Miller & Chevalier

TAX TAKE: Biden Infrastructure Proposal Focuses on International Tax Increases

Tax Alert
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President Biden unveiled highly anticipated details regarding his $2 trillion *American Jobs Plan* last week, not the least of which related to the Administration's proposals to target key corporate and international tax provisions as a means of funding infrastructure spending. Some of those tax proposals included in the *Made in America Tax Plan* (the Plan) are exactly as they were when President Biden revealed them on the campaign trail, namely, raising the corporate tax rate to 28 percent and implementing several modifications to the global intangible low-taxed income (GILTI) regime (including raising the rate to 21 percent, eliminating the qualified business asset investment (QBAI) exemption, and calculating the inclusion amount and foreign tax credits on a country-by-country basis). Notably, the corporate rate increase and the GILTI modifications alone raise the bulk of the $2 trillion cost of the infrastructure spending provisions.

The timeline for funding the infrastructure spending is somewhat unorthodox in that the revenue the tax provisions are expected to raise is estimated over a 15-year window, with the promise that they will pay for the infrastructure spending in full in the first eight years and then reduce deficits permanently for the remaining seven.

Many modifications to existing provisions included in the Plan reflect somewhat of an evolution of thinking in terms of how the Administration would like to shape the international tax regime and might represent a tacit acknowledgment that what's global is local. For example, the Plan proposes repealing the foreign-derived intangible income (FDII) regime, and instead implementing targeted (albeit unspecified) research and development incentives as a means of fueling domestic investment. The articulated ground for repealing FDII is that it incentivizes the offshoring of assets, despite the fact that there is little evidence of taxpayers doing so. Further, in proposing a repeal of the base erosion and anti-abuse tax (BEAT), the Administration instead suggests that a deduction for outbound, deductible payments is only properly denied when the recipient is not subject to a minimum tax regime in its jurisdiction – exactly the approach recommended in the Pillar Two Blueprint released by the OECD last fall. However, the Administration continues to reject an exemption for a percentage of QBAI in the GILTI context, a position that significantly deviates from that of the OECD, which does envision an allowance of a routine return for active business operations in the form of a "substance-based carveout." As a matter of substance, the proposed GILTI rules would be more onerous than the income inclusion rule being considered by the OECD, in that they call for a higher rate, no substance-based carveout, and likely permit limited double tax relief. More generally, the Administration defends the higher rate of corporate tax and more robust GILTI rules as appropriate and sustainable in light of the OECD's work to develop a consensus regarding the Pillar Two minimum tax, without acknowledging the disconnects between the Administration's proposals and those being considered at the OECD. In terms of process, the Administration's proposals are on a much faster track than those at the OECD: while the Administration proposes legislation this year, changes in foreign law resulting from the work at the OECD may be many years away even if high-level political consensus is reached by the Inclusive Framework this summer and any consensus may be conditioned on the Administration's openness to Pillar One and digital taxes.

The Administration also signaled continued interest in pursuing a carrot-and-stick approach to onshoring and offshoring activities, replacing the offshoring surtax with a denial of deductions for costs associated with offshoring jobs, and a desire for more stringent anti-inversion rules, both of which are consistent with Obama-era budget proposals. Similarly, the proposed minimum tax on global book income remains, but with little explanation of how the provision will work in tandem with – or in place of – the existing system. More broadly, harmonization of the proposed international tax modifications with existing domestic regimes – and OECD initiatives – remains of paramount importance. And while the Administration has ostensibly been fleshing out the details with their counterparts on the Hill, it will be important to see to what degree Chairman Wyden's highly anticipated White Paper mirrors the proposals in the Plan or not.

Keeping in mind the Administration's goal of passing the infrastructure bill before Labor Day, the coming weeks will be critical in terms of refining the technical components of the proposals and garnering enough political support to determine how it will be passed. If through reconciliation, revenue raised in the budget window will become a critical issue and other international provisions not mentioned in the Plan could become targets – we expect the Greenbook to identify exactly which ones. **#TaxTake**

Speaking Engagements and Events

On March 16, Jorge participated in a panel discussion titled "Legislative Mandates and the Potential Impact on the Sector," at United Philanthropy Forum's Foundations on the Hill 2021 virtual program .

In The News

Loren was quoted in *The Wall Street Journal* regarding President Biden's infrastructure-financing corporate tax plan which proposes an increase in the corporate tax rate from 21 percent to 28 percent. "What we want to do in any tax bill is keep U.S. multinationals competitive and of course encourage domestic activity," Loren said. **"Under these proposals, I think there is just a denial of the fact that in 2021, companies operate globally."**

Loren and Jorge discussed President Biden's *Made in America Tax Plan* which advocates for the "complete elimination" of the FDII provision in *Tax Notes*. **"I think you have to look at this in the totality. . . . All of this is colored by the proposal to raise the corporate rate,"** Jorge said adding that he hoped for "more detail in the Greenbook." Loren called the proposed elimination of FDII "troubling" for companies. "If it's in response to a fear that the WTO might find it to be a prohibitive export subsidy, [the repeal is] premature," she said. **"We're not there yet; the provision goes under review by the [OECD forum]. To repeal it at this point is harmful to many businesses."**
