Proskauer

Comparison of the Biden Administration and Senate Finance Committee International Tax Proposals

Tax Talks Blog on **April 12, 2021**

On March 31, 2021, the Biden administration released a factsheet for the "Made in America Tax Plan". On April 5, 2021, Senate Finance Chair Ron Wyden (D-Ore.) and Senators Sherrod Brown (D-Ohio) and Mark Warner (D-Va.) released "Overhauling International Taxation: A framework to invest in the American people by ensuring multinational corporations pay their fair share" (the "Senate Finance Plan"), a parallel set of proposals to the Made in America Tax Plan. On April 7, 2021, the Treasury Department released a report on the Made in America Tax Plan that provides more detail on the Biden Administration's tax proposals (the "Treasury Report"). Finally, on April 5, 2021, the Treasury Secretary, Janet Yellen, gave a speech to the Chicago Council on Global Affairs and, on April 8, 2021, wrote an op-ed in the Wall Street Journal advocating a global minimum tax, which is a chief component of the Made in America Tax Plan.

Together, while these proposals retain the basic international architecture of the Tax Cuts and Jobs Act, they effectively would flip the U.S. international tax system from a largely "territorial system", with an effective U.S. tax rate of 10.5% on the foreign-source income of U.S. multinationals (50% of the domestic rate), to one that is largely "worldwide", with a rate between 16.8% to 28% (representing between 60% and 100% of the domestic rate). This dramatic increase in the taxation of offshore income (both in absolute terms and as a percentage of the domestic corporate tax rate), which would increase the aggregate U.S. federal, state, and local tax rate to the highest of any OECD country, could affect U.S. competitiveness unless our trading partners enact corresponding increases to their own corporate tax rates. The threat of global tax competition – arising in part from the Administration's proposed increase – led Secretary of the Treasury Janet Yellen to call for a global minimum tax.

The proposals do not address other elements of global tax competition, such as the OECD's proposal that expands the ability of countries to tax internet and remote services, or transfer pricing, or a uniform corporate income tax. Although Treasury Secretary Janet Yellen has voiced support for some of these efforts, it is unclear exactly what measures the Biden administration would propose.

This blog describes the Biden Administration's international tax proposals and compares them with the Senate Finance Plan.[1]

GILTI

The "global intangible low-taxed income" ("GILTI") regime generally imposes a 10.5% minimum tax on 10-percent U.S. corporate shareholders of "controlled foreign corporations" ("CFCs") based on the CFC's "active" income in excess of a threshold equal to 10% of the CFC's tax basis in certain depreciable tangible property (such basis, "qualified business asset investment", or "QBAI"). GILTI is not determined on a country-by-country basis, and, therefore, under current law a U.S. multinational corporation may be able to avoid the GILTI tax with respect to its subsidiaries operating in low tax-rate countries by "blending" income earned in the low tax-rate countries with income from high tax-rate countries.

Effective Tax Rate on GILTI

Under the Made in America Tax Plan, the effective tax rate on GILTI for corporate taxpayers would increase from 10.5% to 21%, which represents an increase in the effective tax rate on GILTI to 75% of the corporate tax rate (21%/28%) from 50% of the corporate tax rate under current law (10.5%/21%).

While the Senate Finance Plan acknowledges that it is necessary to increase the effective tax rate on GILTI for U.S. corporate taxpayers, it does not propose a specific rate. Instead, it suggests that the rate could be anywhere between 60% and 100% of the domestic corporate tax rate.

Country-by-country determination

Today, GILTI is applied on a global basis and U.S. multinationals can avoid the GILTI tax on investments in low-tax jurisdictions by "blending" the income earned in low-tax jurisdictions with income earned in high-tax jurisdictions. The Made in America Tax Plan would require GILTI to be determined on a country-by-country basis that would prevent blending. Accordingly, income earned in low tax-rate countries would be subject to the minimum tax under the GILTI regime.

The Senate Finance Plan similarly addresses the "blending" issue, but provides for two alternatives to address the issue. The first option would be the same country-by-country determination proposed in the Made in America Tax Plan. The second option would be to exclude high-taxed income from GILTI altogether, effectively taxing only GILTI in low-taxed jurisdictions.

The Treasury Report asserts that this transition to a country-by-country determination would raise more than $500 billion in revenue over a decade.

Elimination of 10% of QBAI exclusion

Both the Made in America Tax Plan and the Senate Finance Plan propose the elimination of the exclusion of 10% of QBAI from the GILTI calculation. Accordingly, the first dollar of CFC "active" income would be subject to the GILTI tax.

