance reflects the general approach of jurisdictions and illustrates how some jurisdictions have addressed the impact of COVID-19 on the tax situations of individuals and employers.

The guidance addresses permanent establishments, residence status of companies (based on place of effective management) and individuals, and the treatment of employment income.

The updated version of the guidance considers some additional fact patterns not addressed in detail in the April 2020 guidance, examines whether the analysis and the conclusions outlined in the April 2020 guidance continue to apply where the circumstances persist for a significant period, and contains references to country practice and guidance during the COVID-19 pandemic.

The OECD has published on its website diverse materials related to different focus areas in response to the COVID-19 crisis.

Note also that EY maintains a tracker that provides a snapshot of the tax policy changes in close to 140 jurisdictions around the world in response to the COVID-19 pandemic and that is updated frequently.

Transfer pricing

OECD releases 2020 MAP statistics and awards

The OECD on 22 November 2021 held its third OECD Tax Certainty Day. During the event, the OECD released the 2020 statistics on Mutual Agreement Procedures (MAP) and presented the 2020 MAP awards.

For 2020, the statistics include information from all members of the OECD/G20 Inclusive Framework on BEPS that joined the Inclusive Framework prior to 2021 and have submitted their MAP statistics for a total of 118 jurisdictions, an increase from the 105 jurisdictions covered in 2019 data. The 2020 data covers almost all MAP cases worldwide. Separate statistics are provided for transfer pricing cases and for "other" cases (i.e., non-transfer pricing cases) for 2020.

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.

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, UN, IMF and World Bank Group present toolkit on the implementation of effective transfer pricing documentation requirements

The Platform for Collaboration on Tax – a joint effort of the OECD, United Nations, International Monetary Fund and World Bank Group – released a toolkit in mid-February 2021, designed to help developing countries with the successful implementation of effective transfer pricing documentation requirements. The toolkit compiles information on transfer pricing documentation and analyzes policy choices and legislative options.

Preferential tax regimes

OECD releases 2021 update on peer review of preferential tax regimes

The OECD on 5 August 2021 released an update on the results of the peer reviews of jurisdictions' domestic laws under Action 5 (harmful tax practices) of the OECD/G20 BEPS Project. The results were approved on 7 June 2021 by the Inclusive Framework on BEPS.

The updated results cover 18 tax regimes. According to the press release, the total number of tax regimes that have been reviewed, or are under review, is 309. The reviews were undertaken by the Forum on Harmful Tax Practices and only one regime (Trinidad and Tobago) was classified to be "harmful." The rest of the regimes have been abolished, are in the process of being abolished, are being amended, are under review or are considered to be "not harmful." The Inclusive Framework will continue its reviews and will provide periodic updates.

The report notes that the United States has committed to abolishing its foreign-derived intangible income (FDII) regime.

The updated results of the review of preferential tax regimes underscore that the Inclusive Framework is continuing its focus on jurisdictions' implementation of the BEPS Action 5 minimum standard despite the ongoing global discussions on the BEPS 2.0 project. The release of the updated results provides information to taxpayers on the status of preferential regimes in jurisdictions in which they may operate.

Exchange of information

OECD releases 2020 peer review report on BEPS Action 5 on the Exchange of Information of Tax Rulings

On 14 December 2021, the OECD released the fifth annual peer review report relating to compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) with the minimum standard on BEPS Action 5 for the compulsory spontaneous exchange of certain tax rulings (the transparency framework).

The report covers 131 of the 141 current Inclusive Framework jurisdictions, including all jurisdictions that joined prior to 30 June 2020, and Jurisdictions of Relevance (i.e., jurisdictions that are outside the Inclusive Framework but are deemed to be of interest for the purposes of transparency in tax) identified prior to 30 June 2020.

The report assesses the 2020 calendar-year period and contains 66 recommendations for 36 jurisdictions to improve their legal or operational framework to identify and exchange tax rulings. Further, the report indicates that as of 31 December 2020, almost 22,000 tax rulings within the scope of the transparency framework had been issued by the jurisdictions under review, and over 41,000 exchanges of information had taken place.

This report is the first report for the peer review process on BEPS Action 5 conducted under the new transparency framework for the years 2021 through 2025 that was published on 22 February 2021.

While there are no signs that the Inclusive Framework intends to modify the Action 5 transparency standard, the European Commission intends to propose changes to the transparency framework in the European Union. According to a recently published Council report, in 2022 the Commission will table a legislative proposal on further revision of the Directive on administrative cooperation in the field of taxation (DAC), including proposals to cover tax rulings for wealthy individuals.

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."

Miscellaneous

OECD releases corporate tax statistics publication (third edition), including anonymized and aggregated CbC report statistics

On 29 July 2021, the OECD released the third edition of its annual Corporate Tax Statistics publication (the report) together with an updated database. The OECD describes the database as intended to assist in the study of corporate tax policy and expand the quality and range of data available for the analysis of base erosion and profit shifting (BEPS) activity. The database includes anonymized and aggregated country-by-country (CbC) reporting statistics, reflecting information for the year 2017 and including information from CbC reports filed in 38 jurisdictions. The OECD also published a list of Frequently Asked Questions on the anonymized and aggregated CbC reporting data.

As highlighted in the press release accompanying the release of the report and the database, the OECD views the new data as showing the importance of the two-pillar plan being advanced by member jurisdictions of the OECD/G20 Inclusive Framework on BEPS in connection with the BEPS 2.0 project "to reform international taxation rules and ensure that multinational enterprises pay a fair share of tax wherever they operate."

United Nations

UN releases MAP and Tax Dispute Resolution Handbook

In late 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.

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.

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

The United Nations 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.

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