GLI GLOBAL LEGAL INSIGHTS

Corporate Tax

2023

11th Edition

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glg global legal group

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USA

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Overview of corporate tax work over the last year and industry sector focus

2023 is shaping up to be another year filled with uncertainty and optimism. Businesses must contend with global economic turbulence, the continued impacts of the COVID-19 pandemic, and the war in Ukraine. Although deal volume shows potential for recovery, high interest rates, high inflation, and the mini-banking crisis in the United States are all causes for concern.

Significant deals and themes

Mergers and acquisitions ("M&A") deal volume continued to decline through the second half of 2022 and into 2023. 2022 had the lowest fourth quarter global M&A deal volume in the last six years, and the average deal value has continued to decrease.[1] Private equity has also faced significant headwinds, declining in both deal activity and value.[2] We believe this shift was driven by interest rate spikes freezing the leveraged finance market, volatile debt and equity markets limiting exits, and significant geopolitical and operating uncertainty generally lowering enthusiasm.

In contrast, 59 spin-off transactions have been announced so far in 2023, more than at the same time in any of the last five years.[3] Spin-offs may remain a popular deal structure as parent companies seek to establish new, independent companies in a way that positions both the parent and the newly independent company to be attractive for M&A activity in the future.

The first quarter of 2023 marked the fourth quarter in a row that the initial public offering ("IPO") market was virtually closed.[4] While secondary sales raised more through May of 2023 than during the same period for 2022, the consensus is that potential IPO candidates will wait until volatility has subsided for a sustained period of time before going into the market.[5] In addition, the U.S. Securities and Exchange Commission (the "SEC") approved Nasdaq and NYSE modifications that allow for direct listings to raise capital more easily, which may encourage more companies to pursue direct listings instead of IPOs.[6]

In contrast to the downward trend of the IPO market, U.S. debt markets started 2023 with an increase in offerings. Private credit is playing an increasingly significant role in the market, with the majority of private equity deals in 2022 using the private credit markets instead of broadly syndicated financings.[7]

The Federal Reserve has raised interest rates for a 10th consecutive time in an effort to fight inflation, resulting in the highest federal funds target rate since October 2007.[8] Fortunately, inflation has showed signs of easing, and the Fed paused further rate hikes at its June 2023 meeting. Overall, FDIC-insured institutions have benefitted from the higher rates, achieving a 7.1 per cent increase in net income from the end of 2021.[9] The rapid increase in

rates, however, was believed to be a contributing factor in the mini-banking crisis described below, and vulnerabilities may well remain in the sector even though banking business remains robust.

Through April 2023, there have been over 230 U.S. corporate bankruptcies, the highest number through the first four months of the year since 2010.[10] According to S&P, consumer discretionary companies, which include retailers and restaurants, have led the way with the most filings. Financial institutions are not far behind, sparked by the mini-banking crisis.

The crisis was set off by three bank failures (Silicon Valley Bank ("SVB"), Signature Bank, and Silvergate) thus far in 2023, the first failures since 2020.[11] Total assets of the failed banks exceed $548 million. SVB collapsed due to a liquidity crisis that was caused, in part, because SVB had to sell its long-term Treasury bonds at a loss after the bonds depreciated due to interest rate hikes.[12] While SVB's failure reduced confidence in Signature Bank, an FDIC report said the primary contributors to Signature Bank's downfall were overreliance on cryptocurrency and uninsured deposits.[13] Silvergate's self-liquidation came largely as a result of Silvergate's involvement with cryptocurrency. As the value of the crypto market declined, so did Silvergate's liquidity, eventually resulting in large crypto-industry clients such as Coinbase and Paxos pulling their deposits.[14]

Headlined by the collapse of SVB, the mini-banking crisis may not yet be over. In May, two regional banks, PacWest Bancorp and Western Alliance, fell in value by 51 per cent and 39 per cent, respectively.[15] Economists worry that further tightening of financial conditions could cause a collapse in confidence, which would then result in consumer spending and business investments plunging.[16]

The past year saw also the collapse of cryptocurrencies after a boom year in 2021, with massive drops in valuations, bankruptcies of a number of exchanges (most infamously FTX), and criminal charges brought against some exchanges and their officers.[17] There has also been increasing enforcement by the Internal Revenue Service (the "IRS") as it grapples with compliance issues and the appropriate treatment of various digital assets and tokens.[18]

Global volatility, decreases in property values, banking uncertainty, and scepticism regarding the broader economy have greatly slowed commercial real estate investment volume, and workouts are increasingly common.[19] Despite nearly market-wide headwinds, select sectors such as multifamily, industrial, and retail have performed well, leading the market in transaction volume.

