Proskauer

Summary of the Biden Administration's Fiscal Year 2025 Green Book Tax Proposals

Tax Talks on **March 27, 2024**

On March 11, 2024, the Biden Administration released the Fiscal Year 2025 Budget, and the "General Explanations of the Administration's Fiscal Year 2025 Revenue Proposals," which is commonly referred to as the "Green Book." The Green Book summarizes the Administration's tax proposals contained in the Budget. The Green Book is not proposed legislation, and each of the proposals will have to be introduced and passed by Congress. Most of this year's proposals were previously proposed. This blog post summarizes some of the Green Book's key proposals.

Summary of the Green Book's Proposals:

I. Business Taxation

- Reproposes to increase the corporate income tax rate from 21% to 28%.
- Proposes to increase the corporate alternative minimum tax ("CAMT") rate from 15% to 21%. **This is a new proposal.**
- Reproposes to increase the excise tax rate on repurchase of corporate stock from 1% to 4%.
- Reproposes to tax certain corporate distributions as dividends.
- Reproposes to reduce the ability of distributing companies to receive cash tax-free from controlled companies in spin-offs and other divisive reorganizations.
- Reproposes to limit losses recognized in liquidation transactions.
- Reproposes to prevent basis shifting by related parties through partnerships.
- Reproposes to conform the definition of "control" with the corporate affiliation test.
- Reproposes proposals to make permanent and strengthen the limitation on business losses for individuals.

II. International Taxation

- Reproposes an “undertaxed profits rule” (a “UTPR”) and a “qualified domestic minimum top-up tax” (a “QDMTT”) to replace the “base erosion and anti-abuse tax” (“BEAT”).
- Reproposes to increase the global intangible low taxed income (“GILTI”) rate to 20%; eliminate the qualified business asset investment (“QBAI”) threshold and repeal the high-tax exemption.
- Reproposes to limit the dividends received deduction for foreign source income of “controlled foreign corporations” (“CFCs”).
- Reproposes to require a “United States shareholder” to report the subpart F income and GILTI of a CFC even if the shareholder did not own the CFC on the last day of the year.
- Reproposes the proposal to replace the foreign derived intangible income (“FDII”) deduction with R&D incentives.
- Reproposes to expand the disallowance deductions for CFCs.
- Reproposes to reduce stock basis in a CFC whose dividends were taxed at a reduced rate.
- Reproposes to expand the anti-inversion rules.
- Proposes to repeal the election that allows a CFC to elect a taxable year that is a month before the taxable year of its majority shareholder and to require a CFC’s taxable year to match that of its majority U.S. shareholder. **This is a new proposal.**
- Reproposes to expand access to retroactive qualified electing fund (“QEF”) elections.
- Reproposes to limit foreign tax credits (“FTCs”) from hybrid entity sales.
- Reproposes to expand the definition of a “10% shareholder” for purposes of the portfolio interest exclusion to include any person who owns 10% or more of the total value of shares of all classes of stock (in addition to any person that owns 10% of the voting power of the corporation, as under current law).
- Reproposes rules that encourage the onshoring of businesses and discourages the offshoring of businesses.
- Reproposes a 30% withholding tax on dividend equivalent payments on derivatives referencing a partnership’s income that is effectively connected with the conduct of a trade or business (“ECI”) within the United States.
- Reproposes to restrict excess interest expense deductions.

III. Digital Assets

- Reproposes to apply wash sale rules to digital assets.
- Reproposes a digital asset mining energy excise tax.Reproposes to apply the securities loan rules to digital assets.
- Reproposes to apply the mark-to-market rules to digital asset dealers and traders.
- Reproposes requiring information reporting for digital asset transactions.

IV. Individual Taxation

- Reproposes to tax long-term capital gains and qualified dividends at the ordinary income rate for taxpayers with adjusted gross income in excess of $1 million, thereby increasing the rate from 20% to 39.6% (for a total of 44.6%, including the increase in the net investment income tax ("NIIT")).
- Reproposes a minimum 25% mark-to-market tax on taxpayers with net assets in excess of $100 million. (The prior proposal had been 20%.)
- Reproposes to increase the NIIT rate and additional Medicare tax rate from 3.8% to 5% for taxpayers with adjusted gross income in excess of $400,000. **This proposal would be effective retroactively.**
- Reproposes to treat all pass-through business income of taxpayers with adjusted net income in excess of $400,000 as subject either to the 3.8% NIIT or the Medicare tax (currently 3.8%) under the Self-Employment Contributions Act ("SECA"). **This proposal would be effective retroactively.**
- Reproposes to increase the top marginal income tax-rate from 37% to 39.6% (for a total of 44.6%, including the increase in the NIIT and additional Medicare tax rate). **This proposal would be effective retroactively.**
- Reproposes to treat transfers of appreciated property by gift or on death as realization events, thereby subject to income tax.

V. Carried Interest

- Reproposes to tax carried (profits) interests as ordinary income.

VI. Real Property

- Reproposes to limit deferral for like-kind exchanges to $500,000 a year ($1 million per year for married individuals filing jointly).

- Reproposes to require 100% recapture of depreciation deductions as ordinary income (rather than the 25% rate under current law).

VII. Tax Administration

- Proposes to allow a partnership to make a "push-out election" 45 days after having received a Notice of Proposed Partnership Adjustments ("NOPPA") (without having also received a Notice of Final Partnership Adjustments (a "FPA"), as under current law). Proposes to allow partnerships to resolve audits earlier. **This is a new proposal.**
- Proposes to change reporting with respect to foreign tax credits. **This is a new proposal.**

VIII. Improve Tax Compliance

- Proposes to expand IRS summons authority for large partnerships. **This is a new proposal.**

Details of the Green Book's Proposals:

I. Business Taxation

Repropose Increasing the Corporate Tax Rate from 21% to 28%

The Green Book reproposes the 2022, 2023 and 2024 proposals to increase the corporate income tax rate from 21% to 28% effective for taxable years beginning after December 31, 2023, with a pro-rated rate for non-calendar year taxpayers that have taxable years beginning before January 1, 2024 and ending after December 31, 2023.

Increase the Corporate Alternative Minimum Tax (CAMT) Rate from 15% to 21%

Section 55(a) currently imposes a 15% corporate alternative minimum tax ("CAMT") on C corporations with average adjusted financial statement income ("AFSI") that exceeds $1 billion for the prior three taxable-year period. AFSI is based on the taxpayer's income on its applicable financial statements (with certain adjustments), as defined in section 451(b)(3).

The Green Book proposes to increase the rate used to calculate the minimum tax from 15% to 21%. **This is a new proposal.** The increase in the CAMT rate is to align the CAMT rate with the Green Book's proposed increases to the corporate income tax rate (to 28%) and the effective GILTI rate (to 21%).

The proposal would be effective for taxable years beginning after December 31, 2023.

Repropose Increasing the Excise Tax Rate on Repurchase of Corporate Stock from 1% to 4%

Under current law, section 4501 imposes a nondeductible 1% excise tax on stock repurchases by publicly traded corporations and certain "surrogate foreign corporations." The Green Book reproposes the 2024 proposal to raise the rate to 4%.

The Green Book also proposes to extend the excise tax to the acquisition of stock of certain foreign corporations by a specified affiliate of that foreign corporation that is a CFC. **This is a new proposal.**

The proposals would apply to repurchases of stock after December 31, 2023.

The stock buyback excise tax was enacted in August 2022, and interim guidance was issued December 27, 2022, mere days before the tax went into effect (see our post on Notice 2023-2 here).

Repropose Taxing Corporate Distributions as Dividends

Under current law, when a corporation makes a distribution to a shareholder, the distribution is first includible in the shareholder's gross income as a dividend to the extent the distribution is made out of the corporation's accumulated E&P or current year E&P (calculated without taking into account distributions made during the current taxable year). Thereafter, the portion of the distribution that is not a dividend is applied to reduce the shareholder's adjusted tax basis in the stock and any excess is treated as gain from the sale or exchange of stock. The Green Book reproposes several measures intended to increase the range of distributions that are treated as dividends. These proposals are summarized below.

1. First, if a shareholder's stock is redeemed in a transaction that is treated as a dividend for tax purposes, the taxpayer reports dividend income and increases its

basis in its remaining stock. Section 312(a)(3) currently provides that if a corporation distributes property to its shareholder, its E&P is reduced by the adjusted basis of that property. The Green Book reproposes to amend section 312(a)(3) to provide that if a corporation distributes stock of a second corporation to its shareholders, and the distributing corporation had increased its basis in the stock of the second corporation by reason of a prior redemption that was treated as a deemed dividend (such stock, the "high-basis stock"), the reduction in the distributing corporation's E&P by reason of its distribution of the high-basis stock to its shareholders would be determined without regard to the basis increase that resulted from the deemed dividend, or from any series of distributions or transactions undertaken with a view to create and distribute high-basis stock of a corporation.

2. Second, if a corporation borrows from a related corporation in order to make a distribution to its shareholders that would not be treated as a dividend to its shareholders, the Green Book reproposes to treat the distribution as arising directly from the related corporation to the extent that the related corporation funded the distribution with a "principal purpose" of avoiding dividend treatment. The proposal does not provide guidelines for the meaning of a "principal purpose" in this context.

