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Legislation

Democrats fail to reach consensus on pared-down budget reconciliation package

The Biden Administration and Senate Democrats in June continued to look for a path forward on budget reconciliation, but no deal was forthcoming.

President Joe Biden in mid-June expressed confidence that Congress could pass a reconciliation bill that addressed prescription drug pricing and clean energy tax credits. “I believe I have the votes to do a number of things. One, prescription drugs. Reduce utility bills... I think we’ll be able to get the ability to have a tax incentive for winterization,” the President said in a 16 June interview. He also said, “we’re going to be able to have a fair tax system” and will have the votes “to have a minimum tax on corporations of 15%” and “tax increases on [the] super wealthy.”

To that end, Senate Majority Leader Chuck Schumer (D-NY) and House Speaker Nancy Pelosi (D-CA) met with the president to discuss “plans for fighting inflation” including reducing prescription drug and energy costs.

In the Senate, the Majority Leader reportedly met with Senator Joe Manchin (D-WV) at least several times in June to try and find common ground over a slimmed-down reconciliation package, and there was a report of Democratic meetings with the Senate Parliamentarian over a possible reconciliation bill.

Senator Manchin earlier had suggested that he could accept a reconciliation bill that splits revenue from tax and prescription drug reform between deficit reduction and spending, probably mostly addressing climate change.

Notwithstanding the flurry of activity, however, no deal emerged by the end of the month. The press quoted Senator Manchin toward the end of June as saying that a deal was not particularly close.

Meanwhile, Republican Senate Finance Committee members released the *Middle-Class Savings and Investment Act* on 14 June, proposing to address US inflation with tax cuts that would be paid for by extension of the State and Local Tax cap deduction. The proposal would raise the threshold for the net investment income tax for joint filers, raise the zero percent threshold for capital gains taxes, exclude the first \$300 of interest income (\$600 for joint filers) and increase the savers credit. The proposed legislation, immediately panned

by Democrats, was introduced by former Finance Committee Chairman Chuck Grassley (R-IA) and Senators John Barrasso (R-WY), Steve Daines (R-MT) and James Lankford (R-OK).

On the House side, Ways & Means Committee Republicans were advocating their own anti-inflationary [measures](#), including repurposing unspent COVID relief funds, making *Tax Cuts and Jobs Act* provisions permanent, negotiating better trade agreements along the lines of the USMCA, and increasing American energy production.

Democrats in Washington not only faced the challenge of defending their economic proposals as inflation-fighting, including those being discussed by Senator Manchin and Majority Leader Schumer for a reconciliation package, but also inflation proposals floated by Republicans that are eyeing a potential takeover of one or both chambers of Congress after the midterm elections.

Treasury Secretary testifies in support of anti-inflationary measures, BEPS 2.0

Treasury Secretary Janet Yellen testified at a Senate Finance Committee hearing on the FY 2023 Budget on 7 June, with the Treasury Secretary and Democratic Committee members united in calling for fighting inflation with clean energy proposals and prescription drug reforms to lower consumer costs.

The Secretary also faced questions regarding the OECD BEPS 2.0 project on new taxing rights and a global minimum tax (Pillar One and Pillar Two, respectively), after a delegation of congressional tax staff traveled to Europe for meetings on the project. She confirmed that ratification of a multilateral agreement to implement Pillar One will require congressional approval, but the form that takes has yet to be determined.

In an opening statement, Committee Chairman Ron Wyden (D-OR) raised concerns about inflation and enumerated steps Democrats have taken, and are prepared to take, to tackle prescription drug prices, energy costs, and the cost of renting or owning a home.

Ranking Member Mike Crapo (R-ID) said in his statement that Democratic spending decisions had contributed to inflation and took Democrats to task for continuing to pursue the tax increases and spending proposals from the House-passed *Build Back Better Act*. He specifically cited the corporate minimum tax on book income, saying it would hit manufacturers hard and undercut investments in innovation and emerging technologies.

Senator Crapo also raised concerns with the OECD-led international tax agreement, saying both pillars cede sweeping new rights to other countries, and noted the agreement cannot be fully implemented without congressional action. “In many cases, the terms can only be properly carried out with a multilateral treaty, requiring a two-thirds vote by the Senate,” he said. He sharply criticized the Administration for not consulting with Congress as it has been negotiating aspects of Pillar One and Pillar Two, and for not providing Congress with any type of impact analysis on the US economy or on US-based companies.

Regarding the global tax agreement, Secretary Yellen said she was willing to work with Congress to make sure that companies making investments associated with business tax credits do not find the value of those credits diminished due to aspects of the global minimum tax regime.

