Pillar One takes a significant step forward with draft tax treaty, but hurdles remain

The OECD this week took a significant step to advance Pillar One of its ambitious project to update international tax rules, but the plan to reallocate taxing rights still faces an uphill climb, and the Senate's top Republican taxwriter insisted that he is still waiting for Treasury to provide an estimate of the impact of "such sweeping and complex changes to global taxing rights which may have an overwhelmingly disproportionate impact on our companies."

The OECD, which has for several years spearheaded the global tax project involving more than 140 countries, on October 11 released a draft of the multilateral tax treaty it proposes for implementing what is known as Amount A of Pillar One. This element of the agreement would establish a taxing right for market jurisdictions with respect to a defined portion of the residual profits of the largest and most profitable multinational businesses—in short, increasing taxing rights for jurisdictions in which the companies have users and customers. The treaty, known as a multilateral convention (MLC), is not final and is not open for signatures yet. Notes throughout the document identify areas where negotiating countries are still trying to reach agreement.
URL: https://www.oecd.org/tax/beps/multilateral-convention-to-implement-amount-a-of-pillar-one.htm

According to the updated OECD's economic impact assessment published along with the draft treaty, Amount A would have generated $204.6 billion in residual profits in 2021 from 106 multinationals. Low-income countries would experience the greatest revenue gains, the analysis concluded, and, "[b]roadly speaking, Amount A reallocates taxing rights largely from investment hubs towards market jurisdictions (*i.e.*, where [multinationals] have sales or users)." Based on that assessment, investment hubs would have lost between 0.5 percent and 7.9 percent of corporate income tax revenue in 2021 as a result of Amount A and between 0.3 percent to 5.3 percent on average over the 2017-2021 period.
URL: https://www.oecd-ilibrary.org/docserver/7c35a55c-en.pdf

In an October 11 statement responding to the OECD release, Sen. Mike Crapo, R-Idaho, the ranking member of the Senate Finance Committee, said he looks forward to "receiving feedback from our impacted companies on this 800+ page proposal," but added, that "[u]nfortunately—despite repeated requests—Treasury has been unwilling to provide information to determine Pillar One's impact on US companies and revenue." He called on Treasury "to immediately provide that information to Congress."
URL: https://www.finance.senate.gov/ranking-members-news/crapo-congress-still-in-the-dark-on-oecd-pillar-one-global-tax-deal-impact-on-us

Global consensus required

Republican taxwriters have strongly opposed many aspects of the global agreement the Biden administration signed in 2021, but have focused especially on Pillar Two, which would create a global minimum tax. Because Pillar Two does not require global adoption but can be implemented by individual countries, it will have a more immediate impact on US-based companies as jurisdictions plan to begin levying certain new taxes as soon as January 1, 2024.

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Pillar One will need broad global consensus to become reality, and in the US it will need sufficient support in the Senate to implement the MLC—support that currently does not seem to exist. And there are other hurdles around the globe: some of the large developing countries at the table, including Brazil, Colombia, and India, are at odds with corporations over the treatment of withholding taxes and the marketing and distribution safe harbor as currently drafted. These challenges, along with other technical disputes, loom over the fate of Pillar One. OECD tax director Manal Corwin told reporters October 11 that countries are actively trying to resolve their differences on technical issues.

Treasury seeks public comments on MLC

For its part, the US Treasury Department this week announced a request for public comments on the just-released draft MLC.
URL: https://home.treasury.gov/news/press-releases/jy1789

Treasury Assistant Secretary for Tax Policy Lily Batchelder stated in the announcement that the release of the MLC and supporting documents is "a key step forward in the Pillar One negotiations," adding that they "reflect countless hours of discussions, across multiple US administrations, and among hundreds of negotiators." She noted that "Treasury stands behind the negotiations, which have resulted in many difficult compromises by all sides with respect to both the design of the partial reallocation of taxing rights and the elimination of discriminatory digital services taxes and similar measures"; but she added that "Pillar One represents a uniquely significant reform to the international tax system" and [b]ecause of the breadth and complexity of the changes proposed, we view public input as critical to our process—to ensure transparency, to facilitate the resolution of several remaining open issues, and to hear whether the proposed framework would be workable for US taxpayers and other stakeholders."

