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# Washington Dispatch

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## OECD releases text of Amount A Pillar One MLC, Treasury announces consultation

The OECD/G20 Inclusive Framework (IF) on BEPS on 11 October released the text of a new multilateral convention (MLC) that “updates the international tax framework to co-ordinate a reallocation of taxing rights to market jurisdictions, improve tax certainty, and remove digital service taxes [DSTs].” According to an OECD press release, the [Multilateral Convention to Implement Amount A of Pillar One](#) reflects the current consensus among IF members. The MLC also includes several provisions that are meant to address certain unique circumstances of developing Inclusive Framework countries.

The MLC was delivered to G20 Finance Ministers and Central Bank Governors in a new [OECD Secretary-General Tax Report](#) ahead of their October meeting in Morocco. The released MLC was accompanied by an [Explanatory Statement](#) and the [Understanding on the Application of Certainty of Amount A](#) (which describes administration and dispute resolution parameters).

Amount A of Pillar One addresses the “reallocation of taxing rights to market jurisdictions with respect to a share of the profits of the largest and most profitable multinational enterprises (MNEs) operating in their markets, regardless of their physical presence.” It is also meant to ensure the repeal and end proliferation of DSTs and relevant similar measures. According to the OECD, Pillar One is expected to reallocate approximately \$200 billion in profits to market jurisdictions each year, resulting in global tax revenues of between \$17 billion and \$32 billion, based on 2021 data.

Manal Corwin, director of the OECD’s Center for Tax Policy and Administration was quoted as saying the draft MLC is considered an “intermediate step” in the process to get countries to sign the document. The goal reportedly is to have 130 countries sign the MLC by the end of the year.

The US government will not be one of the early signatories, however. Treasury Secretary Janet Yellen said the Pillar One MLC will require further negotiation before signing and that it will not take place this year.

## OECD official says BEPS Pillar One MLC preferable to the alternative

The Director of the OECD Centre for Tax Policy and Administration in October defended the recently released Amount A Pillar One Multilateral Convention saying it is much preferable to the alternative, which would be the enactment of hundreds of digital services taxes around the globe. Manal Corwin conceded that “simplification is not always simple,” adding that without the OECD two-Pillar project, taxpayers would see the “the proliferation of multiple different measures, each with different standards and entry points and enforcement mechanisms that lead to double tax.”

The Treasury Secretary was quoted as saying that while the MLC reached considerable consensus and there was substantial progress in its negotiation, outstanding issues remain that will require countries to continue to work into 2024.

“There are some matters that are important to the United States and other countries that remain unresolved, open issues that still must be resolved before the treaty can be signed. So [these] processes will take into next year,” the Treasury Secretary said. She added that it is very important for businesses and other stakeholders, as well as Congress, to be apprised about the MLC and ensure there is support for the convention.

In the meantime, Treasury issued a statement requesting public comments on the BEPS Pillar One MLC text and accompanying documents. According to the Treasury release, the Administration considers “release of the draft Pillar One documents a key step forward in the Pillar One negotiations. ... Treasury stands behind the negotiations, which have resulted in many difficult compromises by all sides with respect to both the design of the partial reallocation of taxing rights and the elimination of discriminatory digital services taxes and similar measures.”

Written comments to Treasury are due by 11 December and must be submitted electronically to: [OTP\\_Pillar1MLC@treasury.gov](mailto:OTP_Pillar1MLC@treasury.gov).

## US Congress

### House of representatives elects new Speaker

The US House of Representatives on 25 October elected Rep. Mike Johnson (R-LA) to be the next Speaker, with members voting 220 to 209 along strictly party-lines. The vote came over three weeks after the ouster of House Speaker Kevin McCarthy (R-CA) from the leadership post on 3 October.

The new Speaker quickly set an ambitious schedule for regular-order consideration of appropriations bills and said a continuing resolution (CR) - after the expiration of the existing CR on 17 November - should end on 15 January or 15 April so the Senate can't "jam" the House with a year-end omnibus spending bill. Speaker Johnson also said he would create a bipartisan debt commission.

