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Legislation

President Biden offers new tax proposals in State of the Union; releases FY2025 Budget with international tax proposals, mainly stemming from prior budgets

President Biden delivered his State of the Union address on 7 March 2024, offering new proposals in terms of taxation. The President called on Congress to raise the corporate minimum tax "to at least 21% so every big corporation finally begins to pay their fair share." The President also said he wanted to "end the tax breaks for Big Pharma, Big Oil, private jets, and massive executive pay!" President Biden further repeated his call for a so-called "billionaires tax."

In briefing documents, the White House said the President supports raising the corporate income tax rate to 28% (from 21%), which has been included in his previous Budget proposals, and ending corporate deductions for the compensation costs for any employee (not just top executives) of more than $1m per year, which the President alluded to in his remarks.

President Biden followed up with the release of the Administration's FY2025 Budget proposal on 11 March, including previous proposals as well as some new tax measures. The Budget, a traditionally aspirational document that in this case represents a roadmap of what a second Biden term could look like on tax if the Democrats win the requisite control in Congress to make the proposals a reality, includes tax items outlined in the State of the Union.

Treasury also released the Greenbook for the Budget, providing a general explanation and revenue estimates.

Most proposals presented in this year's Budget appeared in the FY 2024 budget. Among the highlights:

The Budget would raise the corporate tax rate to 28% from 21%. Together with other changes, (as described later) the proposals would increase the effective GILTI rate to 21%.

The proposal would apply to tax years beginning after 31 December 2023. For tax years beginning before 1 January 2024, and ending after 31 December 2023, the corporate tax rate would equal 21% plus 7% times the portion of the tax year occurring in 2024 (for a tax year ending 30 June 2024, for instance, the tax rate would be approximately 24.5%, i.e., 21% + [7% * (182 days / 366 days)]).

The Administration also proposed to change the GILTI regime and certain other provisions to eliminate perceived incentives to move US operations offshore and to comply with the global minimum tax rules under BEPS 2.0 Pillar Two. These changes include:

- Taxing a US shareholder's entire net controlled foreign corporation (CFC) tested income by eliminating the exemption for qualified business asset investments (effective for tax years beginning after 31 December 2024)
- Decreasing the deduction for a global minimum tax inclusion under Section 250 to 25%, which would increase the GILTI rate to 21% when combined with the proposed corporate rate of 28% (effective for tax years beginning after 31 December 2023)
- Requiring US shareholders to effectively calculate their global minimum tax separately for each foreign jurisdiction in which their CFC operates, eliminating the ability to reduce US tax on income from low-taxed jurisdictions with foreign taxes paid in higher-taxed jurisdictions (effective for tax years beginning after 31 December 2024)

The proposed Budget would also disallow only 5%, rather than 20%, of a shareholder's foreign tax credits (FTCs) with respect to the global minimum tax (effective for tax years beginning after 31 December 2024).

It would further permit US shareholders of CFCs to carry forward GILTI net operating losses (within a single jurisdiction) and to carry GILTI FTCs forward 10 years (within a single jurisdiction effective for tax years beginning after 31 December 2024.

Other international tax proposals in the Budget would:

- Replace the Base Erosion Anti-abuse Tax (BEAT) with an "undertaxed profits rule" (UTPR) that is consistent with the UTPR in the BEPS Pillar Two rules
- Repeal the deduction for foreign-derived intangible income (FDII)
- Create a new general business credit equal to 10% of eligible expenses incurred when onshoring a trade or business to the United States
- Disallow deductions for expenses incurred when moving a US trade or business offshore
- Create a second type of US shareholder to include in income amounts determined with respect to non-taxed dividends distributed by a CFC

- Eliminate the "one-month deferral election" for CFCs, mandating the use of the same tax year for the CFC and its majority US shareholder
- Limit FTCs on sales of hybrid entities
- Restrict deductions of excess interest expenses of members of a financial reporting group
- Revise the scope of the portfolio interest exclusion for 10% shareholders
- Modify the treatment of certain derivative transactions for foreign investors
- Permit taxpayers to retroactively elect, in certain circumstances, to treat a passive foreign investment company (PFIC) as a qualified electing fund (QEF) without IRS consent
- Require Section 6038 reporting for each foreign "taxable unit"

The proposals have various effective dates.

