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United States Tax Alert
OECD policy note has broad implications for US multinationals

The 127-member OECD Inclusive Framework on Base Erosion and Profit Shifting (BEPS) ("Inclusive Framework") released on January 29, 2019 a policy note (**Addressing the Tax Challenges of the Digitalisation of the Economy**) which describes the ongoing work of the Inclusive Framework focused on redesigning the global international tax architecture in response to rapid changes to business models around the world. The policy note emphasizes that countries have not committed to any specific outcomes and remain free to agree or disagree as the work moves forward. The Inclusive Framework operates on a consensus basis, which generally means all member countries will have to agree to an approach before it can be finalized by the 2020 target date. Achieving this consensus will be challenging, but not impossible.

The Inclusive Framework is expected to release an issue paper providing further details around February 11. In addition to requesting comments on the issue paper, they will hold a two-day public consultation on March 13 and 14. Following the public consultation, the Inclusive Framework will further describe the path forward and will report that in June at the G-20 Finance Ministers' meeting in Japan, with the hope for a final proposal being issued on schedule in 2020.

Two pillars of consensus

Inclusive Framework members have agreed to examine proposals involving two "pillars" which could form the basis for consensus. One pillar addresses nexus and allocation issues focused on giving market jurisdictions greater rights to assert tax nexus and to be allocated a share of a multinational's taxable income. During an OECD webcast that occurred in connection with the issuance of the policy note, OECD officials explained that the concepts to be discussed under the first pillar would be (i) the pre-existing U.K. proposals around significant digital presence and income allocation based on users; (ii) a US proposal to identify valuable marketing intangibles (for all taxpayers) and assign the return on those intangibles to the market jurisdictions; and (iii) a proposal from developing countries focused on a permanent establishment in the case of a "significant economic presence." Importantly, the note indicates that "[i]n all cases, these proposals would lead to solutions that go beyond the arm's length principle. They also go beyond the limitations on taxing rights determined by reference to a physical presence generally accepted as another corner stone of the current rules."

Significantly, the policy note further observes that

> The Inclusive Framework recognises that what is proposed may affect not only a small group of highly digitalised businesses but could affect a much wider group of enterprises with cross border business operations, for instance those with marketing intangible profits but limited risk distribution structures in market jurisdictions. Further technical work on the design considerations of the proposals would be required, taking into consideration potential scope limitations, business line segmentation, profit determination and allocation, as well as nexus and treaty considerations.

According to the policy note, the efforts may include more administrable, simplified approaches to these issues, including the use of withholding taxes. Furthermore, it notes both the importance of avoiding double taxation and the need for effective dispute resolution procedures.

The second pillar would address the continued risk of profit-shifting to entities subject to no or very low taxation through the development of two interrelated rules: an income inclusion rule (similar to the US GILTI rules, although possibly designed on a country-by-country basis) and a tax on base-eroding payments when the country to which the payments are made does not enact its own income inclusion rule.

Considerations for US taxpayers

Taxpayers should be aware that this work, *which will likely affect all businesses with cross-border operations*, requires a great degree of additional technical attention and is moving very quickly. Companies may wish to follow the technical work closely.

Contacts

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