### US-Taiwan legislation moves forward

The *U.S.-Taiwan Expedited Double Tax Relief Act* that was passed unanimously by the Senate Finance Committee in September was formally introduced in the Senate (S. 3084) on 19 October by Chairman Ron Wyden (D-OR) and Ranking Member Mike Crapo (R-ID) and in the House (H.R. 5988) by Ways and Means Committee Chairman Jason Smith (R-MO) and Ranking Member Richard Neal (D-MA).

The updated text reflects the Finance Committee's amendment to prevent double taxation on payments to entertainers and athletes in certain circumstances, as well as some other changes.

## IRS news

### IRS proposed regulations would amend Section 367(b) regulations applying to certain cross-border triangular reorgs, inbound nonrecognition transactions

Treasury and the IRS issued proposed regulations on 5 October ([REG-117614-14](#) Proposed Regulations) to modify certain aspects of the existing regulations issued under Section 367(b) (Existing Regulations).

The Proposed Regulations incorporate, with certain modifications, guidance described in Notice 2014-32 and Notice 2016-73 (2016 Notice and collectively, the Notices), each issued in response to transactions perceived to exploit certain aspects of the Existing Regulations.

Consistent with the 2016 Notice, the Proposed Regulations focus mainly on inbound transactions that result in repatriation of previously untaxed foreign earnings. The Preamble to the Proposed Regulations acknowledges that the *Tax Cuts and Jobs Act* (TCJA) drastically changed the US tax landscape by introducing Section 245A and increasing the amount of foreign earnings or income subject to immediate US taxation under the "GILTI" rules in Section 951A. As a result, when distributed to 10 percent US shareholders, most earnings and profits (E&P) of foreign corporations are not taxable either because they give rise to a 100% dividends received deduction or constitute previously taxed earnings and profits (PTEP).

Despite the changes made by TCJA, the IRS and Treasury believe that the regulations under Section 367(b) remain necessary because incentives to avoid treating property transfers as distributions remain (e.g., the distribution may not qualify for the dividends received deduction or the taxpayer seeks to preserve PTEP). Accordingly, the Proposed Regulations would formalize the guidance announced in the Notices but update it in light of the changes made by the TCJA.

### Senate Finance leaders urge USTR to address proposed Canadian DST

Senate Finance Committee Chairman Ron Wyden (D-OR) and Ranking Member Mike Crapo (R-ID) in a 10 October [letter](#) called on the U.S. Trade Representative (USTR) to make clear that the United States will forcefully defend American employers against Canada's proposed 3% DST. The senators urged the USTR to tell the Canadian government it will "immediately respond using available trade tools upon Canada's enactment of any DST." The [proposed Canadian levy](#) would go into effect in 2024 but be retroactive to 2022.

In response to a comment received on the 2016 Notice, the Proposed Regulations would narrow the scope of the “excess asset basis” (EAB) rules specified in the 2016 Notice. Considering the increased prevalence of PTEP after the TCJA, the Proposed Regulations would also treat the foreign acquired corporation as receiving a deemed distribution under Section 301 from its foreign subsidiaries instead of adjusting an exchanging shareholder’s all E&P amount as described in the 2016 Notice.

The IRS requested that comments on the Proposed Regulations be received by 5 December 2023.

### US officials offer update on pending guidance

Treasury and IRS officials in October offered insights regarding expected international tax guidance at a virtual American Bar Association meeting.

Addressing the government’s temporary suspension of final foreign tax credit (FTC) regulations issued in December 2021, an IRS official warned taxpayers that the temporary suspension is just that, and they should not assume Treasury ultimately will make any change to the regulations. The official also said the government anticipates extending the temporary moratorium on the FTC rules past the end of this year. The IRS in July 2023 released [Notice 2023-55](#), announcing temporary relief for taxpayers seeking a foreign tax credit by deferring key components of Reg. Sections 1.901-2 and 1.903-1.

