

## TAX TAKE: Proposed Repeal of the Section 864(f) Election - Retroactivity Revisited?

Tax Alert

**02.15.2021**

Last week, the House of Representatives Committee on Ways and Means passed several portions of the pending COVID-19 relief reconciliation bill. Buried among the provisions we expected to see was one we most certainly did not: repeal of the section 864(f) worldwide interest expense allocation election, which provides a one-time election for the foreign source taxable income of domestic members of affiliated groups to be determined by allocating and apportioning the interest expense of the domestic members of a worldwide affiliated group on a worldwide-group basis (*i.e.*, as if all members of the worldwide group were a single corporation). The provision is taxpayer favorable in that it allows less interest expense to be allocated to foreign source income – the numerator in the section 904 limitation calculation. The overall effect is to increase the amount of foreign tax credits that are potentially available if the section 864(f) election is made.

This provision was originally enacted as a part of the *American Jobs Creation Act of 2004* but with a delayed effective date because of revenue concerns. That effective date was subsequently extended multiple times, ultimately to taxable years beginning after December 31, 2020, as a favorite revenue raiser to fund various pieces of legislation over the years. Interested observers will note that during the run-up to the enactment of the *2017 Tax Cuts and Jobs Act* (TCJA), the Senate version of the bill included a provision to accelerate the effective date of the section 864(f) election to taxable years beginning after December 31, 2017, although the effort ultimately failed – once again because of revenue concerns.

The repeal is retroactive to taxable years beginning after December 31, 2020 – repealing the provision retroactively just as it went into effect. The COVID-19 relief reconciliation bill still needs to pass the full House, as well as the Senate, and be signed into law, but it is anticipated that Senate Democrats (who can pass the bill without any Republican support) and the Biden Administration are likely to be receptive to the repeal of the section 864(f) election.

Tax policy justifications (namely, that without the provision, U.S. multinationals were saddled with higher borrowing costs which make it more difficult for them to make domestic investments) for the enactment of the section 864(f) election aside, one might wonder why its repeal would appear now, in COVID-19 relief legislation, no less. The repeal of the provision is estimated by the Joint Committee on Taxation to raise \$22.3 billion and was undoubtedly added to ensure that the legislation complies with the reconciliation rules – this suggests that other tax revenue raisers may be considered if there is an additional need for revenue as the bill progresses through the legislative process. As to why this provision was selected over other revenue raisers, a number of observations can be made. For one thing, the section 864(f) election is a provision that surely qualifies as “low-hanging fruit” in the eyes of some policymakers - its repeal is rather straightforward and not much work needs to be done to determine how the absence of the election would interact with other provisions of the Internal Revenue Code. In addition, since the provision just went into effect for the 2021 taxable year, it may be viewed by some as not “taking away” something from taxpayers who have yet to benefit from it. Moreover, it sends a strong signal to business taxpayers that the Democrats have not forgotten about them, and this repeal is perhaps the first shot across the bow with respect to more expansive business tax reforms, particularly for U.S. multinationals.

In any event, the proposed repeal of the section 864(f) election is a strong exhortation for those concerned about potential business tax increases to start paying attention and get engaged now. Importantly, [although early signals were that retroactive tax increases were unlikely to be pursued](#), the repeal of the section 864(f) election is arguably retroactive, suggesting other retroactive tax increases may be on the table. This raises an existential question for the week: If a repeal is effective as of a provision's past effective date, but before tax returns have been filed reflecting taxes calculated under the repealed provision, is the tax increase considered retroactive? #TaxTake

## Upcoming Speaking Engagements and Events

On February 17, Marc and fellow Member [Andrew D. Herman](#) will host [Focus on Corporate PACs – Increased Scrutiny of Contribution Policies and Compliance Issues](#), discussing how corporate PACs are modifying their contribution policies in light of the current political environment and how they can best ensure that they comply fully with their obligations under the Lobbying Disclosure Act and other federal regulations.

Marc and Tax Member [George Hani](#) will present a [Tax Legislative Update](#) to the Tax Executives Institute's Salt Lake City Chapter on February 18.

Join Loren on February 18 for her [Tax Foundation panel](#), The Future of U.S. International Tax Rules.

On March 3, Jorge and Marc will present, Floyd's Panel: Legislative Update, and on March 5, Loren will speak on the International Tax Policy - New Administration, New Direction? panel at the [Federal Bar Association's 45th Annual Tax Law Conference](#).

## In The News

Loren [commented](#) on the proposed repeal of the section 864(f) worldwide interest expense allocation election in *Bloomberg Law*. Ponds noted this could indicate that lawmakers are seeking to pullback other taxpayer provisions in the TCJA. "They [Ways and Means] wanted to signal that they haven't forgotten about multinational taxpayers; it's a bit of a foreshadowing of international tax reforms that we can probably expect to see later this year," Ponds said.

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