3. Third, the Green Book would treat a subsidiary's purchase of "hook stock" (stock of a parent corporation held by its subsidiary) as giving rise to a deemed distribution from the purchasing subsidiary (through any intervening entities) to the issuing corporation (and a contribution of the hook stock by the issuer (through any intervening entities) to the subsidiary). The Treasury would be authorized to issue regulations treating purchases of interests in partnerships in a similar manner and provide rules related to hook stock within a consolidated group.

4. Fourth, if a shareholder receives in a corporate reorganization stock of the target and property that is not permitted to be received without recognizing gain (i.e., "boot"), under current law, the shareholder recognizes gain equal to the lesser of the gain realized in the exchange and the amount of the boot. This rule is referred to as the "boot-within-gain" limitation. Generally, if the reorganization transaction results in a distribution that qualifies as a dividend, then the recipient shareholder recognizes dividend income to the extent of the lesser of boot-within-gain and the shareholder's ratable share of the distributing corporation's E&P. The Green Book reproposes to repeal the "boot-within-gain limitation" in reorganization transactions in which the shareholder's exchange is treated under section 356(a)(2) as having the effect of the distribution of a dividend.

The first proposal would be effective as of the date of enactment and the remaining three proposals would be effective for transactions occurring after December 31, 2024.

Repropose Limitation on Tax-Free Monetizations in Divisive Reorganizations

Under current law, a corporation generally recognizes gain upon the distribution of built-in gain property to its shareholders. An exception to this general rule applies to "spin-offs," "split-offs," or "split-ups" that satisfy certain requirements. These divisive reorganizations involve the transfer of property by a distributing corporation ("Distributing") to a controlled corporation ("Controlled") in exchange for stock of Controlled, which stock is then distributed to Distributing's shareholders. Distributing may also receive securities or other debt obligations issued by Controlled or boot of Controlled (e.g., money), and Controlled may assume certain of Distributing's liabilities. If Distributing retains the Controlled debt or boot it generally will recognize gain. However, Distributing may avoid gain recognition if it transfers the Controlled debt or boot directly to its creditors and meets one of two safe harbor tests. This is often referred to as "monetization." Under the first safe harbor, Distributing does not recognize gain if the amount of the assumed Controlled liabilities and any Controlled boot transferred to Distributing's creditors does not exceed the aggregate adjusted basis of the assets that Distributing transfers to Controlled (for these purposes certain liabilities assumed by Controlled are not taken into account). Under the second safe harbor, Distributing can transfer an unlimited amount of Controlled debt securities to its creditors without gain recognition.

The Green Book proposes to modify the two safe harbors by defining a new quantity, the "excess monetization amount," which would equal the excess of (i) the sum of the Controlled boot, Controlled debt, and qualified preferred stock transferred by Distributing to its creditors together with Distributing liabilities assumed by Controlled, over (ii) the total adjusted bases of the assets transferred by Distributing to Controlled. Under the proposal, an excess monetization amount would cause Distributing to recognize gain dollar-for-dollar equal to the lesser of Distributing's excess monetization amount and the amount of Controlled boot that Distributing transfers to its creditors. Further, Distributing would recognize gain if Distributing's excess monetization amount exceeds the amount of Controlled boot that Distributing transfers to Distributing's creditors (in which case an amount of Controlled debt would be treated as if sold in a taxable sale).

The Green Book also proposes that divisive reorganizations would be fully taxable to Distributing (but not its shareholders) if, following the reorganization, Controlled were not both “adequately capitalized” and an “economically viable entity.”

A similar proposal was included in the BBBA and was passed previously by the House in November 2021, but was not passed in the Senate.

The proposal would be effective for transactions occurring after enactment. However, under a transition rule, the provision would not apply to distributions pursuant to a divisive reorganization described in a ruling request initially submitted to the IRS on or before the date of enactment (and which was not withdrawn and for which a ruling has not been issued or denied in its entirely before then).

Repropose Limitation of Losses Recognized in Liquidation Transactions

Under current law, shareholders of a liquidating corporation generally recognize gain or loss on their receipt of property, while the liquidating corporation recognizes gain or loss (potentially subject to loss limitations). However, a corporate parent that owns 80% of the vote and value of a solvent subsidiary does not recognize gain or loss on the receipt of the property, and the liquidating subsidiary does not recognize gain or loss on the portion of its property distributed to the 80% corporate parent.

Under section 267(f)(2), losses that are recognized on sales or exchanges between members of a controlled group of corporations (based on a 50% vote or value test) generally are deferred (but not disallowed) until the relevant property is sold to a third party.

The Green Book reproposes to apply section 267 to complete liquidations within a controlled group where the assets of the liquidating corporation remain in the controlled group after the liquidation, such that both the shareholders and the liquidating corporation would be denied any losses. However, the proposal would permit the Treasury to allow for the deferral, rather than the denial, of such losses, as well as issue regulations to address the use of controlled partnerships to avoid these rules.

Similar proposals have been put forth previously, including under the BBBA, but in contrast to that proposal, the current proposal disallows (rather than defers) losses on the corporation's liquidating distribution of its assets and does not address the application of the rules to insolvent subsidiaries.

The current proposal would curtail so-called "Granite Trust" transactions, in which an 80% or greater corporate parent transfers enough of its stock in a depreciated subsidiary so that it no longer meets the 80% ownership test described above, allowing the corporate majority shareholder to recognize losses that otherwise would have been denied had it liquidated.

The proposal would apply to distributions after the date of enactment.

Repropose Prevention of Basis Shifting by Related Parties through Partnerships

Under current law, if a partnership with appreciated non-depreciable assets and depreciable or amortizable assets makes a "section 754 election" and distributes the appreciated non-depreciable assets on a tax-free basis to one partner whose outside tax basis in the distributed asset is less than the partnership's adjusted basis in the asset, the partnership is entitled to "step-up," or increase, its basis in the depreciable or amortizable assets. This allows the remaining partners to claim increased depreciation or amortization deductions or generate losses from assets to be sold. These transactions are known as "basis bumps."

A section 754 election is an election that allows a partner that purchases an interest in a partnership to adjust its share of the partnership's "inside" tax basis in its assets to fair market value. A section 754 election also permits a partnership to adjust the inside basis in its assets upon the distribution of an asset to a partner. The increase in basis upon the distribution of an appreciated asset is generally equal to the (i) distributee-partner's gain; or (ii) if a distributee-partner takes a lower basis in the distributed asset than the partnership's inside basis before the distribution, the amount by which the partnership's basis exceeds the distributee-partner's outside basis in its interest.

Two related partners in a partnership can use this rule to generate increased amortization or depreciation deductions for one of the partners by distributing an appreciated non-depreciable asset to the other. Additionally, these transactions can be used to reduce gain or generate a loss on assets that are anticipated to be sold, while continuing to hold the low basis assets.

The Green Book reproposes the 2023 and 2024 Green Book proposals to prevent related parties in a partnership from using this rule to generate deductions by prohibiting any partner related to the distributee-partner from benefitting from the partnership's basis step-up until the distributee-partner disposes of the distributed asset in a fully taxable transaction. In addition, the proposal would authorize Treasury to issue regulations to implement this matching rule with respect to related-party partners. The proposal does not define "related" for these purposes.

The proposal has no effect on unrelated partners that use the same strategy to generate increased depreciation or amortization deductions by causing the partnership to distribute appreciated assets to one of the partners.

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Alignment of Definition of "Control" with Corporate Affiliation Test

Under current law, the definition of "control" for purposes of determining whether a corporate entity controls an affiliated corporate entity within the context of most corporate tax provisions is determined by references to section 368(c), which requires ownership of stock possessing at least 80% of the *total combined voting power* of all classes of voting stock and at least 80% ownership of the *total number of shares* of each class of outstanding nonvoting stock of the corporation.

By contrast, the test for determining whether a corporation is a member of an "affiliated group" of corporations under section 1504(a)(1) has a "value" prong as part of its test and requires ownership of stock possessing at least 80% of *the total voting power* of the stock of the corporation, and that has a value of at least 80% of the *total value* of the stock of the corporation.

The Green Book reproposes to align the control and affiliated group tests by imposing a minimum value requirement on the control test similar to that of the affiliated group test. “Control” would be defined as the ownership of at least 80% of the total voting power and at least 80% of the total value of stock of a corporation. Certain preferred stock that meets the requirements of section 1504(a)(4) would not be included as stock in this test. The conformity of the two tests would reduce complexity of the tax Code and make it more difficult for taxpayers to purposefully structure transactions to recognize losses or engage in tax-free transactions.

The proposal would be effective for transactions occurring after December 31, 2024.

Repropose Proposal to Make Permanent and Strengthen the Limitation on Excess Business Losses for Noncorporate Taxpayers

Section 461(l) generally provides that “excess business losses” are disallowed for non-corporate taxpayers. Excess business losses are the excess of current-year net business losses over a specified amount. These losses are carried forward to subsequent taxable years as net operating losses (“NOLs”). NOLs are subject only to the general limitations in section 172 (e.g., NOLs may not reduce taxable income by more than 80%).

The Green Book reproposes the 2023 and 2024 Green Book proposal to make permanent the excess business loss limitation, which otherwise would sunset after December 31, 2028. This proposal was also included in the BBBA, and was passed previously by the House in November 2021, but ultimately was not passed in the Senate.