The IRS official also reiterated prior statements by officials that the Service plans to issue foreign tax regulations before the end of the year that will address how FTCs will apply in the context of coming global minimum taxes.

In regard to the coming global minimum tax, Treasury reportedly is looking at developing anti-abuse rules that will address the BEPS Pillar Two transitional safe harbor for country-by-country reporting. In particular, the US government has concerns that there may be inappropriate use of the safe harbor by taxpayers, specifically in the context of hybrid instruments. Another issue under review by Treasury is the difference between how US rules and Pillar Two rules would treat asset transfers between two entities under common control. The Treasury official said there is no timeframe on when this guidance would be released.

A Treasury official further was quoted as saying that the government will also issue proposed corporate alternative minimum tax (CAMT) guidance before the end of 2023 and that taxpayers will not see another notice until that time. CAMT topics that the proposed rules reportedly may address include controlled foreign corporation income double counting, definitions and determinations related to foreign parents of multinational groups and mark-to-market considerations.

### IRS informing taxpayers of Schedule UTP non-compliance

EY is aware that the IRS has begun sending certain taxpayers letters stating that they have not complied with the rules for reporting an uncertain tax position (UTP). Specifically, the letters state that the Schedule UTP does not fulfill the requirements for a “concise description” for one or more reportable UTPs.

As background, in December 2022, the IRS finalized an updated [Schedule UTP, Uncertain Tax Position Statement](#) with accompanying [instructions](#). The IRS uses the Schedule UTP as a tool in conjunction with other risk analysis factors to identify the highest compliance risks among taxpayers and to assist in working audit issues effectively and efficiently.

The IRS has a centralized review team that reviews and evaluates all concise descriptions of UTPs to assess compliance with the Schedule UTP instructions. The review team will contact the taxpayer when information on the Schedule UTP does not meet the instruction’s requirements.

The letters issued by the IRS appear to stem from this team’s review of taxpayer UTPs, and indicate the Schedule UTP is not compliant due to the lack of a concise description that includes enough detail to adequately describe the issue. The letters also forewarn that the IRS will be reviewing future Schedule UTPs, so the taxpayer must follow the form’s instructions.

The IRS’s issuance of the letters appears to be a compliance-driven effort to ensure taxpayers are reporting the appropriate UTP details. Accordingly, taxpayers should confirm that they are describing reportable UTPs with the requisite specificity to help prevent any future compliance issues.

## PTEP proposed regs to be released in early 2024

An IRS official in October 2023 was quoted as saying that proposed previously taxed earnings and profits (PTEP) regulations now are expected to be released in early 2024, acknowledging the long delays in releasing the regulatory package. IRS officials in the past have said PTEP regulations would be released in tranches, with the official confirming that the regulations would address the timing of basis adjustments related to mid-year share transfers or distributions.

## IRS sending compliance alerts to US subs of foreign-owned corporations

The IRS announced ([IR-2023-194](#)) on 20 October that it plans to send compliance alerts to approximately 150 US-based subsidiaries of foreign-owned corporations that distribute goods in the United States. The alerts stem from the companies' alleged use of certain transfer pricing strategies, which the IRS deems improper. The IRS also said in the news release that it plans to expand the Large Corporate Compliance program in 2024 to audit 60 additional large corporate taxpayers, which will be selected with the help of artificial intelligence.

## IRS to broaden scope of corporate PLRs

The Office of the IRS Associate Chief Counsel (Corporate) reportedly will "significantly broaden" the scope of the type of private letter rulings that it is willing to consider. The new head of the IRS's corporate division was quoted as saying the majority of subchapter C transactions – including Section 351 transactions, acquisitive reorganizations and Section 332 liquidations – will become eligible for PLR requests.

The official added that he also envisions the IRS issuing PLRs on CAMT issues in the context of corporate reorganizations.