Sustainability trends likely will continue through the rest of 2023. Ninety-one per cent of business leaders responding to a poll say they believe their company has a responsibility to act on environmental, social, and governance ("ESG") issues.[20] Areas of ESG focus include decarbonisation, net zero targets, and sustainable consumer products. The impact of the Inflation Reduction Act of 2022 (the "IRA") in this space is yet to be seen, though it is expected to increase investments in renewable energy and carbon sequestration.

Key developments affecting corporate tax law and practice

The last 12 months saw some major developments in corporate tax law in the United States with the passage of the IRA, which paired a number of corporate tax revenue raisers with a slew of green energy tax incentives. In addition, the IRS and Treasury Department have been working to publish guidance addressing both the new law and some longstanding areas of uncertainty. We expect a continuing push for guidance, more aggressive enforcement, and potentially some movement in the divided Congress to address expiring tax breaks.

Our summary below focuses on legislative changes, administrative guidance, and case law affecting corporations in the United States and international investors and multinationals doing business with them.

Legislation and related guidance

In August 2022, Congress passed the IRA, which contained several important federal tax changes generally applying to tax years beginning after December 31, 2022. The IRA was passed by the Senate 51–50, and though it did not include all of President Biden's priorities, it represented the last opportunity for major legislation while Democrats controlled both houses of Congress.

One per cent buyback excise tax

The IRA includes a 1 per cent excise tax on certain stock buybacks and similar transactions (the "excise tax") under new section 4501 of the Code that was initially proposed in a draft of 2021's Build Back Better Act.[21] The excise tax is a non-deductible tax on the fair market value of certain stock that is "repurchased" during the taxable year by certain U.S. corporations or that is acquired by certain of such corporations' subsidiaries, generally reduced by the fair market value of stock issuances for the same taxable year. A number of special rules apply extending and limiting the reach of this new tax, but the broadness of the definition of "repurchase" (including "economically similar" transactions) means that it can apply to transactions as diverse as leveraged buyouts, split-offs, a number of corporate reorganisations, and certain liquidations, in addition to typical buybacks. The apparent policy goal of the excise tax, though missing from the legislative history, is to discourage stock buybacks and instead encourage corporations to reinvest profits in the business and employees.[22] So far, the excise tax has had little impact on the rate of typical stock buybacks, currently projected to top $1 trillion for the first time this year. There has been a proposal to raise the rate to 4 per cent, although this seems unlikely in the current political climate.[23]

The IRS has issued interim guidance, in the form of Notice 2023-2, on the excise tax that provides helpful clarity and a number of limitations that will be beneficial to taxpayers. The Notice excludes a number of transactions from being treated as "repurchases" (such as the distribution of cash *in lieu* of the issuance of fractional shares), sets out an exclusive list of five transactions that the IRS considers "economically similar" to repurchases, and provides guidance on a number of exceptions to the excise tax. Responding to commentators, the Notice excludes certain distributions in complete liquidation of a corporation, as well as any buybacks in the year of a complete liquidation, from the excise tax's tax base, providing relief for special purpose acquisition companies ("SPACs") that have not completed an acquisition. Tax planners are likely to revisit commonly used techniques in the M&A area in response to this Notice.

Corporate alternative minimum tax

The IRA enacted a revised version of the 15 per cent corporate alternative minimum tax (the "CAMT") proposed in a draft of 2021's Build Back Better Act. The CAMT requires certain corporations (each, an "Applicable Corporation") to pay U.S. federal income tax on their adjusted financial statement income ("AFSI") at a rate of at least 15 per cent.[24] A corporation is an Applicable Corporation if it – together with the other members of its controlled group – averages more than $1 billion of AFSI over a three-year testing period. For a U.S. subsidiary of a foreign-parented multinational group to be an Applicable Corporation, the subsidiary also must have AFSI of $100 million or more over the same three-year testing period (taking into account the AFSI of only the domestic members of the group and the

"effectively connected" AFSI of each foreign member), with certain adjustments.[25] S corporations, real estate investment trusts ("REITs"), and regulated investment companies ("RICs") are not themselves subject to the CAMT.