Secretary Yellen also discussed the final foreign tax credit (FTC) regulations that were released in December 2021. The Treasury Secretary said that she would be willing to work with Congress in regard to concerns about the final FTC rules, but said that she did not think the effective date of the regulations will be delayed, as requested by a number of companies.

Addressing whether a one-year delay in the regulations was warranted, Secretary Yellen said the regulations are very important to protect critical interests of the US, and the fundamental principle is that the US should allow a credit for foreign taxes only where the foreign taxing jurisdiction has the primary right to tax the income. A senator on the committee noted that Treasury is poised to make changes to the cost recovery and royalty withholding parts of the rules, but not as to creditability regarding withholding taxes on services. Changes to the final regulations could apply retroactively, Secretary Yellen said.

Statements and testimony from the hearing are available [here](#).

Courts

US Supreme Court accepts FBAR filing case

The US Supreme Court on 21 June agreed to hear *Bittner v. United States*, a Fifth Circuit case on applying non-willful penalties for failure to report foreign financial accounts on FinCEN Form 114, otherwise known as an “FBAR” filing.

The Court will address whether the \$10,000 penalty (as adjusted for inflation) imposed under 31 USC § 5321 for non-willful violations of the statute applies per annual filing (i.e., a maximum of \$10,000 per year as adjusted for inflation), or per account that should have been reported.

In *Bittner*, the Fifth Circuit held that a separate violation occurred for each foreign account not timely reported on an FBAR and imposed a penalty of \$2.72 million over five years. *Bittner* argues the penalty should apply on a per-filing basis, which would reduce the penalty to \$50,000, consistent with the Ninth Circuit’s decision in *United States v. Boyd*. In *Boyd*, the appellate court held that the non-willful penalty applies on a per-filing basis, not on the number of foreign accounts.

IRS news

IRS to defer reporting for certain derivative payments in forthcoming BEAT regulations

The IRS announced (Notice 2022-30) in June that regulations under Sections 59A and 6039A (TD 9885) will be amended to defer the applicability date of some provisions relating to reporting qualified derivative payments (QDPs) until tax years beginning on or after 1 January 2025. In June 2021, the IRS had announced (Notice 2021-36) its intention to amend TD 9885 to delay the applicability date until tax years beginning on or after 1 January 2023.

CFOs comment on final US foreign tax credit regulations

In a [letter](#) to Treasury Secretary Janet Yellen dated 3 June, a group of 28 Chief Financial Officers wrote in regard to the final foreign tax regulations released in December 2021: “foreign withholding taxes for many service payments and royalties are not creditable under the Final Regulations. The inability to claim a tax credit for these withholding taxes provides a tax incentive for U.S. companies to provide services and develop patents and other intellectual property in a foreign country rather than in the United States to avoid double taxation. This could result in the loss of valuable U.S. jobs...”

IRS to expand transfer pricing audit coverage

An IRS official in the Large Business and International Division in June was quoted as saying that the government plans to expand its transfer pricing audit coverage in terms of both companies and issues. The official said the audit expansion will depend on adding more personnel, disclosing that the IRS is currently hiring in transfer pricing.

Another government priority is improving the Advance Pricing Agreement (APA) and Mutual Agreement Procedure programs, she said, with the former potentially including more selectivity in accepting APAs into the program. The official further said the IRS is working on updating its APA and competent authority revenue procedures, although no timeline was given.

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 the QDP, the BEAT netting rule and QDP reporting requirements found in the 2019 final regulations. The new notice explains that Treasury and the IRS "continue to study these provisions and have determined that it is appropriate to further extend the transition period."

In the interim, certain financial services taxpayers should continue to be able to benefit from the QDP exception to base erosion payments without detailed reporting. The ability to continue to rely on this exception should enable them to better manage their BEAT position.

OECD developments

OECD officials offer update on BEPS 2.0 Pillars One and Two

The OECD held its annual tax conference in Washington, DC, on 27-28 June 2022, following a pandemic-related hiatus since the June 2019 conference. The bulk of the discussion at the conference focused on developments with respect to BEPS 2.0 Pillars One and Two of the ongoing project on addressing the tax challenges of the digitalization of the economy. In addition, there were sessions on the OECD's work on global mobility of workers, tax and climate change, and tax certainty. Senior members of the OECD Secretariat participated in the conference, along with tax officials from several OECD and G20 countries who are responsible for their countries' participation in the tax work of the OECD.