The Green Book also proposes the to treat excess business losses carried forward from the prior year as current-year business losses instead of as NOLs. As a result, noncorporate taxpayers would fully lose the benefit of any excess business loss in future years. This proposal was included in the BBBA and was passed previously by the House in November 2021, but ultimately was not passed in the Senate.

The proposal would be effective for taxable years beginning after December 31, 2024.

II. International Taxation

Repropose a UTPR and a QDMTT to Replace the BEAT

Background: The OECD/G20 agreement

On October 8, 2021, the OECD and G20 countries agreed to subject multinational parent companies to an “income inclusion rule” (an “IIR”) and a UTPR.

The OECD/G20 IIR is a “top-up tax” on the parent of a multinational group that is equal to the difference between a 15% minimum tax and the company’s effective rate of tax in each jurisdiction in which it operates.

The OECD/G20 UTPR acts as a backstop to the IIR. It provides that if the parent of a multinational group is not subject to the IIR top-up tax (because the jurisdiction in which the parent is resident has not enacted the IIR), deductions will be denied to the other members of the group located in other jurisdictions (or their taxes will otherwise be adjusted) to produce a 15% effective rate of tax in each taxing jurisdiction in which a member of the parent’s group does business.

In December 2021, the OECD/G20 allowed countries to adopt a “qualified domestic minimum top-up tax” (a “QDMTT”). A QDMTT is a domestic minimum tax that is computed using the same rules as the OECD/G20’s IIR and UTPR. If a country adopts a QDMTT, that country has first priority to claim top-up taxes for foreign subsidiaries whose effective rate is less than 15% because the QDMTT reduces dollar-for-dollar the taxes that would be imposed by another country under its IIR or UTPR.

Under the OECD/G20 rules, nonrefundable credits reduce a company’s effective rate of tax and may subject the company to a UTPR. In the United States, most tax credits are nonrefundable, and, therefore, this rule was particularly controversial.

The OECD/G20 rules provide the following formula to calculate how the IIR top-up tax is divided among those countries that have adopted a UTPR:

50% x (number of employees in a country applying the UTPR/number of employees in all UTPR countries), plus

50% x (total net book value of tangible assets in a country applying the UTPR/total net book value of tangible assets in all UTPR countries).

Repropose a UTPR

The Green Book reproposes the 2023 and 2024 proposal to replace the current BEAT with a UTPR that is consistent with the OECD/G20's UTPR. The UTPR proposed by the Green Book would apply to both domestic corporations that are part of the non-U.S. group and U.S. branches of non-U.S. corporations. Under the Green Book's UTPR, these entities would be disallowed U.S. tax deductions to the extent necessary to collect the hypothetical amount of top-up tax required for the financial reporting group to pay an effective tax rate of at least 15% in each foreign jurisdiction in which the group has profits.[1]

Profit and effective tax rate for a jurisdiction would be based on the group's consolidated financial statements, with certain adjustments, rather than taxable income. In addition, the computation of a group's profit for a jurisdiction would be reduced by an amount equal to 5% of the book value of tangible assets and payroll with respect to the jurisdiction.[2]

The Green Book UTPR would apply to non-U.S. multinationals that have global annual revenue of approximately $800 million (i.e., the equivalent of €750 million) (reduced from $850 million in the 2023 Green Book proposal) or more in at least two of the prior four years. The UTPR would not apply to a group's profit in a jurisdiction if the three-year average of the group's revenue in the jurisdiction is less than $11.5 million and the three-year average of the group's profit in the jurisdiction is less than $1.15 million. Finally, the UTPR would not apply to a group with operations in no more than five jurisdictions outside of the group's primary jurisdiction and the book value of the group's tangible assets in those jurisdictions is less than $57 million. This exception would expire five years after the first day of the first year in which the UTPR otherwise would apply to the group.

The deduction disallowance would apply pro rata with respect to all otherwise allowable deductions, and it would apply after all other deduction disallowance provisions. To the extent that the UTPR disallowance for a taxable year exceeds the aggregate deductions otherwise allowable to the taxpayer for that year, the excess amount of the UTPR disallowance would be carried forward indefinitely until an equivalent amount of deductions are disallowed in future years.

A coordination rule would reduce the UTPR disallowance imposed by the United States to reflect any top-up tax collected by members of the group in accordance with the OECD/G20 UTPR (a "qualified UTPR" or "QUTPR") in one or more other jurisdictions. With respect to each financial reporting group, the percentage of top-up tax allocated to the United States would be determined by the following formula where a jurisdiction applies a QUTPR:

U.S. allocation = 50% × (number of employees in the U.S./number of employees in all OECD/G20 jurisdictions), plus

50% × (total book value of tangible assets in the U.S./total book value of tangible assets in all OECD/G20 jurisdictions0.

This formula matches the OECD/G20 version.

Repropose a QDMTT

The Green Book has also reproposed the 2024 QDMTT. The Green Book's QDMMT would equal the excess of (i) 15% of the financial reporting group's U.S. profit, using the same rules as under the UTPR to determine the group's profits for a jurisdiction, over (ii) all the group's income tax paid or accrued with respect to U.S. profits (including state income taxes, corporate alternative minimum tax, and creditable foreign income taxes incurred with respect to U.S. profits).

The Green Book proposal provides that U.S. taxpayers would benefit from tax credits and other incentives (apparently despite the fact that they are nonrefundable and would normally reduce the effective rate of tax under the OECD/G20 agreement).

The proposals to replace the BEAT with the UTPR and QDMTT would be effective for taxable years beginning after December 31, 2024. The proposals are identical to the 2023 Green Book proposals except that the Green Book's UTPR applies to non-U.S. multinationals that have global annual revenue of approximately $800 million (i.e., the equivalent of €750 million) (reduced from $850 million in the 2023 Green Book proposal).

Repropose Increasing the GILTI Rate to 20%; Elimination of QBAI; Repeal of the High-Tax Exemption.

Under current law, the GILTI regime generally imposes a 10.5% minimum tax on 10% U.S. corporate shareholders of CFCs, based on the CFC's "active" income that exceeds a threshold of 10% of the CFC's tax basis in certain depreciable tangible property (this basis, "QBAI").

A CFC is any foreign corporation if the U.S. shareholders at any time during the foreign corporation's taxable year own more than 50 percent of the total combined voting power of all classes of stock or the total value of the stock of the corporation.

At present, a U.S. shareholder's GILTI inclusion is calculated on an aggregate basis. Accordingly, U.S. multinational corporations blend income and losses from low-tax jurisdictions with income and losses from high-tax jurisdictions, potentially avoiding the GILTI tax on the earnings of subsidiaries in low-tax jurisdictions. In addition, income that is subject to a foreign effective tax rate in excess of 90% of the U.S. corporate income tax rate generally is excluded from GILTI (the "high-tax exception").

The Green Book has reproposed the 2023 Green Book proposal to increase the GILTI rate from 10.5% to 20%, in conjunction with an increase in the corporate tax rate from 21% to 28%. Moreover, the Green Book has reproposed to apply GILTI on a jurisdiction-by-jurisdiction basis to prevent blending.

The Green Book also reproposes the 2022 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.

Finally, the Green Book reproposes the repeal of the high-tax exception from GILTI.

The reduction of the section 250 deduction to 25% that is included in this proposal would be effective for taxable years beginning after December 31, 2023, whereas the remainder of the proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Limiting the Dividends Received Deduction

Under section 245A, a domestic corporation is permitted a 100% dividends received deduction (a "DRD") for dividends received from a foreign corporation's foreign-source income if the domestic corporation owns at least 10% of the foreign corporation's stock (by vote or value), even if the income was not subject to tax under Subpart F or GILTI.

The Green Book reproposes the 2024 Green Book proposal to limit the 100% DRD to dividends received from the foreign source income from **only** CFCs. It would permit only a **65%** DRD from "qualified foreign corporations'" if the U.S. shareholder owns at least 20% of the qualified foreign corporation and only a **50%** DRD from other qualified foreign corporations. A qualified foreign corporation is a corporation that is incorporated in a territorial possession of the United States or is eligible for the benefits of a comprehensive income tax treaty (and certain other requirements are satisfied).

This proposal would apply to distributions after the date of enactment.

Require a U.S. Shareholder to Report Subpart F Income and GILTI If It Did Not Own the CFC on the Last Day of Its Taxable Year

Section 951(a) generally requires a U.S. shareholder of a CFC to include in gross income its pro rata share of the CFC's Subpart F income. A U.S. shareholder is required to include this amount only if the U.S. shareholder directly or indirectly owns stock in the CFC on the last day of the CFC's taxable year. The pro rata share of the CFC's Subpart F income is based on the amount of current year E&P that the U.S. shareholder would receive if the CFC were to distribute all its current year E&P on the last day of the taxable year. However, there is a reduction to the U.S. shareholder's pro rata share of Subpart F income for the portion of the year which the foreign corporation was not a CFC and for any dividends paid by the CFC during the year to another person with respect to the CFC stock that the U.S. shareholder owns on the last day of the tax year.

