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In this issue:

Inversion guidance imminent, Lew says 1
Congress OKs short-term extension of Internet tax moratorium in government funding measure 3
House re-approves permanent extenders in omnibus jobs bill 4
Finance Committee explores energy policy options under tax reform 6
Senate taxwriters examine policy implications of retirement savings incentives 7
Dbriefs webcast: OECD releases guidance on intangibles, transfer pricing documentation, country-by-country reporting 8

Inversion guidance imminent, Lew says

Treasury Secretary Jacob "Jack" Lew this week reaffirmed the Obama administration's plans to address corporate inversion transactions through the regulatory process and promised that guidance would be released "very, very soon."

Speaking at UCLA on September 17, the Treasury Secretary did not offer a precise timetable for releasing any guidance; nor did he provide specific details on what that guidance might include other than to say that it "will remove a lot of the economic benefits of inversions but it will not close the door." He also acknowledged that in crafting a regulatory response to inversions Treasury was challenged by the fact that "this is a very complicated law and we have limited tools administratively."

After you. No, after *you*...

Lew's remarks largely echoed those he made in a September 8 speech in which he stated his preference for Congress to take legislative action to curb inversions and cautioned that Treasury guidance would not be a "substitute for meaningful legislation."

But Senate Majority Leader Harry Reid, D-Nev., made it clear this week that he was waiting for Treasury to take the first step. Reid told reporters September 16 that the Senate's decision to consider an inversion bill later this year would depend on whether the Obama administration decided to address inversions through executive actions.

"[W]e'll see what the president does, if he does it. And if there's more needed than what he can do administratively, we'll take a look at it in the lame duck of course," Reid said.

Wyden promises bipartisan proposal during lame duck

For his part, Senate Finance Committee Chairman Ron Wyden, D-Ore., told reporters September 16 that he intends to release bipartisan legislation to curb corporate inversion transactions during the lame duck session of Congress to be held after the midterm congressional elections. (The Senate adjourned on September 18 for a final pre-election campaign swing; Democratic leaders have announced that the post-election work session will begin November 12.)

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Wyden had indicated before the August recess that he hoped to unveil bipartisan inversion legislation this month, but more recently he tamped down expectations that the Finance Committee would mark up a bill before leaving Capitol Hill for the midterms. In his remarks to reporters this week, however, Wyden indicated that "a number of" his Senate colleagues, including some conservatives who he did not name, were beginning to perceive the increasing pace of inversion transactions as a potential threat to the tax base and to future tax reform efforts and have signaled that they might be open to pursuing an anti-inversion bill during the lame duck session, possibly in conjunction with legislation to extend expired tax provisions. Wyden noted that he is also exploring ways to move an inversion bill through the Senate without attaching it to extenders legislation.

Details unclear – Just what a bipartisan proposal might look like is not currently known. Since he first announced his intention to address inversions in May, Wyden has sketched out his preferences in relatively broad strokes. In an op-ed published in The Wall Street Journal on May 9, Wyden explained that his proposal would tighten the rules under section 7874 to require a U.S. company that reorganizes in an inversion transaction to ensure that at least 50 percent of its stock is owned by legacy shareholders of the new foreign partner in order to avoid domestic corporation treatment. He also stated that the proposal would be effective for transactions on or after May 8, 2014. In an August 14 news release, Wyden indicated that his legislation would include an earnings-stripping component, which he characterized as "a key piece of any sound solution."
URL: http://www.finance.senate.gov/newsroom/chairman/release/?id=4ed00da0-0be6-4f3d-8619-76bf2981d126

The Hatch factor – The ranking Republican on the Finance Committee, Sen. Orrin Hatch of Utah, has not released a proposal of his own and has stated that he would be willing to consider legislation addressing inversions outside of tax reform only if it (1) serves as a bridge to tax reform, (2) does not take effect retroactively, (3) moves the United States toward a territorial system for taxing domestic multinationals, and (4) is revenue neutral. Hatch recently dismissed the broad anti-inversion legislation introduced in May by Sen. Carl Levin, D-Mich., and the draft earnings-stripping proposal released on September 10 by taxwriter Charles Schumer, D-N.Y., stating that they do not "come close to meeting these four essential criteria" and that they appear to be "driven more by the politics of the moment than by any real desire to improve America's tax climate." (For details on Levin's proposal, see *Tax News & Views*, Vol. 15, No. 20, May 23, 2014; for details on Schumer's draft, see *Tax News & Views*, Vol. 15, No. 31, Sep. 12, 2014.)
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140523_2.html
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140912_1.html

Hatch's stance on retroactivity also could hamper negotiations with Wyden, who so far has not abandoned his preference for a May 8, 2014, effective date.