The CAMT was motivated by a concern with large corporations with significant financial statement income paying little income tax, and Democrats touted it as a measure to restore fairness to the tax system.[26] The statute, however, introduces a number of complications. The use of income as set forth on audited financial statements as opposed to that determined under typical tax rules is almost certain to create unintended mismatches in income, and the IRA leaves critical details to be provided in future Treasury and IRS guidance.

That guidance will have significant tax consequences for taxpayers and will be subject to review in an era of heightened judicial scrutiny of agency rulemaking, introducing further uncertainty.[27] In addition, the creation and modification of the GAAP financial statement rules is not subject to Congressional approval or the notice-and-comment requirements of the Administrative Procedures Act. As a result, the calculation of tax liability will be, in part, determined based on decisions made by non-governmental decision-makers.

On December 27, 2022, the IRS issued Notice 2023-7 providing interim guidance on the CAMT. The Notice provides some safe harbours and some helpful rules for taxpayers attempting to navigate a new tax and tax base that lacks a regulatory framework. Under the Notice, (i) there is a safe harbour for calculating AFSI for the first taxable year to which the CAMT applies, (ii) gain or loss for tax-free transactions, including spin-offs, is not taken into account in calculating AFSI, and (iii) some rules are provided for determining the AFSI of parties to certain types of M&A transactions. Despite the Notice, there is still a great deal of ambiguity and complexity in the calculation of AFSI and the application of the CAMT, and, as a result, large corporate taxpayers are likely to face complex issues relating to the CAMT for the foreseeable future.[28]

Clean energy tax credits

The IRA includes $369 billion in tax incentives for clean energy and climate-related programme spending. It represents a significant extension, expansion, enrichment, and evolution of the U.S. tax credit regime applicable to the development of energy assets. Notably, the IRA tied eligibility for several credits to satisfying labour requirements, added "bonus" sweeteners for satisfying "build American" requirements or siting projects in energy transition-affected communities, and allowed a number of credits (including production and investment tax credits with respect to clean energy property) to be sold by taxpayers on a one-time basis to unrelated third parties. A number of credits are also subject to a new direct pay feature allowing certain governmental and non-profit entities to receive the economic benefit of the credits. These changes mean that taxpayers should be able to monetise tax credits without complex and expensive tax equity arrangements.

The IRS has made a significant effort to provide guidance on the tax credits and, to date, has issued rules for (among other issues) satisfying applicable labour requirements, qualifying for the "energy community" and "domestic content" bonus credits, buying and selling credits, and qualifying for refund payments.[29] Republicans in the House of Representatives have proposed cutting a number of the energy credits under the IRA to pay for other priorities, but their repeal seems unlikely in the current political climate.[30]

IRS funding

The IRA also included $80 billion of additional funding for IRS enforcement, taxpayer services, operations support, and modernisation over 10 years. More than $45 billion of the funding was earmarked for IRS tax enforcement, effectively doubling the IRS's enforcement

budget over prior years. On April 6, 2023, the IRS released its Strategic Operating Plan, indicating that it intends to focus increased IRA enforcement funding on "taxpayers with complex tax filings and high-dollar noncompliance" and to expand its capacity to "unpack the complex filings of high income taxpayers and large corporations and partnerships".[31] These plans are likely to be stymied somewhat as up to $21.4 billion of the IRA funding has been eliminated by the debt ceiling deal agreed to between President Biden and House of Representatives Speaker McCarthy at the end of May 2023 in enacting the Fiscal Responsibility Act of 2023, signed into law on June 3, 2023. Under the deal, $1.4 billion of IRS funding provided for under the IRA was immediately rescinded, and $10 billion per year will be reallocated for 2024 and 2025. It is not yet clear how these changes will affect the agency's long-term plans, or how the IRA funding will impact the IRS in the annual appropriations process currently being negotiated for fiscal year 2024.

Other administrative guidance

The IRS and Treasury have promulgated a number of new regulations over the past year with impacts on corporate taxation. Some, such as relaxations to the regulations under section 892, are welcome, while others, such as those relating to the determination of domestic control for qualified investment entities, go in the face of established practice and interpretation of existing guidance without much in the way of explanation from the government.

