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Legislation

US tax policy battle lines are being drawn; House tax writers form 10 TCJA 'tax teams'

US tax policy is coming more into focus in the lead-up to the 2024 elections and the *Tax Cuts and Jobs Act* (TCJA) cliff to follow at the end of 2025.

House Ways and Means Committee (W&M) Chairman Jason Smith (R-MO) and Tax Subcommittee Chairman Mike Kelly (R-PA) on 26 April 2024 announced the formation of 10 Committee Tax Teams that will be comprised of W&M committee Republicans. The purpose will be to "study key tax provisions from the 2017 Trump tax cuts that are set to expire in 2025" and identify other legislative measures that support the Republican agenda.

Battle lines are beginning to be drawn: President Biden has proposed raising the corporate tax rate to 28%; increasing taxes on income, capital gains and dividends; and raising payroll taxes on high-income individuals, as well as international and other tax increases on businesses. The President is also on record favoring a billionaires' tax and increasing the *Inflation Reduction Act* CAMT from 15% to 21%.

While the President supports extending beyond 2025 some of the TCJA provisions that benefit taxpayers who make less than \$400,000 per year, Republican have said they want to extend the bulk of the TCJA provisions set to expire in 2025.

Also in the background is Congress' ongoing attempt to pass tax legislation this spring.

US progress on global minimum tax will positively affect ongoing R&D talks, JCT updating BEPS Pillar Two analysis

A US Treasury official in April 2024 made the argument that US progress in implementing the BEPS Pillar Two global minimum tax rules will have a positive impact on ongoing negotiations over related issues of concern to the US government, notably the US research and development (R&D) tax credit.

Treasury has indicated that it is in discussions to have favorable treatment of R&D in respect to the global anti-base erosion (GloBE) rules included in administrative guidance on Pillar Two.

The official also said the US government continues to take the position that adoption of Pillar Two is in the best interests of the United States, suggesting it would reduce compliance costs and double-taxation concerns as well as improve tax certainty.

In the meantime, a congressional Joint Committee on Taxation (JCT) official said in April that the JCT is reviewing countries' implementation of global minimum tax rules as it considers how it will update its analysis of the impact of BEPS 2.0 Pillar Two on the US fisc. The JCT released an analysis of Pillar Two in June 2023, which the official said did not take into consideration global implementation of the Pillar Two minimum rules.

Treasury and IRS news

IRS releases proposed rules on stock repurchase excise tax; follows earlier guidance with some modifications, including to funding rule, redemptions

The IRS on 9 April 2024 issued eagerly anticipated Section 4501 proposed regulations ([REG-115710-22](#)) that would implement the 1% excise tax surcharge on certain corporate stock repurchases occurring after 31 December 2022. The proposed regulations adopt much of the interim guidance that was released in Notice 2023-2, with some modifications including with respect to the funding rule for foreign-parented groups.

In separate regulations [REG-118499-23](#) released simultaneously, the IRS and Treasury describe the procedures for reporting and paying the new excise tax.

Section 4501 was enacted under the *Inflation Reduction Act*. It imposes an excise tax on a "covered corporation" to the extent its stock is repurchased by the covered corporation or its majority-owned or controlled subsidiary during the tax year. A "covered corporation" is generally defined as any publicly traded domestic corporation.

The provision provides that a repurchase by the covered corporation includes a repurchase by its specified affiliate from a person that is not the covered corporation or its specified affiliate. A specified affiliate is generally a greater-than-50% subsidiary of the covered corporation that is treated either as a partnership or corporation.

For foreign corporations whose stock is publicly traded, Section 4501 treats a domestic specified affiliate of the foreign parent corporation as a covered corporation with respect to certain purchases of the foreign parent corporation's stock.

As noted earlier, the proposed regulations adopt much of the guidance in Notice 2023-2, which went into detail about multiple aspects of the excise tax, including how to calculate the stock repurchase excise tax base, how to treat acquisitive reorganizations, the elements of Section 317(b) redemptions and reducing the fair market value for stock contributions to an employer-sponsored retirement plan.

The proposed regulations modified Notice 2023-2 in several areas, however, including the funding rule for foreign parented groups, the exemption for certain preferred stock, the stock taken into account for purposes of the netting rule, the treatment of partial liquidations and the determination of stock's fair market value.

Publicly traded foreign-parented groups with US subsidiaries may have a mixed reaction to the latest regulations. While the per se funding rule was eliminated, the principal purpose test that remains - which will be a more likely consideration for "upstream" fundings by a US subsidiary - could take some taxpayers by surprise.

For example, the proposed regulations do not adopt exclusions from the rules, despite commentators' suggestions that certain ordinary course fundings should not be within scope. Instead, according to the Treasury [press release](#), the proposed regulations provide a targeted anti-abuse rule without inadvertently capturing "ordinary course intercompany funding transactions."