## US, Uruguay sign TIEA

The US and Uruguay signed a tax information exchange agreement (TIEA) on 24 October. TIEAs allow the US competent authority and their bilateral counterpart to exchange information on tax matters in regard to the administration and enforcement of domestic tax laws.

## Tax treaties

### US-Chile tax treaty's US reservations reflect current policy

A Treasury official in October 2023 said that US reservations to the new US-Chile tax treaty, which were also integrated into the language of the US-Croatia Treaty signed in 2022, reflect current policy and are included in the working model of the US Model Treaty. The reservations in the Chilean accord address the Section 59A base erosion and anti-abuse tax and the application of foreign tax credits. The official was quoted as saying there are no plans to release the next iteration of the US Model Treaty, but that the proposed 2022 US-Croatia tax treaty can serve as a good indication of positions in the new US Model Treaty.

In regard to the US-Chile treaty, the Chilean government on 25 October submitted the proposed convention with US reservations to the Chilean Congress for approval.

## Transfer pricing

### IRS appeals Tax Court's latest decision in Medtronic

The IRS recently appealed the decision issued by the US Tax Court in *Medtronic, Inc. and Consolidated Subsidiaries v. Commissioner (Medtronic III)* to the Court of Appeals for the Eighth Circuit. The decision was issued in accordance with the Tax Court's decision on 18 August 2022, which applied an unspecified method to determine the royalty rate for a license agreement between Medtronic Inc. (Medtronic US) and its Puerto Rican subsidiary.

The basis for the IRS's appeal is not explained in the Notice of Appeal.

In the latest decision, the Tax Court determined income tax deficiencies for tax years 2005 and 2006 of approximately \$175 million, plus interest.

The Tax Court opinion in *Medtronic III* has provided guidance for related-party transactions by rejecting the Comparable Uncontrolled Transaction (CUT) and Comparable Profits Method (CPM) as the best method and instead applying an unspecified method. When the Eighth Circuit ultimately rules on the IRS's most recent appeal of the Tax Court's decision, it will provide important future precedent.

## US, Israel sign CAA on exchange of CbC reports

The US and Israel signed a [competent authority agreement](#) (CAA) on 16 August 2023 on the exchange of country-by-country (CbC) reports, operative on the same date. The exchange of CbC information is based on the information exchange provision in the 1975 US-Israel tax treaty.

Under the terms of the CAA, CbC reports are first to be exchanged for fiscal years (FYs) of multinational groups beginning on or after 1 January 2021, “as soon as possible and no later than 18 months after the last day of the Fiscal Year of the MNE Group to which the CbC Report relates.” CbC reports for FYs beginning on or after 1 January 2022 are to be exchanged as soon as possible but not later than 15 months after the close of the FY of the multinational group to which the report relates.

## Cyprus issues clarification note on future CbC exchange agreement with US

The Cypriot Tax Department [publicly announced](#) that the bilateral Competent Authority Agreement (CAA) for the exchange of Country-by-Country (CbC) reports between Cyprus and the United States – which is still under negotiation – is expected to be effective for Reporting Fiscal Years (RFYs) starting on or after 1 January 2023.

According to the announcement, the secondary filing mechanism for a Cypriot Constituent Entity (CE) of a multinational enterprise group with a US tax resident Ultimate Parent Entity (UPE) is triggered for RFYs starting on or after 1 January 2022, but before 1 January 2023 (i.e., during calendar year 2022).

Accordingly, a Cypriot CE whose UPE is a tax resident in the US, must file the CbC report locally in Cyprus for its RFY ending on 31 December 2022, even if a CbC report has or will be submitted in the US.

## OECD developments

### OECD/G20 Inclusive Framework launches Multilateral Convention to implement Pillar Two Subject to Tax Rule

On 3 October 2023, the OECD [announced](#) that the Inclusive Framework on BEPS had concluded negotiations on a [Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule](#). Together with the announcement, the OECD released the [STTR MLI](#), an [explanatory statement](#) to the STTR MLI, a [summary overview](#) including a roadmap toward signature, and a [frequently asked questions](#) document.