Treating research and management expenses occurred in the U.S. as domestic expenses (provided only in the Senate Finance Plan)

Under current law, a portion of certain expenses are allocated to foreign source income for purposes of determining the effective foreign tax rate on that income, which may subject the foreign income to GILTI. To encourage research and certain types of management activities within the U.S., the Senate Finance Plan proposes to treat research and management expenses incurred in the United States as entirely "domestic expenses", which would not cause U.S. multinationals that incur them to be subject to additional GILTI.

<u>FDII</u>

The "foreign-derived intangible income" ("FDII") regime provides a lower 13.5% effective tax rate for certain foreign sales and the provision of certain services to unrelated foreign parties in excess of 10% of the taxpayer's domestic QBAI.

Under the Made in America Tax Plan, FDII would be repealed in its entirety.

The Senate Finance Plan would retain FDII, but make a number of significant changes to the current regime:

- The exclusion of 10% of domestic QBAI would be removed.
- The effective tax rate on FDII would be made equal to the effective tax rate on GILTI.
- FDII would be redefined as “foreign deemed innovation income” (rather than “foreign deemed intangible income”), and would provide for a lower effective tax rate on “deemed innovation income”, which would be determined by reference to expenses for “innovation-spurring” activities that occur in the United States, such as research and development and worker training. No further details are given. It is unclear how the revised FDII regime would interact with existing incentives, such as deductions for research and development provided under section 174.

<u>BEAT</u>

The “base erosion and anti-abuse tax” (“BEAT”) generally provides for an add-on minimum tax, currently at 10%, on certain deductible payments that are made by very large U.S. corporations to related foreign parties.

The Made in America Tax Plan would replace the BEAT regime with the “Stopping Harmful Inversions and Ending Low-tax Developments” or “SHIELD” regime. Similar to the BEAT, the SHIELD regime would also deny U.S. multinationals tax deductions for payments made to related parties, but only if the related parties receiving the payments are subject to a low effective rate of tax. The tax rate at which the SHIELD regime is triggered would initially be equal to the 21% proposed GILTI rate, but would be replaced by an eventual global minimum tax rate established under a multilateral agreement.

The SHIELD regime would also expand the anti-inversion rules by treating any foreign corporation as a U.S. corporation for U.S. federal income tax purposes if (i) more than 50% (rather than 80% under current law) of the value or vote of the stock of the foreign corporation is owned by the former owners of the acquired U.S. company or (ii) any amount of the foreign corporation is owned by the former owners of the acquired U.S. company if the foreign corporation is “managed and controlled” in the United States.

The Senate Finance Plan would instead retain the BEAT regime, but would change the rules in a couple of ways:

- Under current law, taxpayers can apply 80% of their low-income house credits, renewable electricity production credits and certain energy credits to reduce their BEAT liability. In a pro-taxpayer change, the Senate Finance Plan would allow taxpayers to use 100% of these credits to reduce their BEAT liability. The Senate Proposal also notes that rules regarding foreign tax credits, which also generally increase the BEAT amount, may need to be addressed.
- The BEAT would be bifurcated into two minimum taxes. The first, at 10%, would operate as BEAT currently operates. A new higher rate would apply to "base erosion payments" that erode the tax base.

This table summarizes the Senate Finance Plan's and the Made in America Tax Plan's proposed changes to the international tax rules:

The Made in America Tax Plan	**The Senate Finance Plan**
GILTI	
– Effective tax rate: 75% of the corporate tax rate (21%/28%)	– Effective tax rate: 60-10 (*e.g.* 16.8% – 28%)
– Eliminate exclusion for 10% of QBAI	– Eliminate exclusion for 1
– Country-by-country determination	– Country-by-country dete high-tax exclusion
	– Treat expenses for reseа U.S. as domestic expenses for
FDII	
– Repeal	– Eliminate exclusion for 1 – Equalize tax rates on FD – Replace "deemed intang innovation income"
BEAT	

– Replace with the SHIELD regime

– Seek international cooperation in implementing global minimum corporate tax

– Restore full value of cert regime

– Create second, higher br payments”

–

[1] Our prior blog post provided a summary of the changes in the Made in America Tax Plan.

View Original

Related Professionals

- **David S. Miller**
  Partner
- **Muhyung (Aaron) Lee**
  Partner
- **Martin T. Hamilton**
  Partner
- **Amanda H. Nussbaum**
  Partner
- **Stuart L. Rosow**