One of the more notable changes would affect certain regulated financial entities (e.g., banks), whereby "tier 1" preferred stock issued by those entities would not be treated as stock subject to the stock repurchase excise tax. Other changes elaborate or clarify miscellaneous issues, such as determining eligibility for the \$1 million de minimis test, or treating stockless partial liquidations as repurchases.

On the compliance front, covered corporations must comply with the reporting requirements for the stock repurchase excise tax in any year that a repurchase occurs, even if it is clear that no taxes are owed by virtue of the netting rule or statutory exception. The requirement may result in an unanticipated burden on taxpayers.

Affected taxpayers should review the proposed regulations and consider providing comments by 11 June 2024.

IRS waives penalty for CAMT estimated tax

Treasury and the IRS on 15 April 2024 issued [Notice 2024-33](#), waiving the Section 6655 penalty for a corporation's failure to pay estimated tax payments attributable to a portion of the corporate alternative minimum tax (CAMT) due on or before 15 April 2024, or 15 May 2024 (for fiscal-year taxpayers whose tax year begins in February 2024). This is the second time the IRS has waived the penalty; in June 2023, the IRS waived the penalty for the 2023 tax year.

In issuing the waiver, the IRS cited the challenges of determining whether a corporation is subject to CAMT (i.e., whether an entity constitutes an "Applicable Corporation" under Section 59(k) and determining the amount of a corporation's CAMT liability under Section 55). While the Notice provides penalty relief, it does not clarify the application of the CAMT rules.

The IRS also will modify the instructions to Form 2220, *Underpayment of Estimated Tax by Corporations*, to clarify it will not impose the addition to tax based on a corporation's failure to make estimated tax payments of its CAMT liability for the relevant period.

IRS final regulations on FIRPTA controlled QIE rules released

Treasury and the IRS on 24 April 2024 issued final regulations ([TD 9992](#)) that provide guidance as to when qualified investment entities (QIEs) - which include real estate investment trusts (REITs) and certain regulated investment companies (RICs) - are considered domestically controlled for the purposes of the *Foreign Investment in Real Property Tax Act* rules of Section 897.

The final regulations retain the general approach and structure of proposed regulations published in December 2022 (the proposed regulations), with certain modifications.

The final regulations narrow the application of the domestic corporation look-through rule to privately held domestic C corporations where more than 50% of the fair market value of stock is owned, directly or indirectly, by foreign persons (rather than 25%, as in the proposed regulations).

The final regulations retain the proposed regulations' treatment of qualified foreign pension funds (QFPFs), qualified controlled entities (QCEs) and international organizations (IOs) as foreign persons for purposes of the domestically controlled QIE exception.

A transition rule relieves taxpayers of the application of the domestic corporation look-through rule for certain pre-existing QIEs for 10 years only if acquisitions of new US real property interests (USRPIs) are limited to 20% or less of the fair market value of all USRPIs as of 24 April 2024, and no significant ownership changes (more than 50 percentage points) occur.

The final regulations present significant considerations for investment structures that include REITs and RICs. The adoption of the domestic corporation look-through rule makes understanding and tracking the ultimate ownership of domestic corporations critical, even though the final regulations have increased the foreign ownership threshold that triggers look-through treatment from 25% to more than 50%.

While the final rules provide 10-year transition relief for preexisting structures, this relief is contingent upon meeting specific requirements that may in practice prove challenging for many structures, although the relief may be beneficial for some (e.g., single-asset REITs).

Understanding these provisions and ensuring that existing QIEs that wish to rely on the transition rule comply with the limits for USRPI acquisitions or ownership changes is essential. However, it may not be clear how the limitations in the transition rule would apply to certain fact patterns. As a result, QIEs should monitor investment structures closely for any significant direct or indirect acquisitions of USRPIs or changes in direct or indirect ownership that might subject QIEs to the domestic corporation look-through rule before the expiration of the 10-year maximum transition period.

IRS releases draft Form 1099-DA on digital asset proceeds

The IRS on 18 April 2024 published a [draft Form 1099-DA, Digital Asset Proceeds From Broker Transactions](#), to collect data that the IRS said would be required under the proposed regulations ([REG-1122793-19](#)) published in August 2023. The draft form does not change any of the requirements in the proposed regulations.

Draft Form 1099-DA includes one page of instructions for taxpayers and tax preparers to use in interpreting the form when they receive it from a broker. Some of those instructions shed light on what digital-asset brokers are expected to do, but the picture is incomplete. The IRS has not yet published separate instructions on preparing the form, which would serve as a guide for brokers in building and implementing the information systems related to Form 1099-DA.

In addition to issuing draft Form 1099-DA, the IRS requested [comments](#) on the information collection requirements for digital-asset proceeds from broker transactions. Comments should be submitted by 21 June.

