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In this issue

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Legislation

2. President Biden releases FY'24 Budget with major international policy proposals

Treasury and IRS news

3. US officials offer insights on major pending international regulatory projects
3. Turkish Lira's hyperinflationary status has federal tax implications for US multinationals
4. IRS announces plans to issue guidance on certain NFTs as collectibles

Transfer pricing

4. IRS planning new APA process
5. IRS considering Section 482 regulation for parent's implicit support in pricing intercompany loans

OECD developments

5. OECD holds public consultation meeting on compliance and tax certainty aspects of BEPS Pillar Two global minimum tax

Legislation

President Biden releases FY'24 Budget with major international policy proposals

President Biden on 9 March released the Administration's FY 2024 [Budget](#) and accompanying [Treasury Greenbook](#), calling for \$3 trillion in deficit reduction including through tax increases on corporations and wealthy individuals.

The Budget is a blueprint for the President's preferred policies irrespective of their chances of being enacted, and generally is intended to strike a contrast with spending cuts called for by House Republicans, which may not be detailed until their budget resolution is released in May. It continues to call for tax provisions that fell out of the Build Back Better negotiations that eventually led to the *Inflation Reduction Act* (IRA).

The proposals include a previously outlined quadrupling of the IRA's stock buyback excise tax in Section 4501 from 1% to 4% and a "billionaire's tax" that would impose a 25% minimum tax - higher than the previously proposed 20% - on total income, inclusive of unrealized capital gains, for taxpayers with wealth of greater than \$100 million. Many of the Budget's tax proposals are taken from the President's first Budget (FY 2022), the House-passed *Build Back Better Act* that did not pass the Senate and last year's Budget (FY 2023).

The President's FY 2024 Budget proposes to increase the tax rate for C corporations from 21% to 28%.

Other corporate tax proposals would amend the Code in several ways to ensure that a transfer of property by a corporation to its shareholder(s) cannot be made through transactions that avoid dividend treatment for the corporation's shareholders. The Budget would also limit tax avoidance through inappropriate leveraging of parties to divisive reorganizations, limit losses recognized in liquidation transactions, and prevent basis shifting by related parties through partnerships, among other proposals.

International tax proposals

The FY2024 Budget includes few new international tax proposals, largely reprising proposals from prior budgets. Over \$1.1 trillion, or 29% of the increases in total net tax, would come from reforms to the international tax rules. The international tax proposals would:

- ▶ Limit the Section 250 deduction to 25%, which together with the proposed corporate rate increase to 28% would increase the effective rate on global intangible low-taxed income (GILTI) to 21%
- ▶ Modify the GILTI regime to align with the global minimum tax rules under OECD BEPS Pillar Two, including by applying the GILTI rules on a country-by-country basis
- ▶ Replace the base erosion and anti-abuse tax (BEAT) with an "undertaxed profits rule" (UTPR) that is consistent with the UTPR in the Pillar Two rules
- ▶ Repeal the deduction for foreign-derived intangible income (FDII)

Senate Finance Committee FY '24 Budget hearing focuses on BEPS agreement, European access to clean vehicle tax credits

Treasury Secretary Janet Yellen on 16 March testified before the Senate Finance Committee during a hearing ostensibly on the President's Fiscal Year 2024 Budget but that focused on the current banking crisis as well as the OECD-led global tax agreement. Committee Republicans expressed concern about various aspects of the BEPS 2.0 negotiations, with Ranking Member Mike Crapo (R-ID) saying he opposed the OECD agreement.

Members of both parties also expressed concern about Secretary Yellen's recent comments that future limited free trade agreements focused on battery minerals with the European Union (EU) and other allies would not need approval from Congress.

The US and the EU reportedly are negotiating a deal that would permit European companies to qualify for some of the available clean vehicle tax credits enacted by the *Inflation Reduction Act* (IRA). President Biden and the EU Commissioner on 10 March issued a joint statement that describes the talks as aimed at allowing EU companies to meet the mineral requirements for the Section 30D electric vehicle tax subsidy. The agreement is being coordinated by an EU-US task force on the IRA.

BEPS Pillar Two GloBE permanent safe harbor unlikely, Treasury official says

Addressing BEPS 2.0, a senior Treasury official in late March said negotiations have been so challenging that he does not expect the Inclusive Framework (IF) will be able to craft a permanent safe harbor under the Pillar Two global anti-base erosion (GloBE) rules. Recent OECD guidance provided for several temporary safe harbors that apply to the first three years of GloBE is in effect. On the other hand, the official was also quoted as saying that the IF is working on a qualified domestic minimum top-up tax (QDMTT) safe harbor that would eliminate an in-scope multinationals' liabilities under the Income Inclusion Rule (IIR) and Undertaxed Profit Rule (UTPR).

