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United States Tax Alert
The international tax provisions of the Tax Cuts and Jobs Act – conference agreement

On Friday, December 15, 2017, the conference committee on the Tax Cuts and Jobs Act released its report. With respect to the international tax provisions that differed in the House and Senate versions of the bill, the conferees typically leaned in favor of the Senate version.

The table below summarizes the final shape of key provisions where the House and Senate differed in significant respects. Following the table, we list (1) the House and Senate provisions that were entirely dropped from the bill, (2) Senate-only provisions that were included in the bill more or less unchanged, and (3) provisions included in the conference bill that were essentially the same in the House and Senate bills.

Provision	House Bill (passed House 11/16/2016)	Senate Amendment (passed Senate 12/4/2017)	Conference Agreement (12/15/2017)

Participation exemption (new section 245A)	100% deduction (DRD) for the "foreign-source portion" of dividends received by US corporations after 2017 from "specified 10-percent owned foreign corporations." Shareholder must meet 181-day holding period requirement to qualify.	Similar to House bill, but effective for tax years of foreign corporations beginning after 2017. "Hybrid dividends" denied the DRD. Hybrid dividend received by a CFC generally treated as subpart F income. Length of required holding period increased to 366 days.	Generally follows Senate amendment, but effective for distributions made after 2017.
Transition tax on deferred earnings (revised section 965)	Subpart F income inclusion taxed at effective tax rate of 14% (to extent of cash assets) or 7% (for the remainder) to US shareholder of "specified foreign corporations" (SFCs), based on shareholder's pro rata share of SFCs' "accumulated post-1986 deferred foreign income" as of 11/2/2017 or 12/31/2017 (whichever is larger), net of the US shareholder's pro rata share of post-1986 deficits of SFCs.	Similar to House bill, with higher effective rates: 14.45% (cash) and 7.45% (remainder). Inclusion limited to foreign corporation's income accumulated during periods when the corporation's stock ownership *by US persons* was sufficient to meet SFC definition. Substitutes a 11/9/2017 measurement date for House's 11/2/2017 measurement date.	Similar to Senate bill, with still higher effective rates: 15.5% (cash) and 8% (remainder). Uses House bill's 11/2/2017 measurement date rather than 11/9/2017.
FHRA/ GILTI inclusion (new section 951A)	Requires US shareholder of CFCs to include in gross income 50% of the "foreign high return amount" (FHRA). FHRA is shareholder's pro rata share of the CFCs' "net CFC tested income" to the extent it exceeds a benchmark return (7% plus short-term applicable federal rate) on US shareholder's	Similar to House bill except that the inclusion is 100% of "global intangible low-taxed income" (GILTI), defined similarly to the FHRA, but based on the excess of net CFC tested income over a benchmark return of *10%* on QBAI (not reduced by interest expense). The CFC income "tested" for the GILTI inclusion is generally	Follows Senate amendment, but GILTI is reduced by 10% of QBAI, *less* interest expense. 50% corporate deduction not allowed to RICs and REITs.

	pro rata share of the aggregate tangible depreciable asset basis of all its CFCs (QBAI), minus certain interest expenses. Permits corporate US shareholders an indirect FTC for up to 80% of the CFCs' foreign taxes attributable to the CFCs' tested income.	broader than that tested for the FHRA. Corporate US shareholders generally allowed a deduction (new section 250(a)(1)(B)) of 50% of GILTI (37.5% for tax years beginning after 2025).	
Deduction for Foreign-Derived Intangible Income (FDII) (new section 250(a)(1)(A))	No provision.	Generally allows a domestic corporation a deduction for 37.5% (21.875% for tax years beginning after 2025) of its FDII.	Follows Senate amendment, but FDII deduction not allowed to RICs and REITs.
Excise tax/ base erosion and anti-abuse tax (BEAT) (new section 59A)	Subject to exceptions, generally imposes 20% excise tax on "specified amounts" paid or incurred by a domestic corporation to a foreign corporation that is a member of the same "international financial reporting group" (IFRG).	Imposes tax, on a corporation that is an "applicable taxpayer," equal to the "base erosion minimum tax amount" (BEMTA). BEMTA equals the excess of-- (a) 10% (12.5% for tax years beginning after 2025) of "modified taxable income" (MTI), over (b) regular tax liability reduced by *certain* credits (in years beginning before 2026), and by *all* credits (in subsequent years). For banks and securities dealers, substitute 11% or 13.5% of MTI for 10% or 12.5% of MIT in (a) above. MTI generally is taxable income determined without regard to deductions for certain payments made to certain	Generally follows Senate amendment with modifications: For tax years beginning in 2018, tax based on 5% of MTI rather than 10% of MTI (6% of MTI for banks and securities dealers). Prior to 2026, the credits that do *not* reduce regular tax liability in the formula (and therefore generally *do* reduce the BEAT) include 80% of the low-income housing credit, the renewable electricity production credit, and the energy credit, as well as (consistent with the Senate amendment) 100% of the research credit.