If enacted, these proposals would notably increase taxes for most US multinational companies. Politically, however, the likelihood of their passage in the near term is low with a divided Congress and the forthcoming 2024 presidential and congressional elections. Taxpayers should nevertheless evaluate the potential impact of these proposals as they might resurface as revenue generators in future tax legislation.

Congress passes final FY2024 funding bills, tax bill in limbo

Congressional leaders and the White House in late March reached a deal on the final set of full-year government funding bills, therefore avoiding a partial government shutdown. Congress passed the legislation and the President on 23 March signed it into law. In the meantime, Senate consideration of the *Tax Relief for American Families and Workers Act* (H.R. 7024) business tax and Child Tax Credit (CTC) expansion bill remains in limbo, as Congress began its two-week Spring recess.

Although the tax bill was not attached to appropriations legislation, it still could come up as a standalone bill or with other must-pass legislation. Senate Finance Committee Democrats and Republicans have traded offers to modify the CTC provisions, to no avail.

Treasury Secretary defends Administration's BEPS position at Senate Finance Committee budget hearing

The Senate Finance Committee held a hearing on 21 March on the President's FY 2025 Budget proposal at which Treasury Secretary Janet Yellen testified. The hearing provided a forum to discuss the OECD BEPS 2.0 project, the costs of the project to the United States, and whether and how the two proposed BEPS pillars could be brought before Congress.

Ranking Member Mike Crapo (R-ID) said the Administration should have reservations about signing on to the OECD Pillar One Multilateral Convention (MLC). "The global tax code is not the only concerning part about the international tax negotiations: the Administration should have deep reservations about signing on to the OECD's global tax treaty at month's end. The Joint Committee on Taxation's recent analysis indicates the deal reduces revenue, fails to provide certainty or stability and would not halt discriminatory taxes targeting American companies, which was the sole impetus for entering the negotiations."

He also said the *Inflation Reduction Act's* tax credits benefit foreign manufacturing and their cost has ballooned to $663b over 10 years.

In defense of the President's budget, and the OECD global minimum tax initiative, Secretary Yellen said: "President Biden and I continue to urge Congress to act so that the United States plays its part in the global minimum tax deal, which is currently being implemented in jurisdictions around the world to end the race to the bottom in corporate taxation.

We have also proposed implementing a Billionaire Minimum Tax so that the top .01% pay their fair share; raising the tax on corporate stock buybacks to encourage businesses to reinvest profits in their workers and grow their companies; and closing estate and gift tax loopholes that allow wealthy Americans to pay less than they would otherwise owe."

House Ways & Means Subpanel holds OECD BEPS Pillar One hearing

The House Ways and Means Tax Subcommittee held a hearing on 7 March titled "OECD Pillar 1: Ensuring the Biden Administration Puts Americans First." The hearing largely focused on the Joint Committee on Taxation (JCT) staff report that was released in March 2024 showing that Pillar One would have resulted in a loss in US Federal receipts of $1.4b, based on one set of assumptions, had it been in effect in 2021.

Some members said the report could provide an argument for the US to walk away from the project, but there was consensus that digital services taxes (DSTs) would proliferate if the OECD project falls apart.

In an opening statement, Chairman Mike Kelly (R-PA) said while the OECD project was originally intended to eliminate DSTs, the burden of Pillar One will fall disproportionately on US companies. He said a two-thirds majority would be required in the Senate for US implementation of Pillar One, through a multilateral tax treaty, and said the project is designed to fall apart without US participation.

Chairman Kelly noted the JCT report and said he was concerned about the Biden Administration sacrificing the financial success of US businesses and the economy.

Ranking Member Mike Thompson (D-CA) said the revenue loss projected in the JCT report might be the end of the discussion for some, under the premise of not giving up revenue to other countries, but we need to understand the benefits of the agreement, including on stability, and not just the cost. "For instance, Amount B, if other countries will accede to the Biden Administration's important 'red line' to make Amount B mandatory, could present a real benefit for U.S. businesses, by significantly reducing transfer pricing disputes," he said.