- ▶ Create a new general business credit equal to 10% of eligible expenses incurred when onshoring a trade or business to the United States
- ▶ Disallow deductions for expenses incurred when moving a US trade or business offshore
- ▶ Eliminate the exceptions in computing a controlled foreign corporation's earnings and profits (E&P) for purposes of Section 952(c)
- ▶ Create a second type of US shareholder to include in income amounts determined with respect to non-taxed dividends
- ▶ Limit foreign tax credits on sales of hybrid entities
- ▶ Restrict deductions of excessive interest expense
- ▶ Modify the treatment of certain derivative transactions for foreign investors
- ▶ Permit taxpayers to retroactively elect, in certain circumstances, to treat a passive foreign investment company as a qualified electing fund without IRS consent
- ▶ Require Section 6038 reporting for each foreign "taxable unit"

The proposals have various effective dates.

The above tax proposals are designed to raise tax revenues to fund the Biden Administration's priorities. If enacted, they would significantly increase taxes on US multinational companies. Their prospects for enactment, however, appear dim, given the current composition of Congress.

Taxpayers nonetheless should keep track of these proposals. The fact that these proposals appeared in past legislation and budgets indicates that they could be used again as revenue offsets in future legislation.

Treasury and IRS news

US officials offer insights on major pending international regulatory projects

US government officials fanned out across in Washington in mid-March to offer over their views on some important international tax regulatory projects in the works.

A senior Treasury official was quoted as saying that the Government is mulling whether to issue further notices on the new corporate alternative minimum tax (CAMT). While additional interim guidance is possible, it would likely have to address issues that cannot be resolved in the absence of a comprehensive set of rules. The official said it is too early to predict when proposed regulations on the CAMT will be released and added that the Government needs detailed comments on the CAMT to flesh out proposed rules.

Regarding the stock buyback excise tax, an IRS official said the Government is willing to consider carveouts, but only if those carveouts are clearly defined and consistent with current bright line tests. Another government official indicated there is a first draft of proposed regulations on the stock buyback provision, but said the Government now wants to compare what they have with expected comment letters.

And a Treasury official indicated that the Biden Administration apparently is not inclined to expand the current foreign tax credit regulations' single-country royalty withholding exception to include a services withholding carve out, saying the two areas are distinct and do not lend themselves to comparison. In the meantime, however, another Treasury official said additional foreign tax credit guidance is expected to include rule order and the treatment of qualified domestic minimum top-up taxes (QDMTTs). The official was quoted as saying the Government is continuing to work on foreign tax credit guidance in the context of the BEPS Pillar Two global minimum tax.

Turkish Lira's hyperinflationary status has federal tax implications for US multinationals

US multinationals should be aware that the recent determination of hyperinflationary status for the Turkish Lira (TRY) has US federal tax consequences.

Inflation data published by the International Monetary Fund confirms that the cumulative inflation rate for the TRY exceeded 100% for the 36 calendar months ended 31 December 2022.

Given that the TRY now qualifies as hyperinflationary under Reg. Section 1.985-1, taxpayers and qualified business units (QBUs) that use the TRY as their functional currency must adjust their taxable income and/or earnings and profits for their 2023 tax year. Adjustments for the TRY's hyperinflationary status could trigger gains and losses for these taxpayers and affect previously calculated deemed inclusions for US shareholders of controlled foreign corporations.

The TRY's hyperinflationary status could require certain taxpayers and QBUs with TRY nonfunctional currency-denominated transactions to mark those transactions to market for their 2022 tax year, while also affecting their eligibility for potential exceptions and elections under US federal income tax regulations.

IRS announces plans to issue guidance on certain NFTs as collectibles

The IRS issued [Notice 2023-27](#) on 21 March, announcing that Treasury and the IRS intend to issue guidance related to the treatment of certain nonfungible tokens (NFTs) as collectibles for tax purposes. Pending the issuance of that guidance, the IRS intends to determine whether an NFT constitutes a Section 408(m) collectible by analyzing whether the NFT's associated right or asset is a collectible, under a look-through analysis.