Senate obstacle course

Whether inversion legislation can move through the Senate during the lame duck session also remains an open question.

Hatch, citing the compressed timeline typical of most post-election work periods, told reporters September 16 that a lame duck session is "not the time to usually do brand new legislation" and that the Senate would be "lucky" to complete work on time-sensitive priorities such as an extenders bill and a continuing resolution to fund government operations.

Further complicating the prospects for action is the fact that if Reid does attempt to bring inversion legislation to the Senate floor, Republicans are likely to mount procedural challenges that could only be overcome by a 60-vote supermajority.

No House action expected

Any significant legislative action on inversions that does take place during the lame duck session is likely to begin and end in the Senate.

House Ways and Means Committee ranking Democrat Sander Levin of Michigan introduced a broad anti-inversion proposal in May (substantially similar to the bill introduced in the Senate by his brother, Sen. Carl Levin) and plans to release a discussion draft of legislation intended to make inversions less attractive by tightening the earnings-stripping rules; but neither proposal is expected to be taken up in the Ways and Means Committee or brought to the House floor this year.

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Ways and Means Committee Chairman Dave Camp, R-Mich., remains adamant that any effort to address inversions should be as a component of comprehensive tax reform. He noted in a recent news release that "[u]ntil we address the root of the problem, we will continue to read regular reports of companies leaving the U.S."
URL: http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=392984

House Speaker John Boehner, R-Ohio, likewise argued in a speech at the American Enterprise Institute in Washington September 18 that inversions are just "a visible symptom" of a dysfunctional tax code. (House Budget Committee Chairman Paul Ryan, R-Ohio, expressed a similar sentiment during a September 18 event sponsored by the Financial Services Roundtable.)

Boehner likened the current legislative proposals on inversions to "fussing over a divot when the road is covered with potholes." By reforming the tax code, "we get rid of one of the biggest reasons jobs go overseas," he said.

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Congress OKs short-term extension of Internet tax moratorium in government funding measure

Congress has approved and President Obama is expected to sign a temporary extension of the current-law moratorium on Internet access taxes as part of a short-term continuing resolution to fund the federal government.

The continuing resolution, which cleared the House on September 17 and the Senate a day later, funds government operations at current levels through December 11. (The current funding agreement expires on October 1.)

Internet Tax Freedom Act

The resolution also extends through December 11 the Internet Tax Freedom Act (ITFA), which imposes a moratorium on Internet access taxes and on multiple and discriminatory taxes on electronic commerce and provides grandfathering protections for Internet access taxes that were levied in certain states before 1998.

The ITFA is currently set to expire on November 1. (The Internet tax moratorium and related grandfathering provisions have been in effect since 1998 and were last extended in 2007.)

Deal for long-term ITFA extension pushed to lame duck

The short-term renewal of the ITFA approved in the continuing resolution gives Congress an opportunity to work out an agreement on a longer-term extension of the Internet tax moratorium during the post-election lame duck session.

The House passed legislation (H.R. 3086) on July 15 that would permanently extend the moratorium on taxes on electronic commerce but allow the grandfathering protections for certain pre-1998 taxes to expire. (For details, see *Tax News & Views*, Vol. 15, No. 27, July 18, 2014.) It also re-approved that measure as part of an omnibus jobs package (H.R. 4) on September 18. (For details on H.R. 4, see related coverage in this issue.)
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140718_4.html

In the Senate, Finance Committee Chairman Ron Wyden, D-Ore., has introduced his own proposal (S. 1431) to make the moratorium permanent and allow the grandfathering protections to sunset, but he has not yet held a committee mark-up. Wyden's efforts to move his bill have been complicated by the introduction of competing legislation (S. 2609) on July 15 that would couple a 10-year extension (through November 1, 2024) of the Internet tax moratorium and the grandfather rules with provisions from the Marketplace Fairness Act that would make it easier for a state to capture sales and use tax revenue from transactions involving online and other "remote" vendors that do not have an in-state physical presence. S. 2609 is sponsored by Finance Committee member Mike Enzi, R-Wyo., and Senate Majority Whip Richard Durbin, D-Ill., among others.

