Washington Dispatch

July 2023, Volume 27, Issue 7

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

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

In this issue

US Congress

Congressional Republicans criticize BEPS 2.0 project

Senate Finance Committee Ranking Member Mike Crapo (R-ID) and House Ways and Means Committee Chairman Jason Smith (R-MO) were not satisfied with the OECD's recent 17 July 2023 Administrative Guidance on BEPS 2.0 Pillar Two. (See the OECD developments section below.)

Senator Crapo and Chairman Smith said in a joint statement: "Once again, the Biden Administration neglected to consult Congress before cheerleading the OECD's latest global tax code rewrite. Today's [17 July] 'administrative guidance' acknowledges what Republicans have warned for more than two years: the UTPR [Under Taxed Profits Rule] surtax is unworkable and unlawful. … Moreover, the OECD's nonsensical treatment of investment incentives remains, which will send U.S. R&D jobs and tax revenues overseas."

The House Ways & Means Tax Subcommittee also held a hearing on 19 July that centered on the BEPS 2.0 project. Republicans challenged the Treasury witness, Michael Plowgian, Deputy Assistant Secretary for International Tax Affairs at the Department of Treasury, specifically questioning the constitutionality of allowing other nations a potential share of US taxes through the UTPR. They also criticized a global legal system under which they claimed the US research and development (R&D) credit is not treated the same way as refundable R&D credits provided by other countries.

Democrats on the committee in most cases sought to defend the BEPS project and the Administration.

Plowgian testified that Treasury in the future would work with Congress, saying: "We hope to have a complete Pillar One package soon and intend to continue to seek input. Similarly, with respect to Pillar Two, we stand ready to work with Congress to enact the reforms proposed in the President's Budget to implement Pillar Two, which would increase U.S. revenue and strengthen our tax system. We will also continue to work with Congress to prioritize issues for interpretive guidance."

Senate moves on US-Taiwan tax relations

Senate Finance Committee Chairman Ron Wyden (D-OR), Ranking Member Mike Crapo (R-ID), House Ways & Means Committee Chairman Jason Smith (R-MO) and Ranking Member Richard E. Neal (D-MA) on 12 July 2023 released a discussion draft of legislation for a US-Taiwan tax agreement. According to the press release, the bill would significantly reduce withholding taxes on dividends, interest, and royalties paid on these cross-border investments, among other measures. More information is available here.

Separately on 13 July, the Senate Foreign Relations Committee voted to advance a different bill, titled the *Taiwan Tax Agreement Act of 2023* (S. 1457). This competing bill, introduced by Foreign Relations Committee Chair Robert Menendez (D-NJ), would authorize the Biden administration to negotiate a tax agreement between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office, providing double-taxation relief and measures to limit tax evasion and avoidance.

According to the tax press, the competing bills face an uncertain future. It has been reported, however, that talks are underway to see if there is a solution for reconciling the two bills. "I'm looking forward to working together to see if we can have an amalgam of it," Chairman Menendez said this week.

Congress pivots to crypto assets, requests comments on tax uncertainties

Senators Cynthia Lummis (R-WY) and Kirsten Gillibrand (D-NY) on 12 July 2023 reintroduced the *Lummis-Gillibrand Responsible Financial Innovation Act* to create a comprehensive regulatory framework for crypto assets. The legislation, which includes a Tax Title, significantly expands on the original bill introduced last year, including new consumer protections and safeguards against fraud and bad actors. A section-by-section overview is available here.

The day before, Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Mike Crapo (R-ID) asked for comments on "uncertainties surrounding the tax treatment of digital assets with an open letter seeking input from experts, stakeholders and interested parties" across a number of areas. The Committee release said answers to questions will be collected on a rolling basis until 8 September.

A Congressional Joint Committee on Taxation Report, dated June 2023 but released on 11 July, reviews a number of issues related to digital assets.

Treasury and IRS news

Treasury temporarily delays controversial foreign tax credit regulations

The US government on 21 July 2023 released Notice 2023-95, temporarily relieving taxpayers from the application of regulations under Sections 901 and 903 identifying foreign taxes for which taxpayers may claim a credit (FTC Creditability Regulations).

The far-reaching Notice allows taxpayers to claim a foreign tax credit for many foreign taxes that may not have been creditable under the FTC Creditability Regulations.

Highlights of the Notice include the following:

- For a specified relief period, taxpayers may determine whether a foreign tax qualifies as an "income tax" by applying the version of Reg. Section 1.901-2(a) and (b) (Prior FTC Regulations) that preceded the FTC Creditability Regulations. The FTC Creditability Regulations otherwise apply to tax years beginning on or after 28 December 2021. The relief period includes tax years beginning on or after 28 December 2021, and ending on or before 31 December 2023.
- For purposes of applying the Prior FTC Regulations, the Notice modifies the non-confiscatory gross basis tax rule to limit gross basis taxes qualifying as income taxes to taxes on investment income. As a result, gross basis taxes (including digital services taxes) would be creditable only to the extent that they were treated as an "in lieu of" tax under Section 903.
- The Notice allows taxpayers to determine whether a foreign tax qualifies as an "in lieu of tax" for purposes of Section 903 without regard to Reg. Section 1.903-1(c)(1)(iv) and (c)(2)(iii), which generally incorporate the controversial "attribution requirement" into Section 903.
- To claim relief, taxpayers must apply the Notice to all foreign taxes (i) that they or any other person (for example, a controlled foreign corporation held by the taxpayer) pay in any relief year (a tax year ending "within" the relief period), and (ii) for which the taxpayer would be eligible to claim a credit in the relief year (applying the temporary relief). Furthermore, all members of a consolidated group must apply the temporary relief for any member to be eligible for relief.