The Green Book proposes to modify the existing rules to require a U.S. shareholder of a CFC that owns, directly or indirectly, a share of CFC stock during the CFC's taxable year to include in gross income a portion of the foreign corporation's Subpart F income for the year, even if the shareholder does not own the CFC's stock on the last day of the year. The includible portion would generally be calculated by reference to the amount of dividends paid to the shareholder, or to a CFC of the shareholder, to the extent the dividends were paid out of E&P that would qualify for a DRD. The remainder of the CFC's Subpart F income would be allocated to the U.S. shareholder(s) that owns the stock of the CFC on the last day of the CFC's taxable year. The proposal would similarly revise the pro rata share rules for determining a U.S. shareholder's GILTI inclusion with respect to a CFC.

The proposal would apply to the taxable years of foreign corporations after the date of enactment and to the taxable years of U.S. shareholders in which or within which taxable years of foreign corporations end.

Repropose Replacing the FDII Deduction with R&D Incentives

Section 250 currently provides a domestic corporation with a deduction equal to 37.5% of its FDII for the taxable year. The amount of a taxpayer's FDII is determined generally by reference to "foreign-derived deduction eligible income," which in very general terms is income from sales of property or foreign services to foreign persons for a foreign use.

The Green Book reproposes the 2023 and 2024 Green Book proposals to repeal the FDII deduction and to use the resulting revenue to "encourage R&D."

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Expansion of Disallowance Deductions for CFCs

As discussed above, dividends received by a domestic corporation from certain foreign corporations are exempt from U.S. federal income tax by reason of the DRD. Section 265, however, disallows deductions (such as interest deductions) for any amount that is allocable to "tax-exempt income" (which means income not subject to tax). In addition, section 904(b)(4) requires a domestic corporation to disregard, for purposes of determining its FTC limitation, both the foreign-source portion of any dividend income from a "specified 10%-owned foreign corporation" and any deductions that are attributable to producing that income.

The Green Book reproposes the 2023 and 2024 Green Book proposals to extend the section 265 disallowance to deductions allocable to certain classes of foreign income taxed at preferential rates (or altogether exempt from tax), such as the portion of GILTI which a section 250 deduction is permitted or the dividends eligible for the DRD under section 245A. Accordingly, if a taxpayer borrowed to purchase a CFC and received GILTI or a DRD, the interest on the borrowing would be disallowed. The Green Book would also repeal section 904(b)(4) so that the FTC limitations would apply to the foreign-source portion of dividend income from a CFC.

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Reducing Stock Basis in a CFC Whose Dividends Were Taxed at a Reduced Rate

Section 961(a) increases a U.S. shareholder's basis in its CFC stock by an amount equal to such shareholder's pro rata Subpart F inclusion or GILTI with respect to that stock. The basis increase prevents a U.S. shareholder from being taxed on gain from the sale of the stock that has already been included in income as a Subpart F inclusion or pursuant to GILTI.

The Green Book proposes that a U.S. shareholder's basis in CFC stock will be reduced (but not below zero) by the amount of a DRD (under section 245A) with respect to the stock, the deduction for GILTI inclusions (under section 250) attributable to such stock and any transition tax deductions (under section 965(c)) with respect to such stock.

The proposal would be effective with respect to dispositions on or after the date of enactment.

Propose a Requirement that a CFC's Taxable Year Match that of its Majority U.S. Shareholder

Under current law, section 898(c) requires a CFC to use the same taxable year as its majority U.S. shareholder. Section 898(c) also allows CFCs to elect to use the taxable year beginning 1 month earlier than that of the majority U.S. shareholder. This election was provided to alleviate potential difficulties faced by taxpayers in obtaining and translating tax information from non-U.S. jurisdictions.

However, this difference in taxable year allows the majority U.S. shareholders of CFCs have to defer income inclusions from the CFC.

The Green Book proposes to eliminate the election on the ground that technological advances have reduced or eliminated the original taxpayer concerns that prompted the statute. **This is a new proposal.**

The proposal would be effective as of the date of enactment. CFCs with existing section 898(c)(2) elections would have a short taxable year as of the first taxable year end of its majority U.S. shareholder that is at least 60 days after the date of enactment of the proposal.

Repropose Expanding the Anti-Inversion Rules

An inversion transaction is a transaction in which the shareholders of an existing U.S. corporation own that corporation as a subsidiary of a non-U.S. corporation. Statutory anti-inversion provisions under section 7874 and the associated Treasury regulations provide that if the continuing ownership stake of the shareholders of the inverted U.S. corporation is 80% or more, the foreign acquirer is treated as a U.S. corporation for U.S. federal income tax purposes. If the continuing ownership stake of the shareholders of the inverted U.S. corporation is between 60% and 80%, certain rules apply that are designed to prevent the U.S. corporation from making deductible payments to its non-U.S. parent (i.e., the rules prevent "earnings stripping").

The Green Book reproposes the anti-inversion rules in significant ways. First, the Green Book reproposes to replace the 80% threshold with a 50% threshold and to eliminate the separate regime that applies to inverted U.S. corporations with a continuing ownership level between 60% and 80%. Accordingly, under the Green Book, if a non-U.S. corporation acquires a U.S. corporation and 50% or more of the historic shareholders of the U.S. corporation own the non-U.S. corporation, the non-U.S. corporation would be taxable as a U.S. corporation.

Furthermore, the Green Book reproposes an additional category of transactions that would be treated as inversion transactions that cause the acquiror to be treated as a U.S. corporation, without regard to the level of shareholder continuity. Specifically, if a non-U.S. corporation acquires shares in a U.S. corporation and (i) immediately prior to the acquisition, the fair market value of the U.S. corporation is greater than the fair market value of the foreign acquiring corporation, (ii) after the acquisition, the "expanded affiliated group" (generally, a group of corporations related through at least 50% of ownership) is primarily managed and controlled in the United States, and (iii) the expanded affiliated group does not conduct substantial business activities in the country in which the non-U.S. acquiring corporation is created or organized, then the non-U.S. acquiring corporation would be taxable as a U.S. corporation.

Finally, the Green Book would expand the scope of anti-inversion rules to cover acquisitions of substantially all of the assets constituting (i) a trade or business of a U.S. corporation or partnership, or (ii) a U.S. trade or business of a non-U.S. partnership and distributions of stock in a foreign corporation by a domestic corporation or partnership that represent either substantially all of the assets or substantially all of the assets constituting a trade or business of the distributing entity.

The proposal would be effective for transactions that are completed after the date of enactment.

Repropose Expanding Access to Retroactive QEF Elections

A passive foreign investment company (“PFIC”) is a foreign corporation with primarily passive income or passive assets, and whose shareholders are not subject to the CFC rules. Under the PFIC rules, gain realized on the disposition of stock of a PFIC and “excess distributions” are treated as ordinary income and the taxpayer is subject to additional tax in the nature of a penalty based on the interest rate that applies to tax underpayments. PFIC shareholders that make a “qualifying electing fund” (“QEF”) election can avoid these adverse consequences and instead pay tax on their pro rata share of the PFIC’s ordinary income and long-term capital gains.

Under current law, a PFIC shareholder is entitled to make a QEF election (or protective election) for a taxable year at any time on or before the due date for the shareholder to file its tax return; however, to the extent permitted by regulations, a shareholder may make a late, or retroactive, QEF election if the shareholder reasonably believed that the company was not a PFIC. A PFIC shareholder that has failed to timely make a QEF election or protective QEF election can make a retroactive QEF election only if (i) the shareholder relied on a qualified tax professional’s advice; (ii) the U.S. government’s interests are not prejudiced by granting consent; and (iii) the shareholder requests special consent before the issue is raised on audit.

The Green Book has reproposed the 2023 and 2024 Green Book proposals to eliminate the requirement that a shareholder must have relied on a qualified tax professional’s advice and the requirement that a shareholder must have sought special consent. Instead, a taxpayer could make a retroactive QEF election without requesting consent so long as the election would not prejudice the U.S. government. In addition, the IRS would be authorized to permit partnerships and other non-individual taxpayers that inadvertently fail to make a QEF election to do so retroactively.

The proposal would be effective on the date of enactment.

Repropose Limiting FTCs from Hybrid Entity Sales

A corporation making a qualified stock purchase of a target corporation can elect to treat the purchase as a deemed asset acquisition for U.S. federal income tax purposes, thereby obtaining the benefit of a stepped-up basis in the target's assets. A "qualified stock purchase" means a transaction (or series of transactions) where the acquiring corporation purchases at least 80% of the target corporation. The deemed asset sale is disregarded for purposes of determining the source and character of income in computing the seller's FTC limitation. Instead, any gain is treated as gain from the sale of stock. Because stock sales by a U.S. taxpayer generally give rise to U.S.-source income, the U.S. taxpayer generally is unable to use any FTCs that arise from the sale. However, under current law, sales of interests in a hybrid entity that is treated as a corporation for non-U.S. tax purposes but as a partnership or disregarded entity for U.S. tax purposes is treated as an asset sale for U.S. tax purposes, and may generate FTCs.

The Green Book has reproposed the 2023 and 2024 Green Book proposals to treat gain arising in connection with (i) the sale of a "specified hybrid entity" and (ii) certain taxable changes of entity classification as U.S.-source gain (which will have the effect of denying the U.S. taxpayer the ability to use U.S. FTCs arising from the transaction).

