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Washington Dispatch

January 2022, Volume 26, Issue 1

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Legislation

Biden Administration looks to scaled-back Build Back Better legislation

The Biden Administration and congressional Democrats took a new tack in regard to the Build Back Better (BBB) social spending package in January, following Senator Joe Manchin's (D-WV) announcement in late December that he would not support the $1.7 trillion plan. President Biden said during a 19 January press conference that he now supports breaking up his proposed *Build Back Better Act* legislation into smaller bills.

The President said: "It's clear to me we'll have to probably break it up" … "I think we can break the package up, get as much as we can now, come back, and fight for the rest later." President Biden pointed to the clean energy provisions in the BBB legislation that could be brought forward and passed by Congress, but suggested that extension of the enhanced child tax credit and spending for community colleges may not survive.

Following the President's news conference, Senator Manchin offered his view on a BBB substitute saying that discussions will have to begin "with a clean sheet of paper and start over." He also confirmed earlier reports that his $1.8 trillion BBB proposal from December 2021 was off the table. Senator Manchin further explained his views on moving forward, saying the "main thing we need to do is take care of the inflation. Get your financial house in order. Get a tax code that works."

As the month came to a close, Senator Manchin said during an interview that he was in discussions with Democrats regarding a new version of Build Back Better. The Senator said that while he is open to negotiations, he again pointed to inflation in saying he "wants to be realistic."

Senator Manchin's comments came amid rising concerns of double taxation if Congress fails to enact changes to the global intangible low-taxed income (GILTI) rules and countries adopt the rules under the OECD's Base Erosion and Profit Shifting (BEPS) 2.0 Pillar Two.

A senior Treasury official indirectly addressed the point, saying that the Biden Administration remains "confident that many of the top priorities will ultimately be enacted," noting in particular reform of the GILTI regime and boosting IRS funding by $80 billion over 10 years.

Speaking at a virtual meeting of the New York State Bar Association Tax Section on 25 January, the Treasury official said the Build Back Better international tax proposals would allow the US to conform to the OECD BEPS 2.0 Pillar Two agreement, which she described as "one of the biggest accomplishments of the entire Treasury Department and the administration to date." The official added there is no backup plan to meet US obligations under Pillar Two if the BBBA international provisions are not enacted. "We are really confident Build Back Better will move forward . . . and this is a very key portion of that agenda," the official said.

Ways and Means Committee Republicans warn congressional consent needed for BEPS 2.0 Pillar One and Pillar Two

Seventeen Republican members of the House Ways and Means Committee on 19 January 2022 wrote to Treasury Secretary Janet Yellen warning that Congressional consent is necessary in order for Pillar One and Pillar Two to have US domestic effect. The committee members wrote that both pillars implicate "core Congressional revenue-raising powers" and therefore "implementing legislation is required for either pillar to have domestic legal effect." The letter went on to say: "It is extremely troubling that the Administration has made promises to the world without sufficient bipartisan, bicameral consultation."

IRS news

Final regulations treat domestic partnerships as aggregates for applying certain subpart F provisions, and proposed regulations would apply a similar approach to PFICs

Treasury and the IRS on 25 January 2022 published final regulations (TD 9960) requiring an aggregate approach to determine the subpart F inclusion for a controlled foreign corporation (CFC) owned by a domestic partnership. Under this approach, a partner of a domestic partnership would have a subpart F inclusion from the indirectly-owned CFC if the partner itself were a US shareholder of the underlying CFC. This aggregate approach is consistent with the treatment of a domestic partnership for global intangible low-taxed income (GILTI) inclusion purposes.

The regulations finalize, with limited changes, regulations originally proposed in 2019.

The aggregate approach does not, however, apply for Section 1248 purposes or when determining whether (i) a US person is a US shareholder, or (ii) a foreign corporation is a CFC.

Accompanying proposed regulations (REG-118250-20) would extend the aggregate approach to domestic partnerships that own an interest in a passive foreign investment company (PFIC). The proposed extension would have the following consequences:

- A domestic partnership would no longer be treated as a PFIC shareholder for purposes of making qualified electing fund (QEF) or mark-to-market (MTM) elections, recognizing QEF inclusions or MTM amounts, or filing Forms 8621.
- A partner of a domestic partnership, rather than the domestic partnership, would be required to make a QEF election, and the partner would have to notify its partnership to assist it with information reporting and basis tracking in the QEF stock.
- Domestic partnerships would be treated as aggregates for purposes of applying the CFC-PFIC overlap rule under Section 1297(d).