The Notice requires several action items for taxpayers, some of which are pressing. For instance, taxpayers currently finalizing their 2022 tax returns (or, in some cases, fiscal-year 2023 tax returns) must quickly assess the impact of any additional credits, including adjustments to deemed paid credits, Section 904 calculations, GILTI and subpart F high-tax exception eligibility (and impact), and more.

Taxpayers that have already filed their 2022 tax returns may need to amend them.

The Notice indicates that Treasury continues to analyze, and is considering amendments to, the FTC Creditability regulations. Treasury is also considering whether, and under what conditions, to provide additional temporary relief beyond the relief period.

The Notice provides no relief for other aspects of the foreign tax credit regulations issued with the FTC Creditability Regulations, many of which will continue to pose significant challenges for taxpayers. For example, no relief was granted for Reg. Section 1.861-20 rules on allocating and apportioning foreign income taxes, Reg. Section 901 rules on refundable credits, or IRC Section 905 regulations on foreign tax redeterminations.

Proposed PTEP regs still on track for 2023 release

An IRS official in mid-July 2023 confirmed that proposed previously taxed earnings and profits (PTEP) regulations remain on track for release later this year. The official was quoted as saying that the first tranche of regulations would address foreign exchange rules in the PTEP context – specifically, when a controlled foreign corporation (CFC) receives a PTEP distribution from a lower-tier CFC in a different functional currency. The official also reportedly said the coming rules would address guidance regarding basis and mid-year distributions from CFCs.

IRS makes permanent fast-track program to resolve certain corporate PLR requests

The IRS in Revenue Procedure 2023-26 has established a permanent program for fast-tracking corporate private letter rulings (PLRs) that meet certain guidelines. This program replaces the pilot program under Revenue Procedure 2022-10, with two notable changes, and applies to ruling requests received by the IRS after 26 July 2023.

In January 2022, the IRS announced that it was conducting an 18-month pilot program allowing taxpayers to request fast-track processing of corporate letter rulings if they met certain guidelines.

The permanent program, which is very similar to the pilot program, clarifies that (1) fast-track processing is not available for letter rulings that include a closing agreement; and (2) a business need for the ruling must only be stated for rulings requested with less than a 12-week timeline, although it is still necessary to state the reasons fast-track processing is being requested.

Similar to the pilot program, this permanent program will save taxpayers that need a ruling for issues under the jurisdiction of Associate Chief Counsel (Corporate) substantial time. Taxpayers must be prepared with the necessary materials requested once they begin the process, and generally must respond to requests for additional information within seven business days in order to continue with fast-track processing.

OECD developments

OECD/G20 Inclusive Framework releases technical documents on BEPS Pillars One and Two

The OECD on 17 July 2023 released several technical documents on Pillars One and Two of the OECD/G20 BEPS 2.0 project. At the same time, the OECD released additional documents covering a range of international tax topics (see following article), including developments with respect to tax transparency, that were prepared for a meeting between the G20 Finance Ministers and Central Bank Governors in Gandhinagar, India on 17-18 July.

The July 2023 Guidance includes guidance on currency conversion rules for Global Anti-Base Erosion (GloBE) calculations, tax credits and the application of the Substance-based Income Exclusion (SBIE). It also includes further guidance on the design of a Qualified Domestic Minimum Top-up Tax (QDMTT) as well as providing a QDMTT Safe Harbour. In addition, it provides a Transitional UTPR Safe Harbour, as well as a report on the Subject to Tax Rule (STTR).

This is the second set of Administrative Guidance items released by the Inclusive Framework, following the release of the first set of Administrative Guidance items in February 2023. The July Guidance will be incorporated into a revised version of the Commentary that will be released later this year.

The documents released on Pillar Two were approved by the Inclusive Framework on BEPS.

More specifically, the Administrative Guidance on the Global Anti-Base Erosion (GloBE) Model Rules provides additional information on a series of technical issues and includes the two new safe harbors.

The GloBE Information Return (GIR) has been finalized and includes a transitional framework for simplified reporting on a jurisdictional, rather than entity, basis. The GIR document sets out a standard template for the GIR, a transitional simplified jurisdictional reporting framework, an approach for dissemination of the GIR and next steps.

The report on the STTR provides model tax treaty provisions and related commentary that can be used by jurisdictions to incorporate the STTR into their bilateral tax treaties.

On Pillar One, the OECD released a public consultation document on Amount B (which provides for a "fixed return" on baseline marketing and distribution activities), reflecting further developments since the earlier consultation on this topic and seeking input from stakeholders. This document does not yet reflect consensus as there are remaining open issues.

