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IRS news

US Government officials offer insights, timelines on upcoming TCJA guidance

Acting IRS Commissioner David Kautter addressed the ABA Tax Section meeting in Washington on 11 May, saying the IRS hopes to complete several guidance projects implementing the *Tax Cuts and Jobs Act* (TCJA) by mid-August 2018, although some high-profile projects may take longer.

Projects mentioned by Kautter included:

- ▶ Proposed regulations on the Section 199A pass-through deduction are targeted for mid- to late-July, although he cautioned that the proposed guidance would not answer every issue.
- ▶ Proposed regulations on Section 163(j) are targeted for late summer or early fall.
- ▶ Proposed regulations on Section 951A (Global Intangible Low-Taxed Income or GILTI) are targeted for late summer and the IRS also hopes to issue regulations on 168(k) expensing over the summer.

The Acting Commissioner also was quoted as saying that guidance on Section 965 is not yet complete, stating that the IRS may issue another notice in the coming weeks and will probably have a notice of proposed rulemaking this summer.

Finally, Kautter said that most of the 2018 tax forms have been drafted and are under review, with the plan to finish instructions by the end of May and work on publications over the summer.

Other government officials offered more insights on a number of tax reform-related issues, including:

- ▶ Section 163(j) - An IRS official was quoted as saying the IRS' corporate division is spending significant time on issues concerning consolidated and affiliated groups. The official noted that these issues depend on substantive interpretations by other IRS divisions and would require close collaboration with other divisions before resolving any corporate tax questions. A Treasury official also reportedly said that the department is considering ways to address the treatment of the carryover of excess interest under Section 382 in the proposed Section 163(j) regulations.

House Republicans, Trump Administration officials discuss 'phase-two' tax reform

US House Ways and Means Committee Chairman Kevin Brady (R-TX) in May was quoted as saying that House Republican tax writers and Trump Administration officials are discussing a framework for a so-called "phase two" tax reform bill. The Chairman said that discussions are following a similar track to those that led up to last December's *Tax Cuts and Jobs Act* (TCJA). No specifics or timetable were discussed, although earlier reports said a second reform bill could address the treatment of capital gains as well as making certain temporary measures in the TCJA permanent. While Chairman Brady earlier was quoted as saying he would like to see a vote on a second tax reform bill this year, it is generally seen as unlikely to pass the Senate in 2018.

- ▶ Section 951A - A Treasury official noted that historically, the gross-up has always gone in the same basket as the income to which the taxes relate and was quoted as saying that Treasury expects to issue guidance confirming that result for the Section 78 gross-up attributable to GILTI.
- ▶ Section 1446(f) - An IRS official noted that they are looking at several different issues in relation to this provision (requiring withholding on dispositions of partnership interests). In response to a question, the official reportedly stated that with respect to a distribution in excess of a foreign partner's basis in a partnership that has a US trade or business, withholding applies to the entire distribution.
- ▶ Section 988 - An IRS official was quoted as saying that taxpayers can rely on proposed regulations under Section 988 that allow the mark-to-market method of accounting for some foreign currency transactions. Taxpayers can elect mark-to-market for tax years ending on or after 19 December 2017, the publication date of the regulations.
- ▶ Section 482 - Speaking on a panel about the impact of tax reform on transfer pricing, an IRS official was quoted as acknowledging that there may be legitimate reasons for taxpayers to change their transfer pricing policies, but noted that it is not difficult to imagine taxpayers

attempting to use transfer pricing to avoid the TCJA's anti-avoidance provisions, particularly the Base Erosion Anti-abuse Tax (BEAT), which would raise the concern of the IRS. The official also said that the IRS plans to finalize the 2015 temporary regulations under Section 482, and any changes would be to improve clarity rather than change the rules.

- Section 385 - A Treasury official was quoted as saying that international items addressed as part of Executive Order 13789 to reduce tax regulatory burdens remains in the Priority Guidance plan. Additionally, the official was quoted as saying that Treasury is considering whether the Reg. Section 1.385-3 regulations are still necessary in light of tax reform.

See more on anticipated timing for Treasury regulations on several TCJA international provisions in this issue of the Washington Dispatch, below.

IRS announces forthcoming regulations expanding exception to definition of US property under Section 956

The IRS has announced ([Notice 2018-46](#)) that it plans to issue regulations to expand the exception to the definition of US property under Section 956(c).

More specifically, the IRS intends to promulgate regulations under Section 956 that will extend the exception from the definition of US property to an obligation of a US person, provided that the principal amount of the obligation does not exceed the fair market value of cash and readily

marketable securities that a US or foreign securities dealer posts or receives as initial variation margin/collateral for the obligation in the ordinary course of its business.