Inclusive Framework jurisdictions will be able to use the STTR MLI to implement the STTR in all their relevant tax treaties. Alternatively, Inclusive Framework jurisdictions can implement the STTR in a given tax treaty through bilateral negotiations.

The STTR applies to intragroup payments from source jurisdictions (i.e., the jurisdiction in which the income arises) that are subject to tax rates below 9% in the payee's jurisdiction of residence. The STTR allocates to the source country a limited and conditional taxing right to ensure a minimum level of taxation.

The STTR MLI is open for signature by all states and is subject to ratification, acceptance, or approval. No reservations are permitted, and parties must make notifications regarding the inclusion of specific annexes in Covered Tax Agreements. The STTR MLI will enter into force on the first day of the month following a period of three calendar months beginning on the date of deposit of the second instrument of ratification, acceptance or approval.

Inclusive Framework jurisdictions that have nominal corporate tax rates below 9% have committed to implementing the STTR through tax-treaty amendments when asked to do so by a developing country that is an Inclusive Framework jurisdiction.

The OECD will act as the depositary of the multilateral instrument “and will support governments in the process of its signature and ratification.”

The OECD in July 2023 released a [document](#) under Pillar Two containing the model treaty provision of the STTR, together with an accompanying commentary explaining the purpose and operation of the rule. The STTR is a core element of Pillar Two.

### BEPS IF considering Pillar Two guidance on deferred tax assets

An OECD official in late October was quoted as saying that the Inclusive Framework on BEPS is considering issuing Pillar Two guidance on the treatment of deferred tax assets in jurisdictions with federal and subnational taxes. The official said the GloBE rules on which Pillar Two is based create a deferred tax asset in the jurisdiction in which the entity records a loss, instead of using a loss carryforward mechanism.

Upon the suggestion that it may be possible to recast the deferred tax asset at 15% accounting for both the federal and subnational level, because GLOBE rules do not distinguish between the two, he said, "We are working on this issue ... . The result has to be equivalent to a 15 percent [rate]." He also reportedly said the Inclusive Framework is working on additional guidance on the treatment of deferred losses in countries that have multiple levels of taxation.

### **OECD FTA agrees on action to support continued digital transformation, delivering Pillar Two and capacity building**

The OECD's Forum on Tax Administration (FTA) held its 16th plenary meeting in Singapore on 11-13 October 2023. The [Statement of outcomes: 2023 FTA Plenary Meeting](#) released at the conclusion of the meeting outlined the agreed-upon actions and commitments made by the FTA in three key areas, with the FTA members agreeing to:

- ▶ Collaborate on projects to utilize new technology to enable the vision of the FTA's 2020 publication [Tax Administration 3.0: The Digital Transformation of Tax Administration](#) to be met, through reducing tax gaps and compliance burdens
- ▶ Work together on the consistent and effective implementation of Pillar Two and the strengthening of cooperation between tax administrations to provide certainty over administration of global minimum tax rules
- ▶ Enhance the effectiveness and reach of its global capacity building efforts through closer partnership with other international and regional organizations

The FTA agreed the projects on Tax Administration 3.0 are to begin in December 2023.

### **OECD releases outcomes of sixth peer review on BEPS Action 13 on CbCR**

On 25 September 2023, the OECD published a [compilation](#) of the outcomes from the sixth annual peer review of the minimum standard on BEPS [Action 13](#) (Transfer Pricing Documentation and Country-by-Country Reporting). The Compilation covers 136 jurisdictions and reflects a finding that implementation of country-by-country reporting (CbCR) is largely consistent with the Action 13 minimum standard.

According to the [press release](#), a large number of the recommendations made in the first five peer review phases have now been addressed by jurisdictions. However, 60 jurisdictions still have at least one recommendation outstanding.

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