The new Administrative Guidance and the GIR are particularly significant given that the Pillar Two GloBE Rules are expected to take effect in countries around the world in 2024. US multinationals should review these documents to evaluate the potential implications and continue to monitor the ongoing implementation activities in relevant countries.

In addition, companies may want to take the opportunity to engage with global policymakers on practical implications of the proposed approach to Amount B reflected in the public consultation document.

OECD releases Outcome Statement on progress on Pillars One and Two of BEPS 2.0 project

On 12 July 2023, at the conclusion of the 15th meeting of the OECD/G20 Inclusive Framework on BEPS, the OECD released an Outcome Statement reflecting the agreement reached by 138 of the 143 Inclusive Framework (IF) member jurisdictions on the remaining elements of the BEPS 2.0 project.

The July 2023 statement summarizes the Inclusive Framework deliverables in four areas:

- The Multilateral Convention (MLC) on Amount A of Pillar One
- Amount B of Pillar One
- The Subject to Tax Rule (STTR) under Pillar Two
- Plan for implementation support

In regard to Amount A in Pillar One (new nexus/taxing right), the Statement notes that the IF has developed a text of the MLC for Pillar One Amount A (with a few unidentified open items), which will allow the parties to the MLC to exercise a domestic taxing right. The MLC will be opened for signature in the second half of 2023 and a signing ceremony will be organized by year-end, with the objective of enabling the MLC to enter into force in 2025.

Members of the IF also agreed to refrain from imposing newly enacted Digital Services Taxes or relevant similar measures, as defined in the MLC, on any company between 1 January 2024 and the earlier of 31 December 2024 or the entry into force of the MLC. That moratorium is conditional, however, on having at least 30 countries — with at least 60% of the parents from in-scope companies — sign the MLC by the end of 2023. And that condition represents a major hurdle for the extension to take place.

In regard to Amount B in Pillar One (framework for the simplified and streamlined application of the arm's-length principle to in-country baseline marketing and distribution activities), the Statement says the IF achieved consensus on many aspects of that framework, although additional work remains.

The OECD announced it would open Amount B for further public consultation beginning the week of 17 July 2023, with comments to be submitted by 1 September 2023. The July Statement further indicates the intention that the IF will approve and publish a final Amount B report by year-end, and aspects of Amount B will be incorporated into the OECD Transfer Pricing Guidelines by January 2024. In this regard, consideration will be given to both the needs of low-capacity jurisdictions and the interdependence with the signing and entry into force of the MLC.

The Statement indicates that the STTR is an integral part of the consensus on Pillar Two for developing countries. It states that work has been completed on a MLI together with an Explanatory Statement to facilitate implementation of the STTR, which will be open for signature from 2 October 2023.

IF members can elect to implement the STTR by signing the MLI or bilaterally amending their tax treaties to include the STTR when asked to do so by developing countries that are members of the Inclusive Framework. The STTR will apply to intra-group interest, royalties and a defined set of other intra-group payments that includes all payments for intra-group services. The STTR is subject to certain exclusions and materiality and mark-up thresholds and will be administered through an ex-post annualized charge.

OECD Secretary-General Tax Report provides international tax update

In connection with the July 2023 G20 Finance Ministers and Central Bank Governors meeting, the OECD released several documents that cover international tax matters beyond the BEPS 2.0 project, as well as a BEPS update. The OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors provides a review of the ongoing work on Pillars One and Two and indicates that the OECD is continuing to work on economic impact estimates of the Pillar Two global minimum tax and will publish its analysis in the coming months.

In the area of tax and development, the Secretary-General Report references the release of the G20/OECD Roadmap on Developing Countries and International Tax, which provides an update on developments in this area since the 2022 report. This update focuses on developing countries' engagement with respect to both the BEPS 2.0 project and the original BEPS project and on new programs with respect to carbon mitigation approaches and Value-Added Taxes (VAT)/Goods and Services Taxes (GST) on e-commerce.

The Secretary-General Report includes a section on developments with respect to tax transparency, noting recent updates on information reporting with respect to crypto-assets and implementation of effective information exchange practices. Three new documents related to tax transparency prepared at the request of the Indian G20 Presidency are attached to the report:

- A report on Enhancing International Tax Transparency on Real Estate
- An update on Unleashing the Potential of Automatic Exchange of Information for Developing Countries
- A report on Facilitating the Use of Tax-Treaty-Exchanged Information for Non-tax Purposes

OECD releases 2023 report on tax transparency in Latin America

The OECD in late June 2023 published a progress report, "Tax Transparency in Latin America 2023," in connection with the eighth meeting of the Punta del Este Declaration, an initiative established in 2018 and focused on improving effective exchange of information in tax administrations in Latin America.

The report provides an update on the progress achieved to date and describes how jurisdictions in the region have developed and implemented a strategy to increase the use of exchange of information as a tool to support audits and investigations using the international network and the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum).

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
- Anna Moss anna.moss@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

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.

EYG no. 007423-23Gbl

1508-1600216 NY
ED None