Additionally, the exception from the definition of US property will no longer be limited to certain obligations related to payments made on notional principal contracts (NPCs), but will also be available for obligations arising in connection with the execution of other financial derivative instruments.

For purposes of Section 956(a), taxpayers may rely either on the provisions of Notice 2018-46 or the full margin exception provided in the 2015 proposed regulations until the forthcoming regulations are issued.

The IRS's decision to expand the scope of the exception from the definition of US property to include other financial derivative instruments in addition to NPCs is welcome news. Likewise, the inclusion of readily marketable securities will make it much easier for taxpayers to qualify for the exception and prevent taxpayers from falling out of the exception when additional margin collateral takes the form of readily marketable securities.

Importantly, taxpayers should note that they can rely on the Notice for obligations arising before 4 May 2018.

This exception from Section 956 for certain obligations of US persons was developed in parallel with temporary regulations under Section 446. Those temporary regulations expired on 7 May 2018. Thus, it will be interesting to learn whether the offices of the IRS and Treasury that address domestic tax issues intend to provide guidance under Section 446 that parallels the guidance provided under Notice 2018-46.

Final anti-inversion regulations may be released in June

Final anti-corporate inversion regulations under Section 7874 may be out in June, according to a recent court filing in the IRS's Fifth Circuit appeal in *Chamber of Commerce v. IRS*. The unopposed motion asked for a 60-day extension to file a response brief due to the pending final regulations, which may affect the case. In *Chamber of Commerce*, a federal district court held that Treasury and the IRS violated the *Administrative Procedures Act* (APA) by issuing Reg. Section 1.7874-8T with an immediate effective date and without complying with the APA's 30-day notice-and-comment requirement. Temporary anti-inversion regulations were issued in April 2016.

Puerto Rico proposes tax reform

On 16 April 2018, Puerto Rico's House of Representatives proposed House Bill 1544 (HB 1544), which would amend the Puerto Rico Internal Revenue Code of 2011 (PR Code). This draft legislation has been 18 months in the making and, if approved, would modify the way individuals and corporations are taxed in Puerto Rico.

A noteworthy feature of HB 1544 is the requirement that income tax rate reductions for corporations and individuals depend on meeting certain revenue-based fiscal tests. Namely, total revenues to the Puerto Rico general fund must exceed the budgeted amounts for fiscal year 2017-2018 by 2% and for the first period of fiscal year 2018-2019 by 3%. If these tests are not met, any income tax rate reductions would be limited to tax revenues collected in excess of the Government's budget amounts for those periods.

Similarly, HB 1544 would also require the elimination and reduction of certain sales and use taxes to be financed by a special account that would be funded by the reduction of subsidies and tax credits established in special laws (i.e., tax incentive laws) and previously included in the budget for fiscal year 2017-2018.

HB 1544 is currently in the legislative process, with hearings taking place to allow for comments from various interested parties and stakeholders, such as trading, commercial and professional associations, among others.

The Puerto Rico Government has publicly commented that it intends to have the bill enacted on or before 30 June 2018, which is the end of the current legislative session and also the deadline established by the Fiscal Oversight and Management Board (FOMB) for approving the 2018-19 budget. The budget contains tax revenue projections and estimates that are based on some of the proposed amendments included in HB 1544.

US Government releases offer timing for Treasury regulations on several TCJA international provisions

Two recent releases provide an update on the timing for guidance on the international provisions included in the 2017 *Tax Cuts and Jobs Act* (TCJA). The [OMB Office of Information and Regulatory Affairs \(OIRA\) Spring Agenda](#) lists numerous planned Treasury regulations, including several on international TCJA provisions, and also includes anticipated timelines for the projects.

Regulatory projects listed in the OIRA Spring Agenda include:

1. Proposed regulations on the Section 965 transition tax, planned for August 2018
2. Proposed regulations on foreign tax credit issues arising under the TCJA, planned for August 2018
3. Proposed regulations on the inclusion of global intangible low-taxed income (GILTI) under Section 951A, planned for September 2018
4. Proposed regulations on the base-erosion and anti-abuse tax (BEAT) under Section 59A, planned for October 2018
5. Proposed regulations on the dividend received deduction under Section 245A and branch loss recapture issues under Section 91, planned for April 2019

In addition, Treasury and the IRS (Treasury/IRS) released a [third quarter update to the 2017-18 Priority Guidance Plan](#) on projects anticipated to be released during the guidance plan year ending 30 June 2018.