Proposed regulations on domestically controlled qualified investment entities

On December 29, 2022, the IRS and Treasury issued proposed regulations for determining whether a REIT or RIC (together with a REIT, a "qualified investment entity") is domestically controlled.[32] Interests in REITs and RICs that are domestically controlled (*i.e.*, "foreign persons" holding less than 50 per cent of the value of the entity "directly or indirectly") are not U.S. real property interests ("USRPIs") under the Foreign Investment in Real Property Tax Act ("FIRPTA"). As a result, foreign persons often seek to make private investments in U.S. real estate by owning and selling shares in domestically controlled REITs.

In current practice, and consistent with certain existing guidance, many taxpayers have treated stock of a REIT held by a domestic C corporation as held by a U.S. person for purposes of determining domestically controlled status. The proposed regulations, however, would provide a broad look-through rule that applies not only to typical pass-through entities but also to "foreign-owned" U.S. C corporations and imputes ownership of the REIT stock to the entities' owners on a *pro rata* basis. Foreign investors, including foreign multinationals with domestic C corporation operating subsidiaries, who invested in private REITs they believed to be domestically controlled should re-evaluate the status of these REITs in light of the proposed regulations.

In addition, although the proposed regulations apply to dispositions occurring after the date they are finalised, the testing period for purposes of determining domestic control of a REIT is retroactive to the shorter of (i) five years, and (ii) the date of the election to become a REIT. This means that any foreign investor selling stock of a domestically controlled REIT after the regulations are finalised will have to prove that the REIT complied with the new guidance for the prior five years or its entire existence, whichever is shorter.

Proposed regulations under section 892

Section 892 exempts from U.S. federal taxation certain passive income derived by foreign governments, but does not exempt income derived from an investment in stock of a U.S. real property holding company ("USRPHC") that is controlled by the foreign government. Under current guidance, a USRPHC is viewed as "*per se*" engaged in commercial activity

and any of that income is subject to U.S. tax. The proposed regulations would modify the current temporary regulations to relax this "*per se*" rule, so that a foreign government-controlled USRPHC that is a USRPHC only because it owns minority interests in other USRPHCs will not be treated as engaged in commercial activity.[33] An additional new rule under the proposed regulations would exempt foreign USRPHCs that are qualified foreign pension funds ("QFPFs") or owned by QFPFs from being treated as engaged in commercial activity solely based on their status as USRPHCs. Both of these changes are welcome relaxations of rules that presented traps for unwary investors.

Final regulations on QFPF

The IRS and Treasury adopted with some modifications proposed regulations published in June 2019 relating to qualification as, and gains or losses of, a QFPF for purposes of FIRPTA.[34] The final regulations also finalised rules regarding a QFPF's ability to certify that it is not subject to withholding under sections 1445 and 1446 on the sale or other disposition of an interest in U.S. real property.

Proposed foreign tax credit rules

The IRS and Treasury issued proposed regulations in November 2022 to address concerns related to final regulations on foreign tax credits issued in January 2022.[35] Among other things, the proposed regulations would provide an exception from source-based attribution exclusions (that otherwise would prevent a tax from being creditable) for situations in which the taxpayer can show that a withholding tax is imposed on royalties received in exchange for the right to use intangible property pursuant to a single-country licence within the territory of the taxing jurisdiction. A payment is considered made pursuant to a single-country licence if the terms of the licence agreement characterise the payment as a royalty and limit the territory of the licence to the country imposing the withholding tax. As a result, U.S. taxpayers may need to revise existing licence agreements to qualify for the single-country licence exception.[36]

In addition, the proposed regulations would provide further clarity on the net gain requirements on foreign taxes. A foreign tax is considered an income tax for U.S. tax purposes if, among other requirements, it meets a "net gain" requirement. Final regulations issued in 2021 permitted a foreign tax law that disallows the recovery of certain costs and expenses to meet the "net gain" requirement under certain circumstances.[37]

The proposed regulations added some welcome clarity by specifically providing that a disallowance is permitted if "consistent with any principle underlying the disallowances required under the income tax provisions of the Internal Revenue Code", such as a provision that disallows deductions for stock-based compensation because the Code contains similar disallowances. The proposed regulations, although narrow, provide taxpayers with rules that may be analogised in other areas without guidance.

