

Building a better working world

Washington Dispatch

October 2022, Volume 26, Issue 10

EY's weekly and monthly US international tax podcasts are available on iTunes and ey.com:

- Listen and subscribe to the weekly podcast on Apple Podcast
- Listen and subscribe to the monthly podcast on Apple Podast
- Access all podcasts on EY's Tax News Update: Global Edition tool

In this issue

Treasury and IRS news

2. Proposed FTC regs release expected soon, PTEP regs in first half of 2023
2. Treasury official says proposed crypto regs coming before year end

Transfer pricing news

3. IRS may be more selective on APAs given availability of ICAP in transfer pricing disputes
3. IRS to reconsider APA revenue procedure guidance

Tax treaty news

3. Treasury developing measures for future treaties to address new tax regimes, new US-Croatia treaty before year end

OECD developments

4. G20 Finance Ministers welcomed progress made on BEPS 2.0, called for swift implementation
4. OECD releases public consultation document on administration and tax certainty aspects of Amount A of Pillar One
5. OECD releases report on interaction of Tax Incentives and Pillar Two
5. OECD/G20 Inclusive Framework held 14th plenary meeting and published 6th annual progress report

Treasury and IRS news

Proposed FTC regs release expected soon, PTEP regs in first half of 2023

A senior IRS official told the October American Bar Association (ABA) Taxation Section meeting that the release of proposed foreign tax credit (FTC) regulations is "weeks, not months" away. Final FTC regulations were released in December 2021 and technical corrections to those rules were issued in July 2022.

The coming proposed regulations reportedly will address major issues of concern to taxpayers, according to the official, including the cost recovery rule, withholding taxes on royalty payments, and country-specific issues. In regard to royalties, Treasury officials over the summer indicated the Government was considering a safe harbor for withholding taxes imposed on certain royalty payments that taxpayers have suggested would not be eligible for a foreign tax credit under the final rules.

The official also said that proposed previously taxed earnings and profits (PTEP) regulations would be issued in the first half of 2023.

On 20 October, the IRS announced the withdrawal of the 2006 proposed PTEP regulations under Section 959 and related basis adjustments under Section 961. The preamble to the withdrawal states that the "proposed regulations were never finalized, never went into effect, and did not indicate that taxpayers could rely on them. Withdrawing the proposed regulations at this point will help prevent possible abuse or other misuse of them—such as inappropriate basis adjustments in certain stock acquisitions to which Section 304(a)(1) applies—while the Treasury Department and the IRS continue to develop the new proposed regulations. The IRS may, where appropriate, challenge taxpayer positions giving rise to inappropriate results."

In regard to the recently enacted *Inflation Reduction Act's* corporate alternative minimum tax (CAMT), another IRS official at the ABA meeting was quoted as saying the Government has not yet decided whether there will be a large package of guidance released or multiple smaller packages, or what form the guidance will take. He indicated that the IRS is finalizing its list of priorities that it needs to address in regard to the CAMT, noting there are many sub-issues that will require guidance. The official did not offer a timeline but acknowledged taxpayers will need guidance by Q1 2023 to determine whether they are subject to the CAMT.

Another official said that the IRS Office of Chief Counsel has organized a group of subject matter experts across multiple associate offices in the IRS National Office who will craft the CAMT guidance.

Treasury official says proposed crypto regs coming before year end

A Treasury official in October 2022 was quoted as saying the Government hopes to release proposed crypto regulations before the end of the year. The *Infrastructure Investment and Jobs Act*, enacted in November 2021, imposed information-reporting requirements on sales of cryptocurrency and other "digital assets." Cryptocurrency and other digital assets sold by customers of "brokers" will be subject to Form 1099-B reporting and cost-basis reporting.

IRS to request sponsoring entities to cancel their FATCA agreements if they fail to meet requirements

In a recent announcement in regard to the *Foreign Account Tax Compliance Act* (FATCA), the IRS indicated that it has identified "Sponsoring Entities that do not appear to have Sponsored Entities registered in the FATCA Registration System." A Sponsored Entity is a Sponsored Foreign Financial Institution (FFI) or a Sponsored Direct Reporting Non-Financial Foreign Entity (NFFE). Sponsoring entities perform the "the due diligence, withholding, and reporting obligations of one or more Sponsored FFIs, or the due diligence and reporting obligations of one or more Sponsored Direct Reporting NFFEs."

According to the IRS, it will begin requesting Sponsoring Entities to cancel their FATCA agreement if they fail to meet the requirements to be a Sponsoring Entity of Sponsored FFIs and/or Sponsored Direct Reporting NFFEs.

