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OECD developments

OECD releases final guidance on BEPS Pillar One Amount B on baseline distribution

The OECD on 19 February 2024 published the [final report](#) on BEPS 2.0 Pillar One Amount B, which is intended to simplify and streamline the application of the arm's-length principle to baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries.

The report sets out which distributors and sales agents are in scope and how to price their in-scope intercompany transactions. Distribution of non-tangible goods and services and marketing, trading or distribution of commodities are excluded from the scope of Amount B.

Unlike other BEPS 2.0 measures, Pillar One Amount B is not subject to a revenue threshold (unlike both Pillar One Amount A and Pillar Two) and is widely applicable to multinational businesses. The OECD plans to publish a list of the jurisdictions that choose to apply Amount B. Companies should consider whether they have transactions that may be in scope of Amount B and evaluate the potential impact of the Amount B approach on those transactions. Amount B will be treated as providing an arm's-length outcome only in jurisdictions that choose to apply the approach.

In jurisdictions that do not choose to apply it, Amount B will not be treated as providing an arm's-length outcome, including for the purposes of Article 9 of the OECD Model Tax Convention (MTC) and by extension Article 25. The outcome determined under the Amount B approach by a jurisdiction is not binding on the counter-party jurisdiction.

The report also identifies additional work that is being done with respect to several aspects of Amount B, including updated Commentary on Article 25 of the MTC that will include specific language relating to tax certainty and the elimination of double taxation to ensure that optionality is preserved in all dispute resolution mechanisms for jurisdictions that do not adopt Amount B.

It will be important for companies to monitor whether and how the jurisdictions that are relevant to their business choose to implement Amount B, including assessing whether they may have in-scope transactions that involve a jurisdiction that implements Amount B and a jurisdiction that does not.

The dates of implementation by relevant jurisdictions should be monitored as this could be relevant to accounting for the tax impact, and consequently the effective tax rate of the group.

The report is incorporated into the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022. Jurisdictions can choose to apply the Amount B approach for in-scope transactions of tested parties in their jurisdictions for fiscal years starting on or after 1 January 2025.

IRS news

Finalization of proposed FX regulations expected by year end, two sets of proposed Section 367 regs in first half of 2024

An IRS official in February 2024 provided further insight on finalization of proposed foreign currency regulations that were issued in November 2023. According to the official, the government hopes to finalize the "high-priority" rules by the end of 2024.

The official was also quoted as saying that another set of proposed foreign currency regulations could be issued, noting that 2016 proposed regulations on recognition and deferral of Section 987 gain or loss were not repropounded and portions could be reconsidered in a new package of proposed rules.

Earlier, IRS officials were quoted as saying the government hopes to finalize two sets of Section 367 proposed regulations in the first half of 2024. The IRS plans to finalize the proposed regulations ([REG-124064-19](#)) under Section 367(d), issued in early May 2023, that would apply new rules to "repatriations" of intangible property subject to Section 367(d). In certain circumstances, the proposed regulations would permit the annual inclusions to cease that Section 367(d) and its regulations require.

Another IRS official indicated that Treasury and the IRS also plan to finalize proposed regulations that would amend Section 367(b) regulations applying to certain cross-border triangular reorganizations and inbound nonrecognition transactions. The proposed rules ([REG-117614-14](#)), released in October 2023, would incorporate, with certain modifications, guidance described in Notice 2014-32 and Notice 2016-73, each issued in response to transactions perceived to exploit certain aspects of the existing regulations.

US Senate approves IRS Chief Counsel nomination

The Senate on 29 February 2024 approved the nomination of Marjorie Rollinson to be IRS Chief Counsel. Rollinson spent the majority of her career at EY, retiring as Deputy Director of National Tax, and held several senior positions at the IRS.

Transfer pricing news

IRS sending out more letters regarding transfer pricing compliance

The IRS is continuing to send letters to certain US-based subsidiaries of foreign-owned corporations asking about their intercompany transaction pricing. The letters (Letters 6607 and 6608) have gone out mostly to corporations that distribute goods in the United States, and in limited instances, to corporations that manufacture goods in the United States. These letters stem from the corporations' alleged use of certain transfer pricing strategies that the IRS may deem improper.

US reaches agreement with Austria, France, Italy, Spain and UK on DST moratorium

Treasury on 15 February announced that the US government had reached [agreement](#) with Austria, France, Italy, Spain and the United Kingdom to extend through 30 June 2024 the October 2021 moratorium on unilateral measures, including digital services taxes. Treasury described the further extension as coming "in light of the continuing multilateral negotiations at the G20/OECD Inclusive Framework."

Based on reports, the IRS has sent out about 180 such letters since November 2023. IRS Commissioner Danny Werfel said in a recent interview that addressing these transfer pricing strategies is a "high priority."

The IRS had announced ([IR-2023-194](#)) on 20 October 2023, that it planned to send letters to approximately 150 US-based subsidiaries. The IRS updated this number to 180 in January 2024.

The letters respond to information reported on Form 1120, *U.S. Corporation Income Tax Return*, and Form 5472, *Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade of Business*, when taxpayers report losses or low margins for tax years 2017–2021. The letters say that losses or low margins indicate that the intercompany transaction pricing may not comply with Section 482.

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Taxpayers should consider responding to these IRS compliance letters to avoid potential examinations and engage with the IRS proactively. In addition, taxpayers should also consider doing a health check on their intercompany transaction pricing, confirming that their internal workpapers support accurate and robust transfer pricing documentation.

The IRS has been asserting penalties more frequently for taxpayers' not maintaining sufficient documentation to meet the reasonableness standard under Reg. Section 1.6662-6(d)(2)(iii).

The OECD also released updated results on the review of the substantial-activities factor in connection with the domestic laws of the 12 jurisdictions that have been identified by the Forum on Harmful Tax Practices (FHTP) as being a "no or only nominal tax jurisdiction." For eight jurisdictions, no issues were identified. For the remaining four jurisdictions (Anguilla, The Bahamas, Barbados and the Turks and Caicos Islands), the FHTP identified areas for focused monitoring. For Anguilla, recommendations for substantial improvement also were made.

More OECD news

OECD releases 2024 update on peer reviews under BEPS Action 5 on harmful tax practices

The OECD on 6 February 2024 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 updated results cover four preferential tax regimes. This latest review reflects that specific regimes in Hong Kong and the United Arab Emirates (UAE) have been amended to align with the standard and are now considered nonharmful and specific regimes in Albania and Armenia have been abolished.

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