The proposal would be effective for transactions occurring after the date of enactment.

Repropose Expanding the Definition of 10% Shareholders for Purposes of the Portfolio Interest Exclusion to Include Shareholders that Own 10% of the Value (Rather than Merely 10% of the Vote)

Under current law, "portfolio interest" received by a non-U.S. person is exempt from the 30% U.S. withholding tax generally applicable to FDAP income.

However, portfolio interest does not include any interest received by a "10-percent shareholder", which is defined as any person who, either directly or by attribution, owns 10 percent or more of the total combined ***voting*** power of all classes of stock in a corporation.

The Green Book proposes to modify the definition of a 10-percent shareholder test to also include any person who owns 10% or more of the total ***value*** of shares of all classes of stock of such corporation.

The Green Book does not seek to modify the definition as applied to obligations issued by partnerships.

The proposal would apply to payments made on debt instruments issued (including deemed issuances) on or after the date that is 60 days after enactment.

This proposed modification was also proposed under the Build Back Better Act of 2021 (see our post on the Build Back Better Act of 2021 here).

Repropose Onshoring (Get Tax Credits) – Offshoring (Lose Tax Deductions)

To encourage U.S. employers to bring offshore jobs and investments back to the United States, the Green Book reproposes the 2023 and 2024 Green Book proposals for a new general business credit of 10% of the eligible expenses paid or incurred in onshoring a U.S. trade or business. Onshoring a U.S. trade or business is defined as (i) reducing or eliminating a trade, business, or line of business currently conducted outside the United States and (ii) starting up, expanding or otherwise moving the same trade or business within the United States, to the extent that this action increases U.S. jobs. The tax credit in connection with eligible expenses incurred by a foreign affiliate of a U.S. employer/taxpayer would be claimed by the U.S. employer/taxpayer.

To discourage U.S. employers from moving U.S. jobs offshore, the Green Book has reproposed to (i) disallow deductions for expenses paid or incurred in connection with offshoring and (ii) deny deductions against a U.S. shareholder's GILTI or Subpart F income inclusions for any expenses paid or incurred in connection with offshoring a U.S. trade or business. Offshoring a U.S. trade or business is defined as (i) reducing or eliminating a trade, business, or line of business currently conducted in the United States and (ii) starting up, expanding, or otherwise moving the same trade or business outside the United States, to the extent that this action decreases U.S. jobs.

The proposal would be effective for expenses paid or incurred after the date of enactment.

Reproposes a 30% Withholding Tax on Dividend Equivalent Payments on Derivatives Referencing Partnership ECI

A non-U.S. taxpayer that invests in a partnership that has ECI is required to file a U.S. federal income tax return to report and pay tax on the ECI. Gain on the sale of an interest in a partnership engaged in the conduct of a trade or business within the United States is also treated as ECI and subject to U.S. federal income tax and a withholding tax. A dividend equivalent—i.e., any substitute dividend made pursuant to a securities lending or sale-repurchase transaction that is contingent upon (or determined by reference to) the payment of a dividend from sources within the United States—is subject to U.S. withholding tax rules applicable to non-U.S. persons.

The Green Book reproposes to treat the portion of a payment on a derivative financial instrument that is contingent on income/gain from a publicly traded partnership or other partnership (as specified by Treasury) as a dividend equivalent, to the extent that the income/gain would have been treated as ECI if the taxpayer held the underlying partnership interest. The dividend equivalent would be subject to a 30% withholding tax (unless reduced under a tax treaty).

The proposal would be effective for taxable years beginning after December 31, 2024.[3]

Repropose Restricting Excess Interest Expense

Under Section 163(j) the deduction for business interest expense is an amount equal to the sum of (i) business interest income, (ii) 30% of adjusted taxable income, and (iii) floor plan financing interest. Disallowed business interest expense may be carried forward indefinitely to subsequent tax years.

The Green Book reproposes the 2023 and 2024 Green Book proposals limiting the net interest deductions for U.S. federal income tax purposes when a member of a “financial reporting group” has net interest expense for financial reporting purposes that exceeds the member’s proportionate share of the financial reporting group’s consolidated net interest expense reported on the group’s consolidated financial statements. A member’s proportionate share of the financial reporting group’s net interest expense is based on the member’s proportionate share of the group’s earnings reflected in the financial reporting group’s consolidated financial statements.

In the event that a member has excess net interest expense, a deduction would be disallowed for the member's excess net interest expense for U.S. federal income tax purposes. If a member's net interest expense for financial reporting purposes is less than the member's proportionate share of the net interest expense reported on the group's consolidated financial statements, that excess limitation would be converted into a proportionate amount of excess limitation for U.S. federal income tax purposes and carried forward three years.

The proposal would be effective for taxable years beginning after December 31, 2024.

III. Digital Assets

Repropose Application of the Wash Rale Rules to Digital Assets

Section 1091(a) currently disallows a loss where a taxpayer that is not a dealer sells or disposes of stock or securities at a loss and, within 30 days before or after the sale or disposition, acquires or enters into a contract or option to acquire substantially identical stocks or securities. Because digital assets are not "securities" for these purposes, the wash sale rules of section 1091 do not apply to digital assets.

The Green Book reproposes the 2024 Green Book proposal to expand the wash sale rules of section 1091 to apply to "digital assets."

The proposal provides the Treasury authority to further expand the wash sale rules to any security, commodity or other asset traded on an established market as necessary to prevent abuse, and the basis and holding period rules applicable to purchased assets would be revised to reflect the expanded scope of these rules; however, the Green Book provides that these expanded rules would not be intended to apply to ordinary course business transactions (not including trading) involving digital assets.

The 2025 Green Book also proposes to provide the Treasury Department with authority to provide an exception to the application of the wash sale rules for "de minimis" losses for assets subject to these rules. **This authority is a new proposal.**

The Green Book also proposes that if a taxpayer incurs a loss on the sale of a section 1091 asset, and a related party purchases the same or substantially identical asset within 30 days of the sale, the taxpayer would be required to defer the loss until the related party disposes of the asset. For this purpose, “related party” would mean, (i) in the case of an individual taxpayer, members of their family or tax-favored accounts, or an entity controlled by the taxpayer or its family members; and (ii) in the case of an entity taxpayer, an entity the taxpayer controls, is controlled by, or is under common control with. The proposal provides the IRS with authority to issue regulations to expand this definition.

The Green Book also provides that the wash sale rules would be amended to address derivatives more comprehensively, including by modifying the basis rules to prevent abuse. However, the Green Book does not provide additional information with respect to this provision.

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Digital Asset Mining Energy Excise Tax

The Green Book would impose an excise tax of 30% of the costs of electricity used to mine digital assets. The excise tax would apply to any firm engaged in digital asset mining, whether the computational capacity is owned or leased by the taxpayer.

In addition, the proposal would require firms that mine for digital assets to report the amount and type of electricity used, as well as the value of that electricity, if purchased externally. Taxpayers that lease computational capacity would be required to report the value of the electricity used by the lessor and attributable to the leased capacity; this value would serve as the tax base.

The excise tax would be phased in over three years at a rate of 10% in the first year, 20% in the second year, and 30% in the third year.

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Applying the Securities Loan Rules to Digital Assets

Under current law, securities loans that satisfy certain requirements are tax-free under section 1058.[4] The Green Book would repropose the 2023 and 2024 Green Book proposals to expand section 1058 to apply to "actively traded digital assets" recorded on cryptographically secured distributed ledgers, so long as the loan agreement contains similar terms to those currently required for loans of securities.[5] The Treasury would also have the authority to define "actively traded" and extend section 1058 to "non-actively traded" digital assets. In addition, the proposal would require a lender to include in gross income amounts that would have been included had the lender not loaned the digital asset (i.e., "substitute payments").

The proposals would be effective for taxable years beginning after December 31, 2024.

Repropose Application of the Mark-to-Market Rules to Digital Asset Dealers and Traders

Sections 475(e) and 475(f) allow commodities dealers and commodities and securities traders to mark-to-market their commodities and securities and treat the gains and losses as ordinary gain or loss. The Green Book would repropose the 2023 and 2024 Green Book proposals to extend the mark-to-market election to actively traded digital assets, derivatives on actively traded digital assets, and hedges of those digital assets. The proposal clarifies that digital assets would be treated as a third category of assets, distinct from securities and commodities, to be governed by rules similar to those for actively traded commodities.

The proposal would be effective for taxable years beginning after December 31, 2024.

Repropose Requiring Information Reporting for Digital Asset Transactions

The Green Book contains the following two proposals, which would increase information reporting obligations.

1. *Financial Institutions and Digital Asset Brokers*

The Foreign Account Tax Compliance Act (“FATCA”) requires foreign financial institutions to report to the IRS information about accounts held directly or indirectly by U.S. taxpayers. FATCA also requires brokers to report information about their customers to the IRS, including the identity, gross proceeds from sales of securities and certain commodities, and cost basis information for certain securities of customers.

The Green Book would repropose the 2023 and 2024 Green Book proposals to expand FATCA’s reporting requirements to all financial accounts owned by foreign persons and maintained at a U.S. office, as well as certain non-U.S. source payments. In addition, financial institutions, including U.S. digital asset exchanges, would be required to report information about certain passive entities and their substantial foreign owners, and digital asset brokers would be required to report gross proceeds and other information with respect to their customers.