The legislation specifically amended the Code to make certain changes, including expanding the definition of a broker, defining digital assets, and applying the cost-basis-reporting regime for securities to digital assets. It also required brokers to report to the IRS the basis of digital assets transferred to their customers or other non-brokers and requires digital assets to be treated as "cash" when received in the course of a trade or business. The amendments will be effective for information returns filed in 2024 for the 2023 calendar year.

The official was quoted as saying the proposed rules would provide clarity as to effective dates regarding reporting, which she noted is necessary for market participants.

Transfer pricing news

IRS may be more selective on APAs given availability of ICAP in transfer pricing disputes

The IRS is reviewing the Advance Pricing Agreement (APA) program and may become more selective in terms of acceptance of future APAs, according to a recent statement by Jennifer Best, the IRS's Large Business and International Division Acting Deputy Commissioner. She said that the IRS is "reevaluating the APA program, which will probably become a bit more selective about what it takes in, going forward" and that "ICAP might be a greater interest going forward if the IRS becomes more selective." (ICAP is the acronym for the International Compliance Assurance Program.)

ICAP is a voluntary risk assessment and assurance program aimed at facilitating cooperative engagements between multinationals and tax authorities in their local jurisdictions. ICAP allows multinationals to present their tax position to several tax administrations simultaneously in a more cooperative environment than a typical audit. In ICAP, the tax authorities determine that the multinational's tax positions are "low" risk or that such a finding is not possible.

As with the APA program, ICAP is intended to be part of the "toolkit for dispute prevention and resolution," the official said, which ultimately should reduce the number of disputes that require resolution through Mutual Agreement Procedure (MAP) cases.

If the IRS becomes more selective about which cases are accepted in the APA program, ICAP would become an increasingly important option in preventing transfer pricing disputes. ICAP does not have the same level of certainty that an APA does; it may, however, allow for a (i) faster path to multilateral, practical tax certainty for taxpayers; and (ii) resolution through the risk assessment phase, thus potentially reducing the number of requests for MAP assistance.

Additionally, for a transaction that requires further review (i.e., where it is not determined to be low risk), tax authorities may recommend that the multinational enter the APA program, which may lead to a more efficient APA process because the tax authorities have already reviewed the transaction and should have a more truncated due diligence review. Alternatively, the tax authorities may agree that a tax adjustment is needed and attempt to settle the issue informally outside of the MAP process where possible. Taxpayers who have participated in the ICAP process have reported positive experiences.

IRS to reconsider APA revenue procedure guidance

The IRS reportedly plans to reconsider its Advance Pricing Agreement (APA) revenue procedure guidance in light of the recent Sixth Circuit Court of Appeals decision in *Eaton Corp. & Subs. v. Commissioner*, which upheld the Tax Court's opinion. In August 2022, the Sixth Circuit ruled that the IRS had the burden of proving that there were grounds to cancel the APAs at issue under generally applicable contract-law principles and that the IRS failed to meet that burden. The Sixth Circuit also held the IRS could not impose Section 6662 penalties on Eaton Corporation's self-reported adjustments.

According to an IRS official: "The Tax Court in its decision basically invited us to rewrite the revenue procedure if we want to achieve the result we want."

Tax treaty news

Treasury developing measures for future treaties to address new tax regimes, new US-Croatia treaty before year end

A Treasury official in late October 2022 said the US Government is working on establishing "prophylactic" measures to address new tax regimes in the context of future tax treaties. He indicated that Treasury wants to include rules in US treaties that would consider tax regimes that do not yet exist in order to prevent issues arising later.

The official was also quoted as saying that the US and Croatia are expected to sign a first-ever income tax treaty before the end of the year. He confirmed earlier reports

that US reservations to the proposed US-Chile tax treaty are pending approval in the Chilean Parliament. The US Senate Foreign Relations Committee last spring approved the Chilean treaty subject to two reservations. The official further said there are current plans to update the existing US-Switzerland and US-Israel tax accords.

OECD developments

G20 Finance Ministers welcomed progress made on BEPS 2.0, called for swift implementation

On 12 and 13 October 2022, the G20 Finance Ministers and Central Bank Governors met in Washington, DC. The G20 Chair's summary issued at the conclusion of the meeting noted the G20 Finance Ministers' welcome of the progress made on the two-pillar project to address the tax challenges of the digitalization of the economy (the BEPS 2.0 project) and reaffirmed their commitment to swift implementation of the new rules.