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Wyden opposes the Marketplace Fairness Act and has stated that he wants to keep the Senate debate over the Internet tax moratorium separate from discussions about collecting state and local sales tax on remote transactions. In a September 18 press release issued after the passage of the continuing resolution, Wyden warned against "misguided attempts to tie [the ITFA] to an unrelated and harmful proposal that would turn small businesses into tax collectors for hundreds of different jurisdictions across the country."
URL: http://www.finance.senate.gov/newsroom/chairman/release/?id=d17dc7ac-3ce1-462f-bda8-53bc83a8529c

"Over the next six weeks, I hope that the proponents of the Marketplace Fairness Act will face the facts and admit that they can't achieve their goal by holding the Internet economy hostage, so they'll have to go about it any other way than tying it to ITFA," Wyden said.

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House re-approves permanent extenders in omnibus jobs bill

The House of Representatives voted 253-163 on September 18 to approve an omnibus jobs package that combines several measures the chamber has already passed that would make permanent certain expired tax extenders provisions, repeal certain tax-related provisions of the Patient Protection and Affordable Care Act (PPACA), and permanently extend the current-law moratorium on Internet access taxes.

Extenders

The Jobs for America Act (H.R. 4), which is sponsored by Ways and Means Committee Chairman Dave Camp, R-Mich., repackages several House-approved measures that would permanently extend enhanced versions of certain business tax provisions that expired at the end of 2013, including:

- The research credit (H.R. 4438 – for details, see *Tax News & Views*, Vol. 15, No. 18, May 9, 2014);
  URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140509_1.html
- Bonus depreciation and the election to accelerate alternative minimum tax credits in lieu of additional first-year bonus depreciation (H.R. 4718 – for details, see *Tax News & Views*, Vol. 15, No. 26, July 11, 2014);
  URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140711_2.html
- The reduction in the recognition period for S corporation built-in gains tax and the basis adjustment to stock of S corporations making charitable contributions of property (H.R. 4453 – for details, see *Tax News & Views*, Vol. 15, No. 23, June 13, 2014); and
  URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140613_1.html
- Increased section 179 expensing limits (H.R. 4457 – for details, see *Tax News & Views*, Vol. 15, No. 23, June 13, 2014).
  URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140613_1.html

Patient Protection and Affordable Care Act

The House bill also includes previously approved provisions related to the PPACA that would:

- Repeal the 2 percent medical device excise tax, effective for sales after December 31, 2012, and refund taxes that have already been paid. (The House last approved legislation repealing this tax in 2012. For prior coverage, see *Tax News & Views*, Vol. 13, No. 21, June 8, 2012.)
  URL: http://newsletters.usdbriefs.com/2012/Tax/TNV/120608_1.html
- Define a full-time employee for purposes of the employer mandate as one who works on average 40 hours per week. Section 4980H, which was added to the Internal Revenue Code under the PPACA, defines a full-time employee as an "employee who is employed on average at least 30 hours of service per week." (For prior coverage, see *Tax News & Views*, Vol. 15, No. 15, Apr. 4, 2014.)
  URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140404_4.html

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- Permit an employer to exclude employees who are covered under a health care program administered by the Department of Veterans Affairs or the Department of Defense in determining whether it is subject to the employer mandate. The mandate to provide health insurance generally applies to employers who have more than 50 full-time employees, including full-time equivalents.

Internet tax moratorium

The legislation would permanently extend a provision of the current-law Internet Tax Freedom Act (ITFA) that imposes a moratorium on Internet access taxes and multiple and discriminatory taxes on electronic commerce. It would not, however, extend current-law protections under the ITFA for Internet access taxes that were levied in certain states before October 1998 and grandfathered into the moratorium. (Legislation permanently extending the Internet tax moratorium but allowing the grandfather provisions to expire cleared the House in July. For details, see *Tax News & Views*, Vol. 15, No. 27, July 18, 2014. The ITFA is scheduled to expire on November 1.)
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140718_4.html

JCT score

The Joint Committee on Taxation staff has estimated that the bill would result in a revenue loss of $572.2 billion from 2015-2014.
URL: https://www.jct.gov/publications.html?func=startdown&id=4672

End of the line

House Republican leaders brought the Jobs for America Act to the floor primarily as a "messaging" bill that their GOP colleagues can use on the campaign trail to distinguish themselves from Democratic challengers in advance of the November 4 midterm elections. (The House adjourned September 18 for a final pre-election campaign swing. At press time, House leaders had not announced when the chamber would reconvene to begin the lame duck session.)