The proposals would be effective for returns required to be filed after December 31, 2026.

2. *Taxpayers with Foreign Digital Asset Accounts*

Section 6038D requires taxpayers with an interest in certain foreign assets with an aggregate fair market value of more than $50,000 during a taxable year to report the name and address of the financial institution where an account is maintained, the account number, and identifying information about assets not held in a financial account.

The Green Book reproposes to amend section 6038D(b) to require reporting with respect to any account that holds digital assets maintained by a foreign digital asset exchange or other foreign digital asset service provider (“foreign digital asset accounts”). Under the proposal, only taxpayers holding an aggregate value in excess of $50,000 (or a higher amount prescribed by the IRS) in foreign digital asset accounts and the other foreign assets subject to section 6038D. The Treasury would have the authority to prescribe regulations to expand the scope of foreign digital accounts.

The proposal would be effective for returns required to be filed after December 31, 2024.

IV. Individual Taxation

Repropose Taxing Capital Gains and Qualified Dividends at Ordinary Income Rates

The Green Book reproposes to tax long-term capital gains and qualified dividends of taxpayers with adjusted gross income of more than $1 million (indexed for inflation after 2024) at the applicable ordinary income tax rates, which generally would be 39.6% (44.6% including the increased NIIT).

The Green Book proposes this change to be effective for gains required to be recognized and dividends received on or after the date the law is enacted.

If the proposal to increase the tax rate of capital gains is enacted, we would expect taxpayers to defer sales of appreciated property, to use cashless collars and prepaid forward contracts to reduce economic exposure, and to monetize, liquid appreciated positions. We would also expect an increase in tax-free mergers and acquisitions.

The proposal would be effective for gains required to be recognized and dividends received on or after the date of enactment.

Repropose Minimum Mark-to-Market Tax on Taxpayers with More than $100 Million in Assets

The Green Book reproposes the mark-to-market minimum tax, at a rate of 25%, on individuals who have more than $100 million in assets. (The prior Green Book proposed the same tax, but at a 20% rate.) The minimum tax would be based on all economic income (which the proposal refers to as “total income”), including unrealized capital gain. The tax would be effective for taxable years beginning after December 31, 2024. The minimum tax would be fully phased in for taxpayers with assets of $200 million or more.

Under the proposal, an individual’s first year of minimum tax liability would be payable in nine equal annual installments (e.g., for an individual first subject to the minimum tax in 2025, over the period from 2026 to 2034). For subsequent years, the minimum tax liability would be payable in five equal annual installments. The tax may be avoided by giving away assets to section 501(c)(3) organizations (including private foundations or donor advised funds) or section 501(c)(4) organizations before the effective date of the legislation or to avoid the $100 million threshold.

Operation of the Minimum Tax

The minimum tax would apply to taxpayers with wealth (assets less liabilities) in excess of $100 million. The proposal does not define liabilities and does not indicate whether a taxpayer would be deemed to own the assets of his or her children, or trusts. Therefore, it is unclear as to whether a taxpayer who is close to the $100 million threshold may avoid the tax by giving away assets to children. As mentioned above, a taxpayer can give assets to section 501(c)(3) or 501(c)(4) organizations to avoid the threshold, and so, if the minimum tax is enacted, donations to charity would be expected to dramatically increase.

The proposal phases in for taxpayers with wealth between $100 million and $200 million. The phase in is achieved mechanically by reducing the tax liability to the extent that the sum of (i) the minimum tax liability, and (ii) the uncredited prepayments exceed two times (iii) the minimum tax rate, times (iv) the amount by which the taxpayer's wealth exceeds $100 million. Thus, for a taxpayer with $150 million of wealth and a zero basis and no prior prepayments, the $37.5 million of minimum tax liability would be reduced by $12.5 million to equal $20 million. ($12.5 million is amount by which (i) $37.5 million exceeds (ii) $25 million, which is 50% (two times the minimum tax rate) times $50 million (the amount by which the taxpayer's wealth exceeds $100 million)).

A taxpayer subject to the minimum tax would make two calculations: Their "normal" tax liability under our current realization system, and the "minimum" tax under the proposal. Tax would be paid on the greater of the two.

For purposes of the 25% minimum tax, the taxpayer would include all unrealized gain on "tradeable assets." The proposal does not define tradeable assets. Tradeable assets would be valued using end-of-year market prices. The taxpayer would also include all unrealized gain on "non-tradeable assets." Non-tradeable assets would be valued using the greater of (i) the original or adjusted cost basis, (ii) the last valuation event from investment (i.e., a round of equity financing), (iii) borrowing (i.e., a lender's appraisal), (iv) financial statements, or (v) other methods approved by the IRS. Original or adjusted cost basis would be deemed to increase at a rate equal to the five-year Treasury rate plus two percentage points. The five-year Treasury rate is currently 3.56% and so, at today's rates, non-traded assets without a valuation event would be deemed to increase in value at a 5.56% annual rate. The proposal would not require valuations of non-tradeable assets.

While a taxpayer would be subject to the minimum tax if it exceeds the normal tax, as mentioned above, payment of the minimum tax would be made in equal annual installments (nine for the first year of minimum tax liability and five thereafter).

So, assume that a taxpayer purchases an equity interest in a non-traded C corporation on January 1, 2025, for $200 million. The taxpayer has no realized income and no other assets. The taxpayer would have zero "normal" tax. Assume that the five-year Treasury rate is 3.56%. The investment would be deemed to increase in value by 5.56% (to $211 million). The minimum tax would be 25% of $11 million, or $2.75 million. If this was the taxpayer's first year subject to the minimum tax, the minimum tax liability would be $305,556 in each of years 2025-34, subject to the "illiquid exception" described below. If the taxpayer subsequently sells the C corporation, it would credit the minimum tax prepayments against his or her income tax liability.

Payments of the minimum tax would be treated as a prepayment available to be credited against subsequent taxes on realized gains.

The Green Book has also reproposed that death would give rise to a realization event. If a taxpayer's prepayments in excess of tax liability exceed gains at death, the taxpayer would be entitled to a refund. The refund would be included in a single decedent's gross estate for estate tax purposes. Net uncredited used prepayments of a married decedent would be transferred to the surviving spouse (or as otherwise provided in regulations).

The Green Book generally requires that minimum tax be calculated with respect to all unrealized gain, including deemed appreciation on non-traded assets, subject to an "illiquid exception." If tradeable assets held directly or indirectly make up less than 20% of a taxpayer's wealth, the taxpayer may elect to include only unrealized gain in tradeable assets in the calculation of their minimum tax liability. A taxpayer that makes this election would be subject to a deferral charge upon realization to the extent of gain. The proposal does not indicate the rate of the deferral charge, but provides that it would not exceed 10% of unrealized gain.

This aspect of the Green Book proposal provides a meaningful benefit to "illiquid" taxpayers and encourages taxpayers to become "illiquid" to qualify for the exception. The proposal provides that tradeable assets held "indirectly" are treated as owned by the taxpayer for this purpose and therefore it is unclear whether and to what extent taxpayers can contribute tradeable assets into non-tradeable vehicles to qualify for the illiquid exception. The proposal would provide the IRS with specific authority to issue rules to prevent taxpayers from inappropriately converting tradeable assets to non-tradeable assets.

Estimated tax payments would not be required for minimum tax liability, and the minimum tax payments would be excluded from the prior year's tax liability for purposes of computing estimated tax required to avoid the penalty for underpayment of estimated taxes.

The tax is proposed to be effective for taxable years beginning after December 31, 2024.

Repropose Increasing the NIIT Rate and Additional Medicare Tax Rate for High-Income Taxpayers

The Green Book reproposes the 2024 Green Book proposal that the NIIT rate and the additional Medicare tax would increase to 5% (from 3.8%) for taxpayers earning over $400,000 a year.

The Treasury provides that proceeds from the proposed increase in NIIT and additional Medicare tax would flow to the Hospital Insurance Trust Fund ("HITF"), which is projected to be exhausted in 2028. Currently, the SECA and FICA Medicare taxes flow to the HITF and fund Medicare Part A.

The proposal would be **retroactively** effective for taxable years beginning after December 31, 2023.

Repropose Application of NIIT to Pass-Through Business Income of High-Income Taxpayers

Under current law, a 3.8% NIIT is imposed on net investment income (generally, portfolio and passive income) of individuals above a certain income threshold, and a 3.8% Medicare tax under SECA is imposed on self-employment earnings. Limited partners and S corporation shareholders generally are not subject to the SECA Medicare tax on their distributive share of income from the partnership or the S corporation, respectively.

The Green Book proposes to impose a 3.8% tax (which will be used to fund Medicare), either through the NIIT or SECA Medicare tax,[6] on all trade or business income of taxpayers with adjusted gross income in excess of $500,000 (with a specified percentage of business income between $400,000 and $500,000 being subject to the tax).[7]

Accordingly, under the proposal, limited partners, LLC members and S corporation shareholders who traditionally have not been subject to SECA tax on their distributive share of income from the underlying entity would be subject to SECA tax if they provide services and/or materially participate in the underlying trade or business. Material participation standards appear to be similar to the same standards for purposes of passive activity rules under section 469, which require the person to work for the business for at least 500 hours per year.