Proposed regulations on consolidated group ownership of controlled foreign corporation ("CFC") stock

The IRS and Treasury issued proposed regulations intended to prevent a consolidated group from minimising the inclusion of subpart F and global intangible low-taxed income ("GILTI") by shifting ownership of lower-tier CFCs between members of the group. The proposed regulations would treat all members of the consolidated group as one U.S. shareholder so that one member of the group cannot reduce its subpart F and GILTI inclusions by the amount of distributions the CFC made to another member of the group before being transferred.

Memorandum on requests for Advance Pricing Agreements ("APAs")

On April 25, 2023, the IRS issued new internal procedures for handling requests for APAs that provide criteria for determining whether an APA submission will be accepted and directs the Treaty and Transfer Pricing Operations personnel to engage in pre-submission review to determine whether an APA submission is likely to be accepted. This new approach likely will reduce the number of accepted APAs and certainty with respect to challenging transfer pricing issues, thereby increasing the likelihood that taxpayers will be subject to double tax, but may save taxpayers time and money in preparing APA submissions.

Proposed section 367(d) regulations

Under section 367(d), a transfer of intangible property by a U.S. person to a foreign corporation is treated as a sale in exchange for contingent payments that may be deemed annual or lump sum payments. Congress enacted this rule in 1984 because it believed that "transferor U.S. companies hope to reduce their U.S. taxable income by … transferring the intangible to a foreign corporation at the point of profitability, to ensure deferral of U.S. tax on the profits generated by the intangible".[38] Under the existing regulations, a U.S. transferor could be required to continue to recognise deemed payments under section 367(d) even if there is a subsequent transfer of the intangible property to a U.S. person who will recognise income on the property.

The new proposed regulations would terminate the application of section 367(d) when previously transferred intangible property is repatriated. This requires that the intangible property be transferred to a "qualified domestic person" (including the original U.S. transferor) and requires compliance with reporting requirements. The goal of the proposed regulations is to avoid "excessive U.S. taxation" and incentivise repatriation of intangible property to the United States.[39]

BEPS Pillar II

The Organisation for Economic Co-operation and Development's (the "OECD") Inclusive Framework on Base Erosion and Profit Shifting ("BEPS") Pillar II requires countries to establish a 15 per cent minimum corporate tax rate on large multinational enterprises, with a "top-up" tax to apply in jurisdictions in which the effective tax rate is below 15 per cent.[40] Although the United States has signed onto Pillar II, it will not comply with Pillar II without legislative change. The CAMT is not a qualified domestic minimum top-up tax ("QDMTT") or CFC regime under Pillar II, and GILTI is not an "income inclusion rule", though, for now, it qualifies as a CFC regime, which is a component of a QDMTT.[41] There is also uncertainty on how the IRA's tax credits will be viewed under Pillar II.

While the 2024 General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals (the Green Book) moves towards Pillar II, proposing to replace the Base Erosion Anti-Abuse Tax under section 59A with an under-taxed payments rule, those changes are unlikely to occur given Republican opposition to Pillar II, which goes so far as to threaten U.S. funding for the OECD.[42]

Major cases

Bittner v. United States

In *Bittner v. United States*, Alexandru Bittner, a dual citizen of Romania and the United States, discovered that he had failed to file reports under the Bank Secrecy Act's reporting obligations for 272 bank accounts.[43] The failure to file resulted in the imposition of certain non-wilful penalties on Bittner. The government took the position that the non-wilful penalties should apply to each account not accurately or timely reported, resulting in a penalty of approximately $2.72 million, while Bittner argued that the Bank Secrecy Act

authorises a maximum penalty for non-wilful violations of $10,000 per report, not per account. The U.S. Supreme Court sided with Bittner, holding that the Bank Secrecy Act's $10,000 penalty for the non-wilful failure to file a Foreign Bank Account Report ("FBAR") is determined on a per report, not a per account, basis.

Liberty Global, Inc. v. United States

In *Liberty Global, Inc. v. United States*, Liberty Global, Inc. challenged the validity of temporary regulations limiting the dividend received deduction for repatriated earnings under section 245A and sought a tax refund.[44] The IRS had denied the deduction because the 2019 temporary Treasury regulations applied retroactively to distributions occurring after December 31, 2017, and the amount in question was attributable to the 2018 taxable year. The District Court ruled that the temporary regulations were invalid because they were issued without following the Administrative Procedure Act's notice-and-comment requirements. After the District Court's decision, the government filed a $284 million countersuit, seeking to collect additional underlying (unassessed) income tax liabilities under broader economic substance theories.[45] Liberty Global's initial effort to have the countersuit dismissed was rejected by the District Court.