		foreign related persons ("base erosion payments") and a percentage ("base erosion percentage") of the NOL deduction. "Applicable taxpayer" excludes corporations with a base erosion percentage less than 4%. Base erosion payments exclude certain payments pursuant to derivatives.	Base erosion percentage safe harbor reduced from 4% to 3% (2% for banks and securities dealers. For purposes of applying the base erosion payment exclusion for "derivatives," insurance, annuity, and endowment contracts issued by insurance companies will not be considered "derivatives."
Revision of section 163(j)	Rewrites section 163(j) to cap deductions (subject to exceptions for certain businesses) for all "business interest" by reference to 30% of "adjusted taxable income" (ATI), defined similarly to present-law section 163(j)(6)(A). 5-year carryforward of disallowed deductions.	Similar to the House bill, except that the scope of the exemptions is different, and ATI takes depreciation, amortization, and depletion deductions into account (generally *reducing* ATI relative to present law and the House bill, and therefore potentially disallowing more interest deductions). Disallowed deductions carry forward indefinitely.	Generally follows Senate amendment (further modifying the exemptions), except that for tax years beginning before 2022, ATI computed is *without* regard to depreciation, amortization, and depletion deductions.
Denial of deductions involving related parties and hybrids (new section 267A)	No provision.	Denies deduction for any disqualified related-party amount paid pursuant to a hybrid transaction or by, or to, a hybrid entity.	Follows Senate amendment, with an expansion of the Secretary's regulatory authority to apply the provision to *foreign* branches, extending the authority to *domestic* branches and *entities*.
Dispositions of partnership interests by foreign persons	No provision.	Generally codifies Rev. Rul. 91-32 (imposing US tax on a foreign person's gain from the sale or exchange of an	Generally follows Senate amendment, but withholding liability is not effective for dispositions before 2018.

(Rev. Rul. 91-32)		interest in a partnership that is engaged in a US trade or business), effective for dispositions on or after 11/27/2017, and imposes withholding obligations.	

The following Code amendments that were passed by one or both houses of Congress were *eliminated* from the bill by the conference agreement:

- Proposed modifications to existing subpart F rules:
  - Proposal to make section 954(c)(6) "CFC look-thru rule" permanent
  - Proposed repeal of section 956 with respect to corporate US shareholders
  - Proposed inflation adjustment of de minimis exception (section 954(b)(3)) for foreign base company income
- Proposed international group-based limitations on interest deductions (proposed new Code section 163(n))
- Proposed rules for the tax-free repatriation of intangible property (proposed new Code section 966)

The following provisions that were added by the Senate amendment were *included* in the conference agreement:

- Repeal of the "active trade or business" exception (section 367(a)(3)) from the general non-recognition override provision for certain outbound transfers (section 367(a)(1))
- Amend the definition of intangible property (IP) in section 936(h)(3)(B) to include workforce in place, goodwill, and going concern value
- Provide explicit statutory authority for IRS to value IP on an aggregate basis ("aggregate basis valuation"), if doing so would achieve a more reliable result than an asset-by-asset approach, and to determine an arm's-length price by reference to a transaction different from the one actually completed ("realistic alternatives principle")
- Provide separate section 904 limitation "basket" for foreign branch income
- Eliminate the fair market value method for allocating interest expense under section 864(e)

- Modify the stock attribution rules under subpart F, and allow "downward attribution" of stock owned by foreign persons to US persons, effective for a foreign corporation's last tax year beginning before 2018 and each subsequent year
- Expand subpart F definition of "US shareholder" to include a US person who owns 10% or more of the *value* of a foreign corporation

Finally, the following provisions that were passed by both houses were *included* in the conference agreement:

- Repeal section 902 (relating to foreign taxes deemed paid by corporations upon receipt of dividends from foreign corporations)
- Eliminate the "pooling" principle from section 960 (relating to foreign taxes deemed paid by corporations upon receipt of subpart F inclusions)
- Source section 863(b) sales income based solely on place of production
- Repeal section 955 (taxing certain CFC withdrawals of investment in shipping operations)
- Repeal foreign base company oil related income as a type of subpart F income
- Eliminate 30-day requirement for subpart F inclusion
- Restrict the insurance business exception to the PFIC rules

Contacts

If you have any questions or would like additional information on the topics covered in this alert, please email one of the following Deloitte professionals:

Andro Petrosovitch
apetrosovitch@deloitte.com

Katia Tsai
kattsai@deloitte.com

Elitza Dimitrova
edimitrova@deloitte.com

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