The House jobs package is not expected to be taken up in the Democratic-controlled Senate.

Senate leaders, for their part, have been disinclined to consider permanent extensions of expired tax provisions outside of fundamental tax reform and have instead opted to pursue legislation approved by the Finance Committee in April that would retroactively extend for two years most – but not all – of the 55 tax extenders that sunset at the end of 2013. (For details on the Finance Committee bill, see *Tax News & Views*, Vol. 15, No. 15, Apr. 4, 2014.) Although the Finance Committee approved the extenders package on a bipartisan vote, Senate leaders have been unable to bring it to the floor due to a partisan dispute over amendments and the stalemate is unlikely to be resolved until a post-election lame duck session.
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140404_1.html

Finance Committee Chairman Ron Wyden, D-Ore., confirmed to reporters on September 15 that he remains intent on moving the two-year extenders bill he developed with Republican Sen. Orrin Hatch of Utah, the committee's ranking member.

"I am certainly staying put with [a two-year extension] unless Sen. Hatch and our colleagues on committee want to pursue something else, and I see no evidence of that," Wyden said.

Senate Democrats have also routinely rejected previous House attempts to dismantle the PPACA, and this is likely to continue as long as the chamber remains under Democratic control.

There is some bipartisan support in the Senate for a permanent extension of the Internet Tax Freedom Act: indeed, Finance Committee Chairman Wyden has sponsored his own legislation that would make the ITFA permanent. In recent weeks, however, Wyden indicated that a permanent extension was "not a political reality" in the Senate and that he would instead pursue another temporary extension of the ITFA that could serve as a "bridge" to a permanent fix. (Congress this week approved and will send to the president a short-term extension of the ITFA – through December 11 – as part of a continuing resolution to fund government operations. The House and Senate are expected to negotiate a longer-term extension during the post-election lame duck session. For additional details, see separate coverage in this issue.)

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Finance Committee explores energy policy options under tax reform

A Senate Finance Committee hearing September 17 produced little agreement about what a reformed tax code should or should not do to incentivize energy production, but committee leadership did agree that a short-term renewal of energy extenders is necessary.

Leaders weigh in

Chairman Ron Wyden, D-Ore., opened the hearing by emphasizing that the United States must lead the way on energy tax policy, and he offered some guidelines on what he thinks that leadership should look like. Wyden said the tax code should take into account energy sources' costs and benefits, such as energy efficiency, pollution, and sustainability. Congress, he argued, should also get rid of the code's myriad incentives and replace them with a technology-neutral approach to end the disparity in the tax treatment of energy sources.

Ranking member Orrin Hatch, R-Utah, used part of his time to urge Congress to pass so-called extenders legislation as soon as possible because of its importance to energy tax policy. Hatch praised the committee's work on the package but criticized the partisan disagreements that have prevented it from getting a floor vote. The Finance Committee extenders bill would extend most current-law energy incentives through the end of 2015, retroactive to the end of 2013. The committee approved the measure on a bipartisan basis but the bill has not reached the Senate floor for a vote on final passage because of a dispute between Majority Leader Harry Reid, D-Nev., and Republicans in the chamber over the process for offering amendments. (For details on the Finance Committee's extenders package, see *Tax News & Views*, Vol. 15, No. 15, Apr. 4, 2014.)
URL: http://newsletters.usdbriefs.com/2014/Tax/TNV/140404_1.html

"We need to set partisanship and political gamesmanship aside and get the extenders package across the finish line as soon as possible," Hatch said.

Wyden agreed with the importance of renewing extenders quickly.

Policy discussions

As to the subject of the hearing, Hatch said U.S. energy policy should be an "all-of-the-above" approach to encourage as much energy production as possible. He urged caution in using a technology-neutral approach – like the one proposed by former Finance Committee Chairman Max Baucus, D-Mont., in the energy tax reform discussion draft he released last year – saying that it could be biased against fossil fuels and technologies that could make them cleaner. (For details on Baucus's discussion draft, see *Tax News & Views*, Vol. 14, No. 52, Dec. 18, 2013.)
URL: http://newsletters.usdbriefs.com/2013/Tax/TNV/131218_1.html

Hatch also chastised the Obama administration for putting forward costly budget proposals to discourage domestic oil and gas production and for attempting to enact a cap-and-trade system early in the president's first term.