The final regulations generally apply to tax years of a foreign corporation beginning on or after the date that the regulations are filed with the Federal Register (e.g., 2023 for calendar-year taxpayers). Domestic partnerships may apply the final rules in their entirety to tax years of a foreign corporation beginning after 2017, subject to certain consistency requirements. The proposed regulations generally would apply prospectively to tax years beginning on or after the date the rules are adopted as final regulations.

These final and proposed regulations are relevant to any domestic partnership owning stock in a foreign corporation. S corporations generally are treated like domestic partnerships for purposes of these final and proposed regulations.

The final regulations treat domestic and foreign partnerships the same way for subpart F inclusion purposes, However, the final CFC regulations and (if adopted in final form) the proposed PFIC regulations will make compliance for domestic partnerships and S corporations owning stock in foreign corporations far more complex.

US officials comment on cryptocurrency efforts

A Treasury official in mid-January said the Government is developing interim guidance on cryptocurrency reporting, but provisions included in the recently enacted infrastructure bill have required revisions to drafts. The official was quoted as saying that regulations covering reporting requirements under Section 6045 are a priority, but declined to provide a timeline for the regulations.

An IRS official in January also was quoted as saying that the IRS Office of Fraud Enforcement (OFE) is working with the IRS Criminal Investigation division to ensure that agents have the necessary technology and training to find and follow cryptocurrency transactions. According to the official, the Government will analyze available information by focusing on cryptocurrency transactions and taxpayers' financial and tax filings.

IRS changes to instructions for 2021 partnership Schedules K-2 and K-3 relevant to many partnerships, including private equity and private capital funds

On 18 January 2022, the IRS outlined changes to previously issued IRS instructions for Schedules K-2 and K-3 for the 2021 tax year IRS Form 1065, *U.S. Return of Partnership Income*. Schedules K-2 and K-3 are new reporting forms that pass-through entities generally must complete, beginning in the 2021 tax year.

Many partnerships must complete Schedules K-2 (detailing partners' total international distributive share items) and issue Schedules K-3 (detailing a partner's share of international income, deductions, credits, etc.) to their partners to report US international tax information. Partners use the information reported on Schedule K-3 to complete their US tax and information returns.

The revised instructions show how carefully all relevant facts must be weighed to determine whether, and to what extent, the Schedules K-2 and K-3 must be completed for partners. The changes provide more exceptions from filing, and additional clarity as to when such filing exceptions apply.

Among other things, the new instructions clarify that with exceptions, a partnership with no foreign-source income must file Part II (foreign tax credit limitation) and Part III (information for preparing Forms 1116 or 1118) on Schedules K-2 and K-3 if their partners have items of international tax relevance. Also, in most instances, a partnership does not need to attach its international IRS forms to each partner's Schedule K-3. The updated instructions further clarify that partnerships must determine whether they are obligated to report information on controlled foreign corporations and passive foreign investment companies based on their actual knowledge of their direct and indirect partners (i.e., a partnership is not generally required to affirmatively obtain information from its direct or indirect partners to determine if it needs to file each part of the Schedule K-2 or Schedule K-3).

The clarifications are welcome news for many partnerships, including private equity and private capital funds. The changes reduce the scope of reporting of non-US corporation distributions and income inclusions. They also resolve prior uncertainty, in certain respects, as to when partnerships that have solely domestic activities and US partners must file the Schedules K-2 and K-3.

Partnerships are encouraged to review this guidance, which is incorporated into the 2021 partnership instructions for Schedules K-2 and K-3, when preparing their 2021 tax returns.

IRS announces pilot fast-track program to resolve corporate letter ruling requests in 12 weeks

The IRS is conducting an 18-month pilot program that allows taxpayers to request fast-track processing of corporate letter rulings if they meet the guidelines set out in Revenue Procedure 2022-10. The IRS will strive to issue a ruling within 12 weeks after the request.