At the opening of the conference, Fabrizia Lapecorella, who chairs the OECD Committee on Fiscal Affairs and is Director General of Finance for the Italian Ministry of Finance, provided her perspectives on the BEPS 2.0 project. In regard to Pillar Two, Lapecorella highlighted the ongoing work on the implementation framework to address the practical aspects of the implementation and operation of these new rules. She indicated that the work on the Subject to Tax Rule element of Pillar Two would be completed later this year. On Pillar One, Lapecorella referred to the challenging and complex negotiations that are ongoing in the Inclusive Framework and indicated that good progress is being made. Beyond BEPS 2.0, she highlighted the planned work on carbon mitigation, noting the vulnerabilities of fossil fuel reliance.

Pascal Saint-Amans, director of the OECD Centre for Tax Policy and Administration, acknowledged that the Multilateral Convention on Pillar One would not be ready for signature in July as was the target in the agreed timeline. However, he indicated that an enormous amount of work has been completed. He announced that a package with key building blocks of Pillar One will be released in July in the form of a consultation document for stakeholder comment.

Conferees were told the public consultation document will address key aspects of Pillar One, such as:

- ▶ The Marketing and Distribution Profits Safe Harbor, addressing how to prevent double counting under Amount A
- ▶ Elimination rules to prevent double taxation
- ▶ The interaction with withholding taxes
- ▶ Revenue sourcing
- ▶ Tax base

The OECD and government officials made clear that the Model Rules and related Commentary that have been released on the Pillar Two global minimum tax provide countries with what they need to begin to implement these rules into their domestic tax laws. John Peterson, Head of the Aggressive Tax Planning Unit in the OECD Centre for Tax Policy and Administration, commented on the work on development of the implementation framework for the Pillar Two GloBE rules. He noted that a peer review and tax certainty process will be set up to determine whether jurisdictions' GloBE and Domestic Minimum Tax rules are "qualified," as well as to address rule order and co-ordination. Additional work is ongoing to identify other areas where similar processes are required (e.g., Covered Taxes and Qualified Refundable Tax Credits).

Work is also ongoing on development of administrative guidance, with priority given to guidance that is needed for countries to be able legislate to implement the Pillar Two rules. In addition, a process for identification and timely, consistent resolution of interpretation issues is being developed. The OECD expects to release administrative guidance on a piecemeal basis, as soon as each item of guidance is finalized.

Peterson also discussed the work on preparing a standardized template for the GloBE information return, with exchange mechanisms between tax authorities, and the work on dispute resolution mechanisms to address overlapping imposition of GloBE taxes. He indicated that work has begun on safe harbors and simplification mechanisms, noting that countries that have started their legislative process with respect to implementation may want to include these mechanisms into such legislation. Finally, he stressed the importance of building capacity and the need to provide technical assistance to countries implementing the GloBE rules and/or a Domestic Minimum Tax.

OECD releases public consultation documents on tax certainty under Amount A for Pillar One

On 27 May 2022, the OECD Secretariat released two public consultation documents regarding the [Tax Certainty Framework for Amount A](#) and [Tax Certainty for Issues Related to Amount A](#) for Pillar One of the OECD/G20 BEPS 2.0 project.

The Tax Certainty Framework set out in the first consultation document aims to guarantee certainty to Multinational Enterprise Groups in relation to all aspects of the Amount A rules. To achieve this, the document proposes three mechanisms:

- ▶ A Scope Certainty Review (providing an out-of-scope Group with certainty that it is not in-scope of the rules for Amount A)
- ▶ An Advance Certainty Review (providing certainty on a Group's methodology for revenue sourcing (and potentially segmentation) under the Amount A rules for specified future Periods)
- ▶ A Comprehensive Certainty Review (providing binding multilateral certainty over the Group's application of all aspects of the Amount A rules for a Period that has ended)

Any disagreements that arise during these tax certainty mechanisms are to be resolved by a binding Determination Panel process. In addition, if a Group does not invoke these certainty mechanisms, the Framework includes the potential for tax administrations to agree to work together through a coordinated review.

The second consultation document on Tax Certainty for Issues Related to Amount A contains draft provisions setting out a mandatory binding mechanism to resolve transfer pricing and permanent establishment profit attribution disputes that are unable to be resolved through the Mutual Agreement Procedure (MAP) within two years of the presentation of the MAP case to the Competent Authorities.

The document includes three draft provisions:

- ▶ Access to dispute resolution
- ▶ A mandatory binding dispute resolution mechanism for issues related to Amount A
- ▶ An alternative elective binding dispute resolution (applying instead of the mandatory binding dispute resolution mechanism) for disputes involving developing countries that meet specified criteria to be agreed

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