Written comments are due December 11, 2023, and must be submitted electronically to:
OTP_Pillar1MLC@treasury.gov.
URL: mailto:OTP_Pillar1MLC@treasury.gov

The future of DSTs

A key motivation for the US originally engaging in the OECD project was the promise of new global rules that would end the proliferation of digital services taxes (DSTs) largely impacting US-based tech companies. With taxing jurisdictions from around the globe at the negotiating table and willing to discuss base erosion and profit shifting, reallocation of taxing rights, and a global minimum tax, the US was able to secure a pause on new DSTs through 2023 (or until a new Pillar One multilateral convention came into force, if that occurred sooner).

With the work on Pillar One behind schedule, 138 of the 143 negotiating countries released a statement in July agreeing to extend the current moratorium on DSTs and other similar relevant taxes through 2024, with one important condition: at least 30 jurisdictions accounting for at least 60 percent of the ultimate parent entities of in-scope businesses must sign the multilateral convention before the end of 2023. This condition would appear to indicate that the negotiators expect the US to sign the MLC, given that more than 40 percent of in-

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scope companies reportedly are headquartered in the US. While the prospect of Congress agreeing to implementation of Pillar One in the foreseeable future is dim, the Biden administration could still sign the MLC and then later push for legislative approval.

The July statement also provided for the possibility of a further one-year extension of the moratorium, through the end of 2025, if member countries agree that "sufficient progress has been made by [the end of 2024] towards the entry into force of the MLC."

In his statement this week, the Finance Committee's Mike Crapo said, "While I oppose discriminatory [DSTs] targeting US companies, I also want to ensure that the OECD cure is not worse than the DST disease for US businesses and workers."

This week's draft MLC includes in an appendix a list of nine existing measures that would be subject to removal upon implementation of the treaty, including a DST in France that sparked threats of retaliatory taxes and tariffs by the US in 2019.

Oh, Canada

Among the five countries that did not agree to the July statement extending the DST moratorium was Canada, which has insisted it will move ahead with its plans to impose a DST beginning January 1, 2024, because there is no "firm and binding multilateral timeline to implement Pillar One."

Reiterating points recently made by House taxwriters, Senate Finance Committee Chair Ron Wyden, D-Ore., and ranking member Crapo this week sent a letter to US Trade Representative (USTR) Katherine Tai insisting that she "make clear that [the USTR's] office will immediately respond using available trade tools upon Canada's enactment of any DST." The senators added that USTR would have their "full support" in adopting retaliatory trade measures.
URL: https://www.finance.senate.gov/imo/media/doc/20231010wydencrapolettertoustroncanadadst.pdf

"This is not a matter that warrants extensive new analysis," Wyden and Crapo wrote. "The details and content of this tax are already well known and established. USTR has exhaustively examined nearly identical measures and has convincingly demonstrated why they are discriminatory against the United States." (For prior coverage of comments from House Ways and Means Committee members on Canada's DST, see *Tax News & Views*, Vol. 24, No. 31, Sep. 22, 2023.)
URL: https://dhub.deloitte.com/Newsletters/Tax/2023/TNV/230922_4.html

Tai, US ambassador to Canada David Cohen, and Treasury official Michael Plowgian have all publicly called on Canada to maintain the current DST moratorium while OECD work continues, and Treasury Secretary Janet Yellen has reportedly engaged directly with her Canadian counterpart on the issue.

Canada's DST is a 3 percent tax on the revenue large businesses earn from online marketplaces, social media platforms, the sale and licensing of user data, and online ads. Unless Canada backs down before January 1, 2024—which it currently indicates it will not do—it will begin collecting the tax retroactive to January 1, 2022.

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