3M Co. & Subsidiaries v. Comm'r

3M Co. & Subsidiaries v. Comm'r was a major win for the IRS on transfer pricing issues.[46] The case dealt with the blocked income regulations under Treas. Reg. § 1.482-1(h)(2) (addressing when a taxpayer may take into account foreign legal restrictions for determining the arm's-length amount in a transaction between controlled taxpayers) in connection with certain royalty income received by 3M Co. ("3M") from a Brazilian subsidiary for licensed intangible property (including intellectual property). A Brazilian law imposed a 1 per cent cap on royalties that a Brazilian licensee could remit to a foreign related-party licensor, and 3M complied with this limitation. The IRS argued that the royalty rate should have been six per cent, in line with other related-party manufacturing arrangements, and adjusted 3M's income under section 482, notwithstanding the Brazilian domestic law. The Tax Court found in favour of the IRS on both the reallocation of income under section 482 and the validity of the requirements under Treas. Reg. § 1.482-1(h)(2).

The Coca-Cola Co. & Subsidiaries v. Comm'r

In *The Coca-Cola Co. & Subsidiaries v. Comm'r*, the U.S. Tax Court found that the IRS had not abused its discretion in reallocating income under section 482 from certain foreign manufacturing affiliates to The Coca-Cola Company on account of the use of intellectual property licensed to the affiliates.[47] The formulary apportionment method used had been previously approved in a closing agreement with the IRS, but the IRS later determined that the method did not reflect arm's-length norms. The case raises the same Brazilian "blocked income" issue and regulations at issue in the 3M case described above. On February 14, 2023, the Tax Court directed the parties to address the impact of 3M; a decision is expected soon.

FedEx Corp. & Subsidiaries v. United States

In *FedEx Corp. & Subsidiaries v. United States*, the court addressed Treasury's denial of foreign tax credits claimed by FedEx with respect to foreign taxes imposed on earnings that were offset by losses from other foreign subsidiaries.[48] FedEx argued that its right to the credits was clearly supported under the plain language of section 960(a)(3), whereas the government argued that the credits were properly disallowed under the final transition tax regulations under section 965. The court handed FedEx a major victory, invalidating the regulations and holding that, under the plain language of the tax code, FedEx was entitled to the credits for the foreign taxes paid on offset earnings.

Farhy v. Commissioner

In *Farhy v. Commissioner*, the court held that penalties under section 6038(b) for failure to file IRS Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations, could not be administratively assessed by the IRS and could be collected only by the filing of an affirmative action in court against the taxpayer.[49] The failure to file foreign information returns has been a major focus of recent IRS enforcement efforts, and the decision will create a significant challenge for those efforts.

Moore v. United States

The Supreme Court granted certiorari in *Moore v. United States*, a case in which the taxpayers challenged the constitutionality of the repatriation tax of section 965.[50] The taxpayers argue that the tax on accumulated foreign earnings is not a tax on income as it does not involve a realisation event, and that, as a result, the tax is an unconstitutional unapportioned direct tax. The case is likely to be very important as the Court's ruling could impact all taxes in which taxpayers do not have a direct realisation event, such as subpart F and GILTI.

Developments affecting the attractiveness of the United States for holding companies

There have been no major changes affecting the attractiveness of the United States for holding companies over the past year. The 2021 Corporate Transparency Act (part of the Anti-Money Laundering Act of 2020), which requires reporting of beneficial ownership for most U.S. companies (including Delaware LLCs), is set to go into effect for new companies starting January 1, 2024 and for existing companies starting January 1, 2025. There are a number of questions regarding the interpretation of this law, including whether holders of options and preferred interests are beneficial owners who must be included on report. An additional point to note is that the United States's non-compliance with Pillar II of BEPS may eventually trigger incremental compliance burdens for U.S.-parented multinational enterprises.

The year ahead

While there is some prospect for legislative compromise on key issues, such as the deductibility of research and experimentation expenses and an expansion of the child tax credit, we do not expect major changes to U.S. federal tax law in the year ahead given the difficulty of passing legislation with the split control of Congress and the current political climate. The IRS most likely will continue to focus on issuing guidance in accordance with the priority guidance plan, including focusing on providing additional guidance on the CAMT and the clean energy credits enacted by the IRA.[51]

In addition, enforcement actions are likely to increase given the IRS's increased budget and stated goals. Taxpayers will be wise to ensure that their documentation and analysis supporting their tax positions are in order.