Those who look at the JCT report and say the US should "pack our bags and go home" should be asked, "What is the alternative?" Also, there is the question of whether the patchwork of DSTs that will doubtlessly spring into place would be preferable to Pillar One.

Treasury and IRS news

IRS delays Form 1042 electronic filing requirement for US and foreign withholding agents

The IRS issued Notice 2024-26 on 27 February 2024, exempting US and foreign withholding agents from electronically filing Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, for calendar year 2024.

The electronic filing requirement is delayed as follows:

Withholding agent residence	Form 1042 reporting relief
US	Electronic submission not required for 2023 Form 1042 (due 15 March 2024, or six months later by extension)
Non-US	Electronic submission not required for 2023 and 2024 Forms 1042 (due 15 March 2024 and 15 March 2025, respectively, or six months later by extension)

This relief does not apply to Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*. As such, those agents must electronically file Form 1042-S using the IRS's FIRE system.

As background, Form 1042 is an annual information return submitted by withholding agents to provide, among other information, details on (1) withholding tax liabilities; (2) deposits for nonresident alien withholding under Sections 1441 through 1443; and (3) *Foreign Account Tax Compliance Act* (FATCA) withholding under Sections 1471 through 1473.

The return has historically been a paper ("wet ink" signature) mailing to the IRS. For each calendar year, Form 1042 is due by 15 March of the succeeding year, although a six-month extension is possible.

In February 2023, Treasury and the IRS published final regulations on electronic filing (e-filing) requirements. The regulations required certain types of withholding agents to e-file Form 1042 and Form 1042-S starting with their 2023 reporting (to be filed with the IRS in 2024):

Under the final regulations, a withholding agent that fails to file electronically, when required, is deemed to have failed to file the return(s) and is subject to the applicable Section 6651 failure-to-file penalties.

Notice 2024-26 administratively exempts all withholding agents from the e-filing requirement for 2023 reporting. Foreign withholding agents get an additional year of relief and are exempt from the e-filing requirement for both 2023 (to be submitted to the IRS in 2024) and 2024 reporting (to be submitted to the IRS in 2025).

The relief is automatic (i.e., no further action is needed to be taken by the withholding agent). In addition, Notice 2024-26 will not treat a Form 1042 that is timely submitted on paper as a failure to file.

Government officials offer international regulatory update

US officials recently offered some news in regard to international regulatory projects.

A Treasury official in late March said eagerly anticipated proposed regulations on the corporate alternative minimum tax (CAMT) may be months away from release, although they could also be released sooner. According to a Treasury official, the proposed CAMT package will address mark-to-market adjustments for unrealized gains and losses and will include a "relatively straightforward" safe harbor for periods both before and after the regulations' release.

US working to safeguard R&D credit in BEPS Pillar Two minimum tax

A Treasury official in late March was quoted as saying the US is "working to protect the benefits of the research credit under the [BEPS 2.0] Pillar 2 global minimum tax, possibly through OECD administrative guidance." According to the official, the US is working to identify a "range of potential fixes." Speaking at a Washington tax conference, the Treasury official said the immediate goal for the US is to address the issue through administrative guidance.

IRS proposed regulations on the one percent stock buyback excise tax are "imminent," according to another senior government official at the end of March. The official disclosed the coming rules would address a "funding rule" that would apply in the case of a foreign company repurchasing stock, if the repurchase was indirectly funded by a US corporation.

The official further said Treasury and the IRS are "very far along" in developing proposed regulations implementing Notice 2012-15, which would address the application of Sections 367(a) and (b) to stock transfers to foreign corporations that are exchanged for property under Section 304. Progress has also been made in regard to final Section 367(b) regulations that address triangular reorganizations involving foreign corporations. The IRS in October 2023 released proposed regulations (REG-117614-14) addressing cross-border triangular reorganizations that would adopt the modifications to the Section 367(b) regulations proposed in Notice 2014-32, as modified by Notice 2016-73.

The official disclosed that final regulations under Section 367(d) on the repatriation of intangible property that had previously been transferred offshore are "very far along."