The program, which began on 14 January 2022, applies to both new and pending requests under the jurisdiction of the Associate Chief Counsel (Corporate). The program is not available, however, for requests to extend the time to make elections under Reg. Section 301.9100 (Section 9100 relief), but taxpayers can request expedited handling under the procedures in Revenue Procedure 2022-1.

The fast-track process replaces expedited handling for most requests under the jurisdiction of the Associate Chief Counsel (Corporate) and will generally be granted. An IRS official was quoted on 19 January 2022 as saying that fast-track processing is not "need-based." This contrasts with expedited handling, which is only granted under Revenue Procedure 2022-1 in "rare and unusual cases," when something outside a taxpayer's control creates a real business need to obtain a letter ruling or determination letter before a certain date to avoid serious business consequences.

OECD developments

BEPS 2.0 model rules commentary expected to be released soon

The OECD commentary related to the BEPS 2.0 Pillar Two model rules is forthcoming, perhaps in early February 2022, according to an OECD official. The official was quoted as saying in January that when the Pillar Two commentary is completed, the Inclusive Framework will begin working on a multilateral instrument to coordinate implementation of the subject-to-tax rule. The official also confirmed that the Inclusive Framework is on schedule to complete the text of a multilateral convention to implement the Pillar One new taxing right, with both projects set for completion by the end of "first semester of this year."

OECD developing BEPS 2.0 Pillar Two corporate minimum tax implementation framework

An OECD official on 25 January 2022 was quoted as saying that the organization is developing a BEPS 2.0 Pillar Two corporate minimum tax implementation framework that would utilize the peer review process to determine if a country's existing tax provisions are compliant with the new BEPS rules.

The official indicated the implementation framework would address administration, compliance and coordination in regard to topics associated with Pillar Two, including identifying the existence of a qualified income inclusion rule (IIR) and undertaxed payments rule (UTPR) as well as minimum domestic taxes.

The official said: "We could envisage that that process will take place through some kind of peer review process whereby those countries that were involved in implementing these rules would assess the legislation of others to determine whether they are comfortable that these rules do, in fact, meet the criteria that they have agreed." According to the official, the results would be forwarded to tax administrations and multinational groups to determine those countries that have qualified global anti-base erosion (GLOBE) rules. The implementation framework is expected to be released sometime in 2022, the official said.

OECD publishes 2022 Transfer Pricing Guidelines

On 20 January 2022, the OECD released the 2022 edition of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD TP Guidelines).

The 2022 edition of the OECD TP Guidelines mainly reflects a consolidation of a number of reports resulting from the OECD/G20 BEPS Project. It incorporates the following three revisions of the 2017 edition:

- The report *Revised Guidance on the Application of the Transactional Profit Split Method*, published on 21 June 2018.
- The report *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles*, published on 21 June 2018.
- The report *Transfer Pricing Guidance on Financial Transactions*, published on 11 February 2020.

It also includes some related changes for consistency.

Individual countries take different approaches with respect to whether and how they incorporate the OECD TP Guidelines into their domestic tax systems. For example, in some countries, the domestic rules explicitly refer to the approved OECD TP Guidelines so that updates are automatically incorporated, while in other countries it requires some form of administrative or other action to incorporate a new version of the TP Guidelines into their domestic law.

Companies are encouraged to understand and analyze the implications of this development for each jurisdiction in which they operate. For example, companies should review the amendments to the OECD TP Guidelines with respect to their global operations and their current transfer pricing policies and approaches. There will likely be increased scrutiny by tax authorities from OECD member countries and non-OECD member countries on the application of the concepts reflected in the amendments to cross-border intercompany transactions.

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

The OECD on 24 January 2022 released the eighth batch of Stage 2 peer review reports relating to the outcome of the peer monitoring of the implementation by Brunei Darussalam, Curaçao, Guernsey, Isle of Man, Jersey, Monaco, San Marino, and Serbia (the assessed jurisdictions) of the BEPS Action 14 minimum standard on dispute resolution.

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

The outcomes of this batch of Stage 2 peer review reports generally demonstrate positive changes across the assessed jurisdictions.

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EYG no. 000863-22Gbl

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