In advance of the meeting, on 10 October 2022, the OECD released the Secretary-General's Tax Report to the G20 Finance Ministers and Central Bank Governors. It provided an update on activities with respect to the G20's international tax agenda, including updates on the BEPS 2.0 project, the work on tax policy and climate change and the OECD's other tax work. In parallel, the OECD released a report requested by the G20 providing an OECD/G20 Roadmap on Developing Countries and International Taxation that takes stock of progress since 2021 and a brief report from the OECD Secretary-General on the Establishment of the Inclusive Forum on Carbon Mitigation Approaches (the IFCMA Report)

The Report contained seven annexes encompassing recent OECD tax documents:

- Report on Automatic Exchange of Information (AEOI)
- Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One
- G20/OECD Roadmap on Developing Countries and International Taxation
- Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard
- Tax Incentives and the Global Minimum Corporate Tax
- Pricing Gas Emissions (forthcoming)
- OECD/G20 Inclusive Framework on BEPS Progress Report

OECD releases public consultation document on administration and tax certainty aspects of Amount A of Pillar One

On 6 October 2022, the OECD Secretariat released a Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One (the Report) in connection with the ongoing OECD/G20 BEPS 2.0 project.

The Progress Report is a consultation document that covers important building blocks not included in the Progress Report on Amount A of Pillar One released on 11 July 2022; namely the rules on the administration of the new taxing right and the tax certainty-related provisions. The Secretariat document does not represent the consensus views of the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) jurisdictions.

The Report was released by the OECD Secretariat in order to obtain further input from stakeholders on the administration and tax certainty aspects of Amount A, with written comments requested by 11 November 2022.

The Report indicates that two other public consultation documents will be released by the end of 2022: one addressing the withdrawal and standstill of digital services taxes and other relevant similar measures, and the other one on Amount B.

Finally, the Report states that the work on Amount B will proceed with a view to completing it in the first half of 2023.

The Progress Report does not represent the final or consensus views of the Inclusive Framework jurisdictions, but it does provide an indication of the overall direction in which the administration and tax certainty for Amount A and Related Issues may develop.

FinCEN issues final rule on beneficial ownership information reporting requirements

Treasury's Financial Crimes Enforcement Network (FinCEN) on 28 September 2022 issued a final rule requiring certain entities to file reports with FinCEN that identify two categories of individuals – (1) beneficial owners of an entity and (2) individuals who have filed an application with specified governmental authorities to create the entity or register it to do business. The new regulations implement section 6403 of the *Corporate Transparency Act*, enacted in 2021.

OECD releases report on interaction of Tax Incentives and Pillar Two

On 6 October 2022, the OECD released the report Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GloBE Rules (the Report). Prepared at the request of the Indonesian G20 Presidency, the Report identifies considerations for jurisdictions when preparing for the implementation of Pillar Two. In particular, it addresses the current use of tax incentives in developed and developing jurisdictions in the context of the GloBE Rules and describes how key provisions of these rules may impact diverse types of tax incentives differently.

The Report suggests that the design of the GloBE Rules could provide new momentum for jurisdictions to engage in tax incentive reform. It recognizes that any such reforms require careful consideration in a Pillar Two environment, as the GloBE Rules would not affect all taxpayers or all tax incentives in the same ways and to the same extent. In particular, the OECD discourages the use of incentives that provide windfall gains to Multinational Enterprises (MNEs) without generating substantial tangible investment or jobs. The OECD expresses the view that expenditure-based tax incentives linked to payroll and/or tangible assets have proven to be most effective, while these would also be least affected by the GloBE rules due to the Substance Based Income Exclusion rule (SBIE).

The Report suggests that tax incentives reform, with a focus on existing incentives that carry the greatest risk of resulting in MNEs being liable for Top-up Taxes under the GloBE Rules and that result in the largest revenue forgone for the jurisdiction, and the introduction of Qualified Domestic Minimum Taxes (QDMTs) may be the most important first steps that a jurisdiction can take in preparing for the implementation of Pillar Two, in particular in developing countries.

The Report describes how the GloBE Rules would have a material impact on tax incentives worldwide, consequently affecting the taxation of in-scope MNEs and the operation of jurisdictions' tax policies.

Jurisdictions need to prepare for the implementation of Pillar Two, including the potential redesign of their tax incentives policy. The Report encourages jurisdictions to look at their own tax incentives systems and to consider potential tax reforms.

OECD and UN | Tax Inspectors Without Borders publish Annual Report 2022

On 6 October 2022, the 2022 Annual Report on the Tax Inspectors Without Borders (TIWB) initiative was released at the 14th Meeting of the OECD/G20 Inclusive Framework on BEPS.

The Report takes stock of the work undertaken under the TIWB initiative, providing an update on TIWB's achievements from July 2021 to June 2022 and its objectives going forward.