US says draft Australian ruling on cross-border computer software sales contrary to US-Australia DTT, OECD Model Treaty

A senior US Treasury official wrote to his Australian counterpart that Australian [Draft Taxation Ruling TR 2024/D1 Income tax: royalties - character of payments in respect of software and intellectual property](#) on the cross-border sale of certain computer software is contrary to the US-Australia income tax treaty, as well as the OECD Model Tax Treaty.

In a 5 April 2024 letter, the US official urged the Australian Taxation Office “to either withdraw TR 2024/D1 or revise it as it applies to the Australia-U.S. tax treaty to bring it into conformity with the OECD Model Commentaries and maintain the reciprocal nature of the treatment of payments by local distributors of computer software.”

IESBA revises framework for providing tax services

The International Ethics and Standards Board for Accountants (IESBA) [announced](#) changes to the International Code of Ethics for Professional Accountants on 15 April 2024 as a result of its Tax Planning and Related Services project. The revisions create an ethical framework for professionals to follow when providing tax services and will apply to all tax planning activities starting after 30 June 2025.

There will be detailed guidance from the IESBA in the coming months on how to apply the ethical framework.

Transfer pricing news

APA report for 2023 shows number of APAs executed more than doubled

The IRS Advance Pricing and Mutual Agreement Program (APMA) issued the 25th annual Advance Pricing Agreement (APA) report (the Report) on 30 March 2024, in [Announcement 2024-16](#). The Report discusses APMA, including its activities and structure for calendar year 2023, and gives useful insights into its operation.

The total number of APAs executed increased significantly from 77 to 156 and the median amount of time to finalize an APA decreased from 43.4 months in 2022 to 42 months in 2023. However, the number of APA filings slightly decreased in 2023, with taxpayers filing 167 APA requests (down from 183 in 2022).

Worth noting, after executing a historically low number of APAs in 2022 (77), the fewest executed in any year since 2011, the number of APAs executed more than doubled in 2023 (156), setting a record for the most APAs executed in a single year.

And for the third year in a row, APMA received more APAs than it executed. During 2023, 167 APA applications were filed and 156 APAs were executed. Thirteen APA applications were withdrawn, and the inventory of pending APAs slightly decreased in 2023.

At year end, 558 APA requests were pending (480 bilateral, 34 multilateral and 44 unilateral), down from 564 in 2022.

Details were provided on the treaty partners to bilateral APAs executed during the year. APAs with Japan (32%), India (17%) and Italy (11%) comprised approximately 60% of all US bilateral APAs executed in 2023. This is the first year since at least 2013 where Canada was not one of the top three treaty partners with which the IRS executed the most APAs.

Note that APMA has been rewriting Revenue Procedure [2015-41](#) (and its Mutual Agreement Procedure corollary Revenue Procedure [2015-40](#)) for some time. APMA has not suggested that there will be a comment period nor a flexible implementation period. As a result, taxpayers considering an APA may want to submit their request before new guidance is issued.

US APA historical chart

Year	Unilateral			Bilateral			Total		
	2023	2022	2021	2023	2022	2021	2023	2022	2021
APA applications	17	22	16	144	154	121	167	183	145
APAs executed	24	10	25	130	66	98	156	77	124
Renewals executed	15	10	19	59	32	59	74	42	78
Pending requests for APAs	44	54	39	480	480	395	558	564	461
Pending requests for renewals	33	37	26	199	185	147	252	237	185
APAs canceled or revoked	0	0	0	0	0	0	0	0	0
APAs withdrawn	2	1	1	11	5	4	13	6	6

* In some cases, the totals include additional multilateral cases

OECD developments

OECD BEPS 2.0 update

The OECD/G20 Inclusive Framework BEPS 2.0 project continues to move forward, with the Inclusive Framework reportedly expected to release additional guidance for the Pillar Two Global Anti-Base Erosion (GloBE) model rules in the coming weeks. Further developments from the OECD are also expected regarding the mechanism for exchanging GloBE information return information, which is hoped will reduce domestic filing requirements.

The OECD reportedly is making progress on several critical items in respect of Pillar One Amount B guidance, including identifying “low-capacity jurisdictions.” Recall that the OECD on 19 February 2024, published a [final report](#) on Pillar One Amount B, which is intended to simplify and streamline the application of the arm’s-length principle to baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries (the so-called Amount B approach).

Also, negotiations on the Pillar One Amount A Multilateral Convention (MLC) were expected to be completed by March 2024. This would enable members of the Inclusive Framework to sign the MLC by mid-2024. However, the MLC’s expected adoption and release have been delayed, keeping the international tax community engaged with the evolving process.

OECD releases consolidated GloBE commentary document, revised GloBE examples

The OECD on 25 April 2024 released a [consolidated commentary document](#) on the BEPS Pillar Two global anti-base erosion (GloBE) rules. The consolidated document includes GloBE Administrative Guidance released over the period March 2022 through December 2024.

The OECD also released a revised [document](#) with illustrative examples under the GloBE rules.

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