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# Washington Dispatch

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## US Congress

### President Biden delivers State of the Union address, proposes fourfold increase in stock buyback excise tax, 'billionaire surtax'

President Joe Biden gave his second State of the Union address to Congress on 7 February, striking a mostly optimistic tone, pointing to the country's recovery from the COVID-19 pandemic and the creation of 12 million new jobs, among other developments. The President proposed reducing the budget deficit by \$2 trillion with help from revenue raisers, including the 15% corporate alternative minimum tax enacted in the 2022 *Inflation Reduction Act*, quadrupling the current one percent tax on corporate stock buybacks and enacting a "billionaire surtax."

The President also proposed closing unspecified tax loopholes and "cracking down on wealthy tax cheats." According to some commentators, increasing the stock buyback excise tax and passage of a billionaire surtax may have little chance of passing Congress this year. The President is expected to release his proposed FY 2024 budget on 9 March.

Later in the month, Senate Finance Committee member Sherrod Brown (D-OH) and Chairman Ron Wyden (D-OR) introduced the [Stock Buyback Accountability Act of 2023](#), which would increase the recently enacted one percent stock buyback excise tax to four percent.

Also in February, and for the fourth consecutive Congress, House Ways and Means Committee Member Lloyd Doggett (D-TX) and Senate Finance Committee Member Sheldon Whitehouse (D-RI) introduced the [No Tax Breaks for Outsourcing Act](#). Among other things, the bill would eliminate the global intangible low-taxed income (GILTI) tax and foreign-derived intangible income (FDII) deductions and apply GILTI on a per-country basis, repeal the 10% exemption for tangible investments, and treat corporations managed and controlled in the US as domestic corporations.

### House Ways and Means Committee Chairman calls BEPS Undertaxed Profits Rule 'fundamentally flawed'

Addressing the OECD-led BEPS 2.0 global tax agreement, House Ways and Means Committee Chairman Jason Smith (R-MO) sent a [letter](#) to OECD Secretary-General Mathias Cormann on 10 February, in which he defended the United States (US) global intangible low-taxed income (GILTI) regime and said other countries are considering a minimum tax only if they can impose the "fundamentally flawed" Undertaxed Profits Rule (UTPR) on US companies.

The chairman warned that the UTPR would target US tax incentives like the research and development credit "as well as the operations of American companies in third-party jurisdictions." Chairman Smith said House Republicans "will aggressively pursue tax and trade countermeasures to protect American jobs, sovereignty, and tax revenues."

## Treasury and IRS news

### Proposed PTEP regulations to be released in latter half of 2023

The IRS will not release proposed regulations on previously taxed earnings and profits (PTEP) until the latter half of 2023, according to an IRS official in February. The Government has announced delays in the release of the eagerly anticipated regulatory package on several occasions, most recently last fall.

The official was quoted as saying the complex guidance will be released over a period of years in multiple packages and warned taxpayers that while this year's regulations would address pressing concerns, taxpayers would not see all their questions answered in the first tranche.

### US Supreme Court holds FBAR penalties apply per form, not per account

In a 5-4 decision, the US Supreme Court on 28 February held in [Bittner v. United States](#) that FBAR penalties in the *Bank Secrecy Act* (BSA) apply per form and not per account. Justice Gorsuch wrote: "Best read, the BSA treats the failure to file a legally compliant report as one violation carrying a maximum penalty of \$10,000, not a cascade of such penalties calculated on a per-account basis."

## US-Chile tax treaty stalled

The press reported in February that the proposed US-Chile tax treaty is stalled due to disagreement among Senate Finance Committee Republicans and Treasury on the issue of foreign tax credits. Committee Republicans reportedly want clarification in treaty language that US companies will not face double taxation in certain situations.

The Senate Foreign Relations Committee cleared the proposed US-Chile tax treaty in the last Congress, although it was not brought to the floor of the Senate for a vote. The treaty therefore must again go through committee approval in the new 118th Congress.

## IRS addresses deductions involving cryptocurrency in two Chief Counsel Advice memos

In two recently released Chief Counsel Advice (CCA) Memoranda, the IRS issued “non-specific taxpayer” advice involving cryptocurrency transactions, both concluding that cryptocurrency is not a “security” under Section 165(g)(2).