An IRS official also was quoted as saying the government in the next year also plans to update guidance on applying for an advance pricing agreement and requesting competent authority relief. According to the official, the new rules will come in the form of revenue procedures and as "companion documents."

US reaches agreement with Turkiye on unilateral measures, including DSTs

Treasury announced that the US had reached agreement with Turkiye to extend through 30 June 2024 the November 2021 moratorium on unilateral measures, including digital services taxes. Treasury announced on 15 February 2024 that a similar extension had been reached with five European governments.

IRS will no longer issue single-issue PLRs, instead focus on 'transactional rulings'

A senior IRS official recently elaborated on recently announced changes to the IRS private letter ruling (PLR) program. The IRS in January 2024 issued Revenue Procedure 2024-1 and Revenue Procedure 2024-3, significantly broadening the scope of available letter rulings relating to certain issues under Sections 332, 351, 355, 368 and 1036.

The official was quoted as saying that the IRS will no longer issue significant single-issue rulings, but instead only entertain "transactional rulings." The official added that decisions on what could be considered included in a particular transaction would be made on a case-by-case basis.

Transfer pricing news

IRS official discusses benefits of mandatory arbitration on MAP

The IRS's Large Business and International (LB&I) Division Director of Treaty and Transfer Pricing Operations recently said the United States encourages jurisdictions to pursue mandatory binding arbitration to strengthen their mutual agreement procedure (MAP) programs.

Speaking on 7 March 2024 at a Washington DC conference, the official said mandatory binding arbitration is the US tax treaty policy. Mandatory binding arbitration is included in the 2016 US model tax treaty and the bilateral US income tax treaties with Belgium, Canada, France, Germany, Japan, Spain and Switzerland, and the pending treaty with Croatia. MAP disputes can be brought to an arbitration panel if the parties agree to arbitration and fulfill certain requirements.

Mandatory arbitration in MAP is baseball style, or final-offer arbitration, meaning that each party puts forth its final position and one position is chosen by the arbitration panel. The successful party in arbitration is the one that submits a more reasonable offer. Arbitration can help to more efficiently reach a MAP settlement because competent authorities might be more willing to negotiate before arbitration to avoid an all-or-nothing settlement.

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OECD developments

OECD releases update on BEPS 2.0 project

The G20 Finance Ministers and Central Bank Governors held a meeting on 28-29 February 2024, at the conclusion of which the Chair issued a summary document underscoring the importance of enhanced international economic cooperation and reiterating the G20's focus on finalizing the BEPS 2.0 project. Before the G20 meeting, the OECD released the Secretary-General Tax Report to the G20 Finance Ministers and Central Bank Governors, providing an update on international tax matters including progress on the BEPS 2.0 project, implementation of the minimum standards of the original BEPS project, tax development and tax transparency.

The Secretary-General Tax Report stated that in regard to BEPS Pillar Two, the global minimum tax has been or will be implemented by more than 35 jurisdictions with effect in 2024. Also on Pillar Two, the Report notes that more than 70 developing countries in the Inclusive Framework are entitled to request inclusion of the subject-to-tax rule (STTR) in their treaties with Inclusive Framework members.

On Pillar One, the Secretary-General Tax Report stated that the Inclusive Framework is working toward finalizing the text of the multilateral convention (MLC) on Amount A, with a view of holding a signing ceremony by the end of June 2024. It also noted that the Amount B report was approved by the Inclusive Framework and released in February 2024 and had been incorporated into the OECD Transfer Pricing Guidelines.

The Report added that additional work related to Amount B is ongoing, including work on the interdependence of Amount B and Amount A that will be undertaken prior to the signing and entry into force of the MLC.

OECD Council approves update to Model commentary on exchange of information

The OECD Council in February 2024 approved an update to the commentary on Article 26 of the OECD Model Convention, dealing with exchange of information. According to an OECD announcement, the update "… clarifies that information received through administrative assistance can be used for tax matters concerning persons other than those in respect of which the information was initially received. It also provides interpretative guidance on confidentiality, in particular regarding the access of taxpayers to information exchanged when such information has a bearing on their tax situation and regarding reflective non-taxpayer specific information, including statistical data, about or generated on the basis of exchanged information."

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