Accordingly, limited partners who provide services (such as the limited partners of an investment management company) would be subject to self-employment tax on their distributive share of the partnership's business income, and S corporation shareholders who materially participate in the corporation's trade or business would be subject to SECA taxes on their distributive share of the S corporation's business income to the extent it exceeds certain thresholds.

The proposal would be **retroactively** effective for taxable years beginning after December 31, 2023.

Repropose an Increase in the Top Marginal Income Tax Rate

The top marginal individual income tax rate is currently 37% for taxable years beginning after December 31, 2017, and before January 1, 2026, and 39.6% for taxable years beginning after December 31, 2025.

The Green Book reproposes to increase the top marginal tax rate to 39.6%, which applies to income (i) over $400,000 for single individuals (other than surviving spouses and head of household filers), (ii) over $425,000 for head of household filers, (iii) over $450,000 for married individuals filing jointly and surviving spouses, and (iv) over $225,000 for married individuals filing separately.

The proposal would be effective **retroactively** for taxable years beginning after December 31, 2023.

The tax brackets would continue to be indexed for inflation after 2024.

Repropose Treating Gifts and Death as Realization Events

Under current law, transfer by gift or death is not taxable, and upon death, the decedent's heirs get a "stepped up basis" to fair market value at the time of death. The Green Book proposes to treat death and gifts of appreciated property as realization events that require gain to be recognized as if the underlying property was sold, subject to a $5 million per donor lifetime exclusion, which would be indexed for inflation after 2024 and would be portable to the decedent's surviving spouse. Gains on gifts or bequests to charity would not be required to be recognized, and gains on gifts or bequests to a spouse would not be required to be recognized until the spouse dies or disposes of the asset. Basis would carry over in each case.

Payment of tax on the appreciation of certain family-owned and operated businesses would not be due until the interest in the business is sold or the business ceases to be family-owned and operated. The Green Book proposal would also allow a 15-year fixed-rate payment plan for the tax on appreciated assets transferred at death, other than (i) liquid assets, such as publicly traded financial assets, and (ii) businesses for which the deferral election is made.

The proposal would tax transfers of property into, and distributions in kind from, a trust, partnership or other non-corporate entity (other than a grantor trust that is deemed to be wholly owned and revocable by the donor), if the transfers have the effect of a gift to the transferee. It is questionable whether the drafters intended as broad a result as the words of the proposal suggest because it would effectively prohibit the use of partnerships for many common business ventures.

Finally, the Green Book proposal would impose tax without any realization event on the unrealized appreciation of assets of a trust, partnership or other non-corporate entity if there has not been a recognition event with respect to the applicable property within the prior 90 years. A tacking rule would apply to property received in a nonrecognition transaction from another entity. The provision would apply to property held on or after January 1, 1944 that was not been subject to a recognition event after December 31, 1943. Accordingly, these entities would be subject to tax with respect to this property beginning on December 31, 2033.

The qualified small business stock ("QSBS") rules of section 1202 would remain in effect.

The proposal would be effective for gains on property transferred by gift and at death after December 31, 2024 and for certain property owned by trusts, partnerships and noncorporate entities on January 1, 2025.

V. Carried Interests

Repropose Taxation of Carried (Profits) Interest as Ordinary Income

The Green Book reproposes the 2023 and 2024 Green Book proposals to tax profits interests as ordinary income and subject this income to self-employment taxes.

Under current law, a "carried" or "profits" interest in a partnership received in exchange for services is generally not taxable when received and the recipient is taxed on their share of partnership income based on the character of the income at the partnership level. Section 1061 requires certain carried interest holders to satisfy a three-year holding period – rather than the normal one-year holding period – to be eligible for the long-term capital gain rate.

Under the Green Book proposal, a partner's share of income on an "investment services partnership interest" (an "ISPI") in an investment partnership would generally be taxable as ordinary income and gain on the sale of an ISPI would be taxable as ordinary income if the partner's taxable income (from all sources) exceeds $400,000. The proposal suggests that income or gain attributable to goodwill or other assets unrelated to the provision of services will not be taxed as ordinary income, and the Administration intends to develop mechanisms with Congress to determine how much of the income or gain from an ISPI should be recharacterized.

The Green Book would define an ISPI as "a profits interest in an investment partnership that is held by a person who provides services to the partnership." This definition is broader than section 1061, which applies to interests in partnerships in the business of "raising or returning capital" and investing or developing "specified assets" (generally limited to investment-type assets).

Under the Green Book's proposal, a partnership would be considered an "investment partnership" if substantially all of its assets are investment-type assets (which are similar to the "specified assets" definition of section 1061), but only if more than 50% of the partnership's contributed capital is from partners to whom the interests constitute property not held in connection with a trade or business.

The purpose and meaning of the exception provided by this 50% test is unclear. Assume that insurance companies contribute cash from their reserves to an investment partnership in exchange for partnership interests, and the general partner of that partnership receives a carried interest in exchange for managing the assets of the partnership. The partnership interests received by the insurance companies would appear to be reserves held in connection with their trade or business of providing insurance. It appears that the general partner would not be subject to the Green Book's proposal or, as discussed below, section 1061, and therefore could receive allocations of long-term capital gain based upon a one-year holding period.

Under the Green Book's proposal, if a partner who holds an ISPI also contributes "invested capital" (generally money or other property, but not contributed capital attributable to the proceeds of any loan or advance made or guaranteed by any partner or the partnership or a related person) and holds a "qualified capital interest" in the partnership, income attributable to the invested capital, including the portion of gain recognized on the sale of an ISPI attributable to the invested capital, would not be subject to recharacterization.

"Qualified capital interests" would generally require that (a) the partnership allocations to the invested capital be made in the same manner as allocations to other capital interests held by partners who do not hold an ISPI and (b) the allocations to these non-ISPI holders be significant. The "same manner" requirement would be a return to the language used in the section 1061 proposed regulations, which was ultimately relaxed to a "similar manner" requirement in the final regulations. The proposal's requirement that allocations to non-ISPI holders be "significant" is also a divergence from the final section 1061 regulations, which look to whether the capital contributed by "Unrelated Non-S ervice Partners" is significant.

The Green Book proposal would also require partners to pay self-employment tax on ISPI income.

In addition, under an anti-abuse rule in the proposal, any person above the income threshold who performs services for any entity (including entities other than partnerships) and holds a "disqualified interest" in the entity would be subject to tax at "rates applicable to ordinary income" on any income or gain received with respect to the interest.

A “disqualified interest” would be defined as convertible or contingent debt, an option, or any derivative instrument with respect to the entity (but does not include a partnership interest, stock in certain taxable corporations, or stock in an S corporation). Thus, under the proposal, if an employee received a note as compensation from a C corporation, any gain on the sale of the note would be taxable at ordinary income rates (but, apparently, would not be treated as ordinary income so the gain could be offset by capital losses). The anti-abuse rule provides that capital gain subject to it is taxable “at rates applicable to ordinary income,” but does not provide that the capital gain is ordinary income. It is unclear why this rule is different than the rule that applies to ISPIs, but it would allow capital losses of the taxpayer to offset the capital gains.

The proposal notes that it is not intended to adversely affect qualification of a REIT owning a profits interest in a real estate partnership.

The proposal would repeal section 1061 for taxpayers whose taxable income (from all sources) exceeds $400,000 and would be effective for taxable years beginning after December 31, 2024. Taxpayers whose taxable income is $400,000 or less would be subject only to section 1061. If the proposal were to become law, we expect that sponsors of funds will be more likely to receive their compensation in the form of deferred fees rather than as a carried interest.

VI. Taxation of Investments in Real Property

Repropose Restricting Like-Kind Exchanges Under Section 1031

The Green Book reproposes the 2023 and 2024 Green Book proposals to limit the gain that can be deferred under a like-kind exchange of real estate under section 1031 to $500,000 a year per taxpayer (or $1 million a year for married individuals filing jointly). Taxpayers will be required to recognize gain in excess of the $500,000/$1 million threshold in the year the real property is exchanged.

The proposal would be effective for exchanges occurring in taxable years beginning after December 31, 2024.

Repropose 100% Recapture of Depreciation Deductions as Ordinary Income for Certain Depreciable Property

The Green Book has reproposed the 2023 and 2024 Green Book proposals to treat all gain on section 1250 property held for more than a year as ordinary income to the extent of cumulative depreciation deductions taken after December 31, 2024. Depreciation deductions taken on section 1250 property prior to December 31, 2024 would continue to be subject to current rules (and subject to recapture only to the extent the depreciation exceeds the amount that would be allowable under a straight-line method). Any gain on the sale of section 1250 property in excess of depreciation recapture would continue to be treated as section 1231 gain. Any unrecaptured gain on section 1250 property would continue to be taxable to noncorporate taxpayers at a maximum 25% rate.