In [CCA 202302011](#), the IRS determined that a taxpayer could not claim a loss deduction for cryptocurrency that had lost almost all its value. The CCA concludes that the cryptocurrency in question could not be considered worthless because it had some value (albeit less than one cent). This conclusion is consistent with historical case law and should not come as a surprise.

In [CCA 202302012](#), the IRS determined that a taxpayer could not claim a charitable deduction for a donation of cryptocurrency that she had not had independently appraised. The regulations support the IRS’s position that a qualified appraisal is required. Taxpayers have encountered a similar issue with donations of publicly traded partnerships for decades.

One practical difficulty not addressed by the CCA, however, is how to actually obtain a qualified appraisal of cryptocurrency.

## Transfer pricing

### US Tax Court approves IRS/Eaton Corporation agreement resolving APA cancellation case

The US Tax Court on 3 February 2023 issued a stipulation approving an agreement between Eaton Corp. (Eaton) and the IRS to adjust Eaton’s tax bill for 2005 and 2006 to \$8.8 million. The proposal follows lengthy litigation in both the Tax Court and the Sixth Circuit Court of Appeals.

The case originated with Eaton’s inadvertent errors in calculating its transfer pricing methodology for its Advance Pricing Agreement (APA) annual reports in 2005 and 2006. The IRS used these inadvertent errors to justify cancelling Eaton’s APAs and proposing a \$75 million adjustment plus \$51 million in Section 6662 penalties.

The Tax Court held that the IRS was not authorized to cancel Eaton’s APAs and rejected the IRS’s assertion of penalties. The IRS appealed the Tax Court’s decision to the Sixth Circuit, but the appeals court ruled in favor of Eaton, finding that the IRS had the burden of proving that it had grounds to cancel the APAs under contract-law principles and failed to do so.

In November 2022, Chief Judge Kerrigan ordered Eaton and the IRS to submit a proposed decision on or before 20 January 2023. The proposed decision determined deficiencies of \$4.7 million in 2005 and \$4.6 million in 2006, with no penalties. On 3 February 2023, Chief Judge Kerrigan issued a stipulated order identical to the proposed decision, which also took into account overpayments of tax for each year to result in the final \$8.8 million adjustment.

Taxpayers should pay attention to how the IRS revises Revenue Procedure 2015-41 (which provides guidance on requesting and obtaining APAs) while keeping in mind that every dispute concerning an APA depends on the facts of the particular case. The IRS has indicated that it intends to rewrite Revenue Procedure 2015-41 in light of the Sixth Circuit’s ruling in *Eaton*, although no timeline has been given on when the revised revenue procedure will be released. Until new guidance is released, APAs are binding under contract-law principles, and the IRS has the burden of proving the grounds supporting an APA cancellation.

## OECD developments

### OECD releases additional administrative guidance on BEPS 2.0 Pillar Two

The OECD/G20 Inclusive Framework on 2 February 2023 released a long-awaited [package](#) of additional administrative guidance under BEPS 2.0 Pillar Two. The latest package will be incorporated into a revised version of the Commentary to be issued later this year, replacing the original Commentary released in March 2022. The guidance was adopted by the 142-member OECD/G20 Inclusive Framework on BEPS.

The additional guidance – together with the December 2022 releases (i.e., safe harbors, penalty relief, information return and tax certainty) – finalizes the Implementation Framework set out in October 2021. The Executive Summary acknowledges that further guidance will be needed, on an ongoing basis, as countries implement the Pillar Two rules and issues arise after the rules are legislated into their domestic laws. The release explains that the items addressed are those most in need of immediate clarification and simplification.

Among the areas in the new guidance that may be most significant are: (i) the treatment of certain non-refundable tax credits that flow through a tax transparent entity and that arise from an equity method investment, including the low income housing tax credit and many renewable energy tax credit investments; (ii) allocation of taxes arising under the US global intangible low-taxed income (GILTI) and other blended controlled foreign company (CFC) regimes; and (iii) the design elements for Qualified Domestic Minimum Top-up Taxes (QDMTTs) that will be used for assessment of whether a domestic minimum tax meets the requirements for qualified status, and specific rules relating to the QDMTT.

The guidance sets out minimum standards for the QDMTT and makes clear that the tax base and the rate for QDMTTs can be different than under the rules governing Income Inclusion Rules (IIRs). QDMTTs can deviate from the global anti-base erosion (GloBE) rules but generally must produce a tax rate that equals or exceeds the GloBE's 15% minimum rate.