Some of the witnesses backed Hatch's statements, while others were more amenable to the administration's stance. Don Nickles, a former Republican senator and taxwriter from Oklahoma, said that if Congress reformed the code correctly, then energy companies would grow with the rest of the economy without the need for subsidies or penalties. He said that some tax expenditures that encourage investment, like bonus depreciation, should be made permanent; but he was critical of others, like the production tax credit (PTC) for wind energy. That credit, he argued, should be allowed to lapse because the industry had matured and the credit was "overly generous" and market distorting.

However, Ethan Zindler of Bloomberg New Energy Finance defended the PTC and said that if Congress did not extend the credit it would negatively impact the industry and reduce production.

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Carbon tax?

Gilbert Metcalf of Tufts University testified in support of enacting a carbon tax, which he said would align the private and social costs of burning fossil fuel and also provide revenue to reform the code and reduce payroll taxes. Such a tax could raise as much as $100 billion annually in the first few years and would eliminate the need for subsidies for any energy sources, he said. If Congress does not enact a carbon tax, Metcalf said the second-best option would be a technology-neutral incentive system like that proposed by Baucus.

However, David Kreutzer of the Heritage Foundation said a carbon tax would be disastrous for the economy because 85 percent of the energy in the United States is provided by hydrocarbon fuels. Enacting a carbon tax would cost the U.S. a million jobs and reduce the gross domestic product by more than $1 trillion by 2030, he said.

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Senate taxwriters examine policy implications of retirement savings incentives

The Senate Finance Committee held a hearing September 16 to discuss the most effective ways for a reformed tax code to promote retirement savings.

In his opening statement, Chairman Ron Wyden, D-Ore., expressed concern that "the incentives for savings in the tax code are not getting to the people who need them." According to Wyden, a recent study by the Federal Reserve indicated that "an employee with middle-of-the-pack savings has $59,000 set aside for retirement," while a study from the Government Accountability Office (GAO) indicates that 9,000 taxpayers have accumulated individual retirement account balances of $5 million or more.

"Wise investors have every right to use all the tools available to them, and no one should begrudge them their success. But IRAs were never intended to become tax shelter for millionaires – they're designed to help typical Americans save for retirement. As the Finance Committee continues to work on modernizing the tax code, it should take a good look at fixing this issue. With limited resources, it's crucial to use taxpayer dollars wisely," Wyden said.

Finance Committee ranking Republican Orrin Hatch of Utah observed in his opening statement that Congress has acted on a bipartisan basis over the last two decades to make saving for retirement easier for workers and to increase the amounts that workers can contribute to their retirement savings accounts on a tax-preferred basis. But he expressed concern "that there is a political strategy by some in Congress to turn pension policy into…another front in the class warfare that consumes so much energy on some other committees in Congress."

High-income IRAs

A number of taxwriters shared Wyden's concerns over how a relatively small number of high-income taxpayers with traditional IRAs have been able to accumulate balances in the millions of dollars. (According the GAO report Wyden cited, approximately 99 percent of taxpayers had IRA balances under $1 million, while around 600,000 were in excess of that threshold.)

But Brian Reid, chief economist for the Investment Company Institute, told the panel that Congress should build on the strengths and successes of the U.S. retirement system and not eliminate retirement incentives.

"Reducing the incentive for employers to offer plans will lead to fewer employers offering plans," he said in his written testimony. In effect, he argued, the impact of proposals to reduce tax benefits of employer-sponsored defined contribution plans would not be limited to taxpayers in the higher tax brackets. In response to a question from Hatch, Reid suggested that proposals to cap the deduction for retirement plan contributions for high-income taxpayers would likely lead to these taxpayers pulling out of the system altogether.

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Scott Betts of National Benefits Services suggested simplifying and adapting the current rules to enhance retirement coverage. He cited legislation introduced by Hatch in July 2013 as providing numerous sensible reforms. The Secure Annuities for Employee (SAFE) Retirement Act (S. 1270), would "simplify the operation of employer-sponsored retirement plans by eliminating unnecessary paperwork and traps for the unwary, as well as providing new approaches to expand the availability of workplace savings, especially for small business retirement plans," Betts said in his