OECD/G20 Inclusive Framework held 14th plenary meeting and published 6th annual progress report

The OECD on 4 October 2022 published the sixth annual progress report of the OECD/G20 Inclusive Framework on BEPS (the Progress Report). The Progress Report describes developments in the work on addressing the tax challenges of the digitalization of the economy (the BEPS 2.0 project) as well as other activity of the Inclusive Framework during the period from September 2021 to September 2022.

On 6-7 October 2022, the Inclusive Framework held its 14th plenary meeting, with over 500 delegates from over 135 jurisdictions participating either in person or virtually. Several sessions of the meeting were streamed for public viewing, including discussions on climate change and tax policy, tax transparency, digitalization of tax administration, and tax and development.

Significant activity in the Inclusive Framework is ongoing on both Pillar One and Pillar Two, with major releases expected with respect to both pillars before the end of the year. At the same time, the Inclusive Framework is expanding its focus to new areas, including work on tax and climate change. It is important for companies to monitor these developments closely.

Companies also may want to consider taking the opportunity to engage with the Inclusive Framework and/or participate in the public consultations through the submission of written comments providing feedback on practical implications of the new rules that are being developed.

Ernst & Young LLP, International Tax and Transaction Services, Washington, DC

- **Craig Hillier** **craig.hillier@ey.com**
- **Colleen O'Neill** **colleen.oneill@ey.com**

- Tyler Arbogast tyler.arbogast@ey.com
- Stephen Bates stephen.bates@ey.com
- Doug Chestnut douglas.chestnut@ey.com
- Arlene Fitzpatrick arlene.fitzpatrick@ey.com
- Revital Gallen revital.gallen@ey.com
- Liz Hale elizabeth.hale@ey.com
- Lena Hines lena.hines@ey.com
- Enrica Ma enrica.ma@ey.com
- Oren Margulies oren.margulies@ey.com
- Carlos Mallo carlos.mallo@ey.com
- Marla McClure marla.mcclure@ey.com
- Mike McDonald michael.mcdonald4@ey.com
- Martin Milner martin.milner@ey.com
- John Morris john.morris@ey.com
- Chris Ocasal chris.ocasal@ey.com
- Al Paul al.paul@ey.com
- Stephen Peng stephen.peng@ey.com
- Tom Ralph thomas.ralph@ey.com
- Joshua Ruland joshua.ruland@ey.com
- Craig Sharon craig.sharon@ey.com
- Daniel Sosna daniel.sosna@ey.com
- Raymond Stahl raymond.stahl@ey.com
- Allen Stenger allen.stenger@ey.com
- Matthew Stevens matthew.stevens@ey.com
- Zach Pouga Tinhaga zach.pouga.tinhaga@ey.com
- Julia Tonkovich julia.tonkovich@ey.com
- Mathew Urbina matthew.urbina@ey.com
- Thomas Vidano thomas.vidano@ey.com
- Tim Wichman timothy.wichman@ey.com
- Michael Yaghmour michael.yaghmour@ey.com
- Jason Yen jason.yen@ey.com
- Adam P Becker adam.p.becker@ey.com
- Ted Clabault ted.clabault@ey.com
- Robert Contreras robert.contreras@ey.com
- Heather Gorman heather.gorman@ey.com
- Tanza L. Olyfveldt tanza.olyfveldt@ey.com
- Deborah Tarwasokono deborah.tarwasokono@ey.com
- Carlos J Vaca Valverde carlos.j.vaca.valverde@ey.com
- Jeshua Wright jeshua.wright@ey.com

International Tax and Transaction Services

Global ITTS Leader, **Jeffrey Michalak,** *Detroit*

Global Transfer Pricing Leader, **Tracee Fultz,** *New York*

ITTS Director, Americas, **Craig Hillier,** *Boston*

ITTS NTD Leader, **Colleen O'Neill,** *New York*

Transfer Pricing Leader, Americas, **Katherine Pinzon,** *Houston*

ITTS Markets Leader, Americas, **Jonny Lindroos,** *McLean, VA*

ITTS Regional Contacts, Ernst & Young LLP (US)

West
Sadler Nelson, *San Jose, CA*

East
James Keim, *New York*

Central
Aaron Topol, *Atlanta*

Financial Services
Chris J Housman, *New York*

Canada – Ernst & Young LLP (Canada)
Warren Pashkowich, *Calgary*

EY | Building a better working world

About EY
EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EY member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

prepared by Ernst & Young LLP's Washington International Tax Services summarizing recent developments and "inside-the-beltway" news pertinent to multinational companies. For additional information, please contact your local international Tax professional.

© 2022 EYGM Limited.
All Rights Reserved.

EYG no. 009600-22Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, legal or other professional advice. Please refer to your advisors for specific advice.

ey.com