Under current law, section 1250 requires a certain amount of the gain from the sale or disposition of certain depreciable real property used in a trade or business to be "recaptured," or recharacterized as ordinary income, to the extent of prior depreciation deductions taken on that property.[8] For property held for one year or less, the amount of gain recaptured is all prior depreciation deductions. For property held for more than one year, the amount of gain recaptured is the amount of depreciation that exceeds the amount that would have been allowable under a straight-line method. Accordingly, only gain attributed to deductions equal to the difference between those taken under an accelerated depreciation method or bonus depreciation and those allowable under a straight-line method is recaptured and taxed at ordinary rates. This would be changed under the Green Book proposal. For noncorporate taxpayers, gain that is attributable to straight-line depreciation, or "unrecaptured 1250 gain," is taxed at a maximum rate of 25%. This rule would remain under the Green Book proposal.

In addition, under section 1231, noncorporate taxpayers treat section 1231 losses as ordinary losses and section 1231 gain as long-term capital gain. This rule would remain under the Green Book proposal.

The Green Book proposal would not apply to noncorporate taxpayers with an adjusted gross income below $400,000 (or $200,000 for married individuals filing separately). These income amounts would be calculated before applying the proposed 100% depreciation recapture on section 1250 property.

Under the Green Book proposal, flow-through entities would be required to compute the character of gains and losses on the sale or disposition of section 1250 property and report to the entity owners the amounts of ordinary income or loss, capital gain or loss, and unrecaptured section 1250 gain under both existing and proposed rules. Owners with income of at least the $400,000/$200,000 threshold amount would report tax items calculated under the proposed rules.

The proposal would be effective for depreciation deductions taken on section 1250 property in taxable years beginning after December 31, 2024, and sales or dispositions of section 1250 property completed in taxable years beginning after December 31, 2024.

VII. Improve Tax Administration

Propose to Allow Partnerships to To Make a Push-Out Election Without First having Received a Notice of Final Partnership Adjustment

Under the current partnership audit rules, partnerships are by default liable to pay imputed underpayments on partnership adjustments. Section 6226 permits audited partnerships to elect for adjustments to be taken into account by the reviewed-year partners, rather than by adjustment-year partners or at the partnership level (the "push-out election"). Electing partnerships are not required to pay the imputed underpayments or associated interest and penalties (instead the adjustment-year partners are).

Prior to making a push-out election, a partnership must have received a Notice of Proposed Partnership Adjustments ("NOPPA") and a Notice of Final Partnership Adjustments ("FPA").

The Green Book proposes to eliminate the requirement that an FPA be issued prior to making a push-out election. The only prerequisite to making the push-out election would be the issuance of a NOPPA. **This is a new proposal**. Partnerships would be allowed to make push-out elections until 45 days after the FPA is ultimately issued.

The proposal would be effective upon enactment.

Propose To Expand Reporting of "Foreign Redeterminations" and Increase the Statute of Limitations with Respect to Foreign Tax Credits

- *Foreign Redeterminations*

Under current section 905(c), a taxpayer that has received a foreign tax credit (an "FTC") that is subsequently adjusted must notify the IRS of the redetermination within (i) 180 days if the foreign tax is reduced; or (ii) 10 years from the due date of the return if the foreign tax paid or deemed paid is increased (a "foreign redetermination").

In the event of a foreign redetermination, the foreign income tax originally reported must be adjusted (along with related tax items) to redetermine the amount of U.S. tax due. If the taxpayer does not file an amended return and pay additional tax owed (due upon notice and demand), additional tax is assessed.

U.S. individuals who incur $300 ($600 for married individuals filing jointly) or less of creditable foreign income taxes on passive investment income are exempt from the above foreign redetermination rules.

The Green Book proposes that foreign redeterminations include changes in the liability for foreign income taxes, in addition to certain other changes that may affect a taxpayer's U.S. tax liability (i.e., changes to foreign taxes that would affect a taxpayer's subpart F or GILTI inclusion amounts). **This is a new proposal.**

The IRS would have the authority to assess and collect any U.S. tax liability resulting from a foreign redetermination in the year of the foreign redetermination, as well as under deficiency procedures. The IRS would also have the authority to make alternative adjustments (such as appropriate netting or offsetting of adjustments, overpayments, underpayments, and interest) in different years with respect to foreign redeterminations reportable in the same taxable year.

The proposal would be effective for foreign income taxes paid or accrued in taxable years effective after December 31, 2024.

- *Statute of Limitations and Penalties*

Failing to substantiate an FTC may cause the entire credit to be disallowed, but there are currently no specific penalties or extensions to statute of limitations ("SOL") for failing to provide or substantiate information on the FTC reporting forms. However, a taxpayer that fails to timely report a foreign redetermination is subject to a 5% penalty on any deficiency arising from this failure, increased by 5% for each month during continued failure and capped at 25%.

The Green Book proposes extending this SOL to three years after the date on which the IRS receives the required information.

The Green Book also proposes to impose information reporting penalties in an amount equal to the greater of 5% or $10,000 for each failure, with willful failures subject to an increase to 20%. Failure to respond to IRS information requests to substantiate an FTC or foreign redetermination would be subject to penalties in an amount equal to the greater of 5% or $10,000 after 90 days of failing to respond, increased by the greater of 5% or $10,000 for each subsequent 30-day period, capped at the greater of 25% (40% for willful failures) or $50,000.

These are new proposals.

The proposals would be effective for taxable years beginning after the date of enactment, including with respect to foreign redeterminations occurring in such years that relate to prior years.

VIII. Improve Tax Compliance

Propose to Expand IRS Summons Authority for Large Partnerships

Under current law, the IRS can issue a designated summons to a ***large corporate*** taxpayer that is under examination and suspend the statute of limitations ("SOL") on assessment of additional tax, and the designated summons must be served at least 60 days prior to expiration of the SOL.

In connection with serving the designated summons, the IRS must also establish in a judicial enforcement proceeding that prior reasonable requests were made to obtain information sought from the corporate taxpayer. Following a court's enforcement of the summons, the corporate taxpayer's SOL is suspended for 120 days, and if the court does not enforce the summons, the SOL is only suspended for 60 days after the court proceeding (including a period of appeal of the decision).

The Green Book proposes expanding the designated summons provisions to include ***large partnership taxpayers*** that are under examination pursuant to the IRS's Large Partnership Compliance Program (or any successor program). **This is a new proposal**.

The Green Book does not specify the length of a proposed SOL extension period following a partnership designated summons, but it states that the SOL "could be extended subject to judicial enforcement."

The administrative procedures for a partnership designated summons would also be similar to the current rules for corporate taxpayers under the LCC.

The proposal would be effective after the date of enactment.

[1] The Green Book provides the following example: A group with $1,000x of profits in a foreign jurisdiction with no corporate income tax would have a top-up tax amount of $150x with respect to that jurisdiction. If the top-up tax were not collected under GILTI or an IIR implemented by a foreign jurisdiction, a U.S. corporation or U.S. branch that is a member of the group would be subject to a deduction disallowance of $536x, equal to the top-up tax amount of $150x divided by the U.S. corporate income tax rate of 28 percent. (For simplicity, this example assumes that there are no tangible assets or payroll in the foreign jurisdiction with no corporate income tax, and that there are no other jurisdictions with a UTPR such that all of the top-up tax is allocated to the U.S. corporation or U.S. branch.)

A financial reporting group is any group of business entities that prepares consolidated financial statements and that includes at least one domestic entity or domestic branch and at least one foreign entity or foreign branch. "Consolidated financial statements" means those determined in accordance with U.S. Generally Accepted Accounting Principles ("GAAP"), International Financial Reporting Standards ("IFRS") or other methods authorized by the IRS under regulations.

[2] The reduction corresponds to the "substance-based income exclusion" in the OECD/G20 rules. During a transition period of nine years, the exclusion would be 7.8% of the book value of tangible assets and 9.8% of payroll, declining annually by 0.2 percentage points for the first four years, by 0.4 percentage points for tangible assets and by 0.8 percentage points for payroll for the last five years.

[3] The Green Book provides that this proposal would be effective for "taxable years starting December 31, 2024," which appears to be a typographical error intended to mean taxable years starting after December 31, 2024.

[4] Taxpayers that loan securities pursuant to agreements that fail to satisfy section 1058 may be taxable initially and when they receive back the loaned securities.

[5] The securities loan agreement must (i) provide for the return to the transferor of securities identical to the securities transferred; (ii) require payments made to the transferor of amounts equal to all interest, dividends, and distributions on the security during the term of the loan; (iii) not reduce the risk of loss or opportunity for gain of the transferor of the securities in the securities transferred; and (iv) meet other requirements as the IRS may prescribe by regulation. Section 1058(b).

[6] As noted above, the Green Book proposes to raise this rate to 5% for taxpayers earning over $400,000.

[7] The Green Book does not include a proposal to remove the cap on Social Security tax on taxpayers with adjusted gross income in excess of $400,000, which is one of the proposals President Biden had made during his presidential campaign.

[8] For this purpose, “sale or disposition” includes sale, exchange, involuntary conversion, transfer by corporation to shareholder, transfer in a sale-leaseback transaction, and transfer upon foreclosure of a security interest. Treasury regulations section 1.1250-1(a)(4).

View original.

Related Professionals

- **Jean M. Bertrand**
  Partner
- **Martin T. Hamilton**
  Partner
- **David S. Miller**
  Partner
- **Amanda H. Nussbaum**
  Partner
- **Stuart L. Rosow**
- **Seo Kyung (Rosa) Kim**

Associate

- **Maggie Livingstone**
  Associate