While some NFTs may represent a right or asset explicitly listed under Section 408(m), such as gemstones, other assets may require further clarification in the ensuing guidance. In particular, the IRS will make a determination on the extent to which a digital file may constitute a "work of art" under Section 408(m)(2)(A). Notice 2023-27 requests comments on specific questions offering taxpayers the opportunity to provide technical input on future guidance.

The IRS has never issued income tax guidance specific to NFTs. Notice 2023-27 is significant in that it is the first of its kind and may help start a discussion around the proper tax treatment of NFTs.

By expanding the definition of "collectibles" to include certain NFTs, the Notice confirms that a 28% tax rate will apply to sales of these NFTs, as well as gain from the sale of an interest in a trust, S corporation or partnership attributable to an NFT.

The forthcoming guidance may also provide a much-needed framework for state departments of revenue as they try to issue guidance around the proper treatment of digital assets, such as NFTs. While a handful of states have issued published guidance on cryptocurrencies and NFTs in the context of sales tax, most state taxing authorities have held back on issuing tax guidance specific to blockchain-based digital assets.

Transfer pricing

IRS planning new APA process

The IRS Acting Deputy Commissioner of the Large Business and International (LB&I) Division said in early March that the IRS plans to implement a new process for taxpayers considering applying for an APA.

Under this new process, the IRS and taxpayer will engage early on so the IRS can provide feedback to the taxpayer on whether the proposed transactions to be covered in an APA would be best resolved in the APA program or some other process, such as the International Compliance Assurance Programme (ICAP).

The official said that the new process is not intended to limit the number of APAs that the IRS accepts but rather an attempt to channel transfer pricing cases, depending on the facts and circumstances, into the most efficient and effective dispute resolution process for the benefit of both the IRS and taxpayers.

The new APA pre-filing process is expected to be outlined in an update to existing APA Revenue Procedure 2015-41. The official added that the IRS will release details "setting forth a process which I hope will be well received, because it will include early engagement with the taxpayer as part of this process to communicate what our thoughts are on whether the proposed APA will achieve the certainty goals." As an example, the official noted that ICAP could provide "more comprehensive certainty and assurance for a taxpayer" than an APA in certain cases.

Senate approves Daniel Werfel as next IRS Commissioner

The Senate on 9 March confirmed Daniel Werfel to be the next IRS Commissioner for a five-year term. The 54 to 42 vote was closer than expected.

IRS considering Section 482 regulation for parent's implicit support in pricing intercompany loans

The IRS has indicated that it is considering the overarching issue of whether intercompany debt should be priced solely on the borrower's credit rating or using a group approach where a parent would support the borrower if a financial need existed (i.e., implicit support).

An IRS official in March was quoted as saying that the agency is considering issuing a regulation that would clarify that parental support of a subsidiary's intercompany loan must be considered when pricing the loan. In addition, the [IRS's priority guidance plan](#) for 2022/23 listed a project on clarifying the effects of group membership (e.g., passive association) on arm's-length pricing for financial transactions. According to the official, a clarifying regulation could require taxpayers determining the interest rate on an intercompany loan to account for a parent's implicit support when rating a subsidiary borrower, just like a credit agency would, even if that support does not entitle the parent to a corresponding fee. This would align with the [OECD transfer pricing guidelines](#).

The official further explained that the likelihood that parental support might increase the credit rating of a borrower should be considered in pricing the loan, acknowledging that such an impact varies based on the relative importance of the borrower to a group or to the parent.

Taxpayers should closely monitor any development as any future regulation likely will impact the general approach to pricing intercompany debt when there is implicit support. Furthermore, the potential retroactivity of the clarifications could conflict with foreign jurisdictions, as they may not accept a new pricing approach for transactions already in place.

OECD developments

OECD holds public consultation meeting on compliance and tax certainty aspects of BEPS Pillar Two global minimum tax

The OECD on 16 March 2023 held a virtual consultation meeting on the public consultation documents that had been released by the OECD Secretariat on 20 December 2022 on the Pillar Two global anti-base erosion (GloBE) information return and on tax certainty for the Pillar Two GloBE rules in connection with the ongoing BEPS 2.0 project.

During the consultation meeting, three panels of business representatives and an academic discussed tax certainty and two panels of business representatives discussed the GloBE information return. The panels on tax certainty focused on why tax certainty is important for the implementation of the GloBE rules and how differences/issues in the application of the rules can be prevented or resolved. The panels on the GloBE information return focused on simplification of the data points and the return as well as standardization of administration.

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