As expected, a QDMTT must exclude tax paid or accrued by domestic Constituent Entities with respect to the income of foreign Constituent Entities under its own CFC or taxable branch regimes. Therefore, GILTI and subpart F taxes cannot be pushed down to impact the effective tax rate in the case of QDMTTs.

The US Treasury praised the release, with a senior Treasury official describing the guidance as providing “certainty for green energy tax incentives, support [for] coordinated outcomes and provide[s] additional clarity that stakeholders have asked for.” A Treasury statement said certainty was also provided on “clear and administrable treatment of taxes paid under the existing U.S. GILTI global minimum tax regime” and refers to a consensus statement by all Inclusive Framework members that Pillar Two “was intentionally designed so that top-up tax imposed in accordance with those rules will be compatible with common tax treaty provisions.”

### OECD's Pillar Two administrative guidance raises implications for US multinationals

The OECD/G20 Inclusive Framework on BEPS on 2 February 2023 released administrative guidance on the Pillar Two GloBE Rules (the Administrative Guidance or AG). The AG supplements the previously issued GloBE Model Rules (Model Rules or MR) and Commentary.

Certain provisions of the AG will particularly impact US multinational enterprises (MNEs) due to unique rules under US GAAP and the Internal Revenue Code:

- ▶ US GAAP and common control transactions (AG Article 2.1)
- ▶ Overall domestic loss recapture and foreign tax credit carryforwards resulting from US losses offsetting US GILTI/subpart F income (AG Article 2.8)
- ▶ “Push down” of GILTI taxes to Constituent Entities and interaction of GILTI with Qualified Domestic Minimum Top-up Taxes (AG Article 2.10 and 5.1.3)
- ▶ Inclusion in GloBE of stock gains/losses – equity-investment-inclusion election (AG Article 2.9)
- ▶ Tax equity investments – Qualified flow-through tax benefits (AG Article 2.9)
- ▶ Treatment of pre-GloBE foreign tax credit and general business credit carryforwards (AG Article 4.1)
- ▶ Application of intercompany transfer transition rule to US GAAP common control transactions (AG Article 4.3)

While formulated as revisions to the Pillar Two Commentary issued in March 2022 (Commentary), the Administrative Guidance includes numerous new substantive rules and certain wholesale changes to specific MR provisions.

As such, it appears that substantive changes to the rules can be made through Administrative Guidance (in the form of revisions to the Commentary). Considering that the Inclusive Framework appears unwilling to change the MR, additional future modifications to the rules may occur through this process.

While the AG provides welcome answers on numerous areas important to US MNEs, it leaves many questions unaddressed. The AG itself references the need for further work, noting that “the Inclusive Framework will continue to consider Administrative Guidance priorities on an ongoing basis, where more clarity is required, with the aim of releasing guidance throughout the year as soon as it is agreed so that the Inclusive Framework members can meet their implementation schedule.”

In addition, guidance from the US Treasury and the IRS on the US law interactions with Pillar Two will be needed, particularly as related to GILTI and the new corporate alternative minimum tax, as well as the foreign tax credit rules more generally.

Ultimately, though, implementation and enforcement of a global minimum tax will rest with foreign countries that are implementing Pillar Two. Companies will need to also closely follow the domestic law implementation of the Pillar Two rules to confirm that the rules are adopted consistently and incorporate the new AG.

## OECD releases revised methodology for BEPS Action 14 peer reviews, updates on reporting of MAP and APA statistics

In late January 2023, the OECD and G20 Inclusive Framework on BEPS [released](#): (i) a New Assessment Methodology for continuing the peer review process with respect to BEPS Action 14 on improving the MAP that seeks to increase efficiencies and improve dispute resolution timelines; (ii) new data points to be reported in the annual MAP Statistics; and (iii) the creation of a new annual framework for reporting APA Statistics.

## OECD release manual on MAPs and APAs

The OECD Forum on Tax Administration on 1 February 2023 released the “[Manual](#) on the Handling of Multilateral Mutual Agreement Procedures and Advance Pricing Agreements.” The manual is meant to act as a “guide to multilateral MAP and APA processes from both a legal and procedural perspective.”

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