Treasury/IRS previously added projects implementing some TCJA international provisions (Sections 965 and 163(j)) to the second quarter update to the Priority Guidance Plan that was released in February 2018. The third quarter update contains 13 additional projects, and adds one new international project:

- Final regulations under Sections 7874, 367, 956, 7701(l), and 304 regarding inversions and related transactions (temporary and proposed regulations were published on 8 April 2016).

IRS announces new template for APA agreements

The IRS on 11 May 2018 released a revised mandatory [template](#) for Advance Pricing Agreements (APAs) to be included in all taxpayer APA requests.

The new template released by the IRS is the basis for the draft APA agreement that taxpayers must file as Exhibit 15 of their APA request.

Exhibit 15 of all APA requests must include a taxpayer prepared draft of the future APA agreement, but the taxpayer must use the most current template available at the time of the submission. The recent template released by the IRS constitutes the most current version of the template for Exhibit 15. The IRS also indicated that “APMA envisions periodically reviewing the template and making further revisions as it gains experience in the template’s use.”

The IRS has requested comments on the template. Comments may be e-mailed to lbi.tpo.apma.feedback@irs.gov (APMA Mailbox) with the subject line “APA Template Comments.”

Note that taxpayers that have already prepared an APA request using the old version of the APA template may file their request using that version. Additionally, they should submit a revised draft APA with the current version within the following 60 days, together with any required justification of options selected (see the template’s General Instructions) that were not included in the request.

Multilateral organizations

OECD releases first annual peer review report (Phase 1) on Action 13

On 23 May 2018, the OECD released the [first annual peer review report](#) (Report) relating to compliance by members of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS) of the minimum standard on Action 13 (*Transfer Pricing Documentation and Country-by-Country Reporting*) with a focus on the domestic legal and administrative framework.

The Report also comments on certain aspects relating to the exchange of information framework as well as maintaining confidentiality and the appropriate use of Country-by-Country (CbC) reports.

OECD may revise Transfer Pricing Guidelines

The OECD in May [announced](#) that it is considering beginning two new projects to revise the guidance in Chapter IV (administrative approaches) and Chapter VII (intra-group services) of the *Transfer Pricing Guidelines*. The OECD is requesting public comments on the scope of the revisions, to be sent no later than 20 June 2018.

The Report contains the review of 95 jurisdictions which provided legislation or information pertaining to the implementation of CbC reporting, with individual sections for each jurisdiction.

This report will be followed by two additional annual reports on peer reviews performed in 2018 and in 2019, which will focus on different aspects of the key areas under review, i.e., the exchange of information framework, and the confidentiality and appropriate use of CbC reports, respectively.

Overall, the Report provides the following main conclusions:

- ▶ As of 12 January 2018, 60 jurisdictions have introduced legislation to impose a CbC filing obligation for relevant multinational enterprises (MNEs), thereby covering the majority of MNEs expected to be in scope.
- ▶ In total, 28 jurisdictions received one or more recommendations for improvement in specific areas of their framework, such as the definition of Ultimate Parent Entity of an MNE Group, amending the group revenue threshold and limiting requirements for local filing of reports.
- ▶ For 33 jurisdictions, a general recommendation to put in place or finalize their domestic legal and administrative framework has been issued.
- ▶ The vast majority of jurisdictions do not have CbC requirements for fiscal year 2016, but rather for later fiscal years.
- ▶ Out of the 95 jurisdictions that were assessed, 58 jurisdictions have multilateral or bilateral competent authority agreements in place, effective for taxable periods starting on or after 1 January 2016, or on or after 1 January 2017.
- ▶ Also, 39 jurisdictions provided sufficient detailed information relating to the assurance that measures are in place to ensure the appropriate use of CbC reports.

UN releases updated Model Tax Treaty

The United Nations (UN) on 18 May 2018 released an updated Model Tax Treaty, including a new Article 12A that provides source-based taxation for fees for technical services, and a new version of Article 1 that includes a fiscally transparent entity clause and savings clause. The updated model treaty also has a new Article 29 with provisions relating to entitlement to treaty benefits. The new measures include a limitation on benefits rule, a third state permanent establishment rule and a general anti-abuse rule. The model further contains certain concepts from the OECD Base Erosion and Profit Shifting (BEPS) project.

The UN's Committee of Experts on International Cooperation in Tax Matters also released several tax documents and drafts, including several draft chapters of the UN Handbook on Dispute Avoidance and Resolution, summary notes on a paper regarding the treatment of collective investment vehicles (CIVs), and a draft update of the Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries.

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