* * *

Endnotes

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20. https://www.pwc.com/gx/en/services/sustainability/publications/cop26/how-much-does-the-public-care-about-esg-pwc-cop26.html#:~:text=91%25%20of%20business%20leaders%20say,communities%20and%20the%20environment%20poorly.
21. Unless indicated otherwise, all "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the Treasury regulations promulgated under the Code.
22. https://tax.thomsonreuters.com/news/proposed-4-percent-tax-on-stock-buybacks-faces-hurdles.
23. https://www.wsj.com/articles/the-1-stock-buyback-tax-hasnt-slowed-repurchases-a-proposed-4-tax-might-f87044eb.
24. The CAMT increases a taxpayer's tax only to the extent that the 15 per cent minimum tax (computed after taking into account applicable foreign tax credits) exceeds the taxpayer's regular tax plus the base erosion and anti-abuse tax.
25. A U.S. corporation is a member of a foreign-parented multinational group if it is included in the applicable financial statements of a group that has a foreign parent.
26. https://www.nytimes.com/2022/08/06/us/politics/corporate-minimum-tax.html.
27. U.S. courts have historically afforded "Chevron" deference to regulations promulgated by the Treasury Department and IRS if a statute is ambiguous in its application and the regulations adopt a reasonable interpretation of it. On May 1, 2023, the U.S. Supreme Court granted review in *Loper Bright Enterprises v. Raimondo*, Docket No. 22-451, to consider "[w]hether the Court should overrule *Chevron* or at least clarify that statutory

silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency". The Court's decision in the case could mark a sea change on deference to administrative rulemaking.

28. https://www.gibsondunn.com/irs-and-treasury-issue-interim-guidance-addressing-the-corporate-alternative-minimum-tax.
29. T.D. 9975, Notice 2022-61, Notice 2023-29, Notice 2023-38, Notice 2023-45, and Notice 2023-47.
30. https://news.bloombergtax.com/daily-tax-report/energy-industry-warns-projects-in-danger-if-gop-debt-bill-moves.
31. https://www.irs.gov/pub/irs-pdf/p3744.pdf.
32. 87 Fed. Reg. 80097.
33. *Id*.
34. 87 Fed. Reg. 80042, T.D. 9971.
35. 87 Fed. Reg. 71,271, T.D. 9959, 87 Fed. Reg. 276.
36. https://www.gibsondunn.com/proposed-us-foreign-tax-credit-rules-provide-relief-for-certain-taxpayers-and-ideas-for-others.
37. Disallowances are acceptable when "consistent with the principles underlying the disallowances required under the Internal Revenue Code, including disallowances intended to limit base erosion or profit shifting". Treas. Reg. § 1.901-2(b)(4)(i)(C)(1).
38. S. Rep. No. 169, 98th Cong., 2d Sess., at 360 (1984); H.R. Rept. No. 432, 98th Cong., 2d Sess., at 1315 (1984).
39. Preamble to proposed regulations, 88 Fed. Reg. 27819 (May 3, 2023).
40. https://www.oecd.org/tax/oecd-releases-pillar-two-model-rules-for-domestic-implementation-of-15-percent-global-minimum-tax.htm.
41. www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar-two.pdf.
42. https://news.bloombergtax.com/daily-tax-report-international/global-tax-deal-moves-ahead-sparking-new-republican-resistance.
43. 143 S.Ct. 713 (2023).
44. 129 A.F.T.R.2d 2022-1373 (D. Colo. 2022).
45. https://www.taxnotes.com/tax-notes-today-federal/global-intangible-low-taxed-income-gilti/companys-intercompany-transactions-lacked-substance-doj-charges/2022/10/11/7f7dk.
46. 160 T.C. No. 3 (2023).
47. 155 T.C. No. 145 (2020).
48. 2023 WL 2755311 (W. D. Tenn. 2023).
49. 160 T.C. No. 6 (April 3, 2023).
50. 36 F.4th 930 (9th Cir. 2022).
51. https://www.irs.gov/pub/irs-utl/2022-2023-pgp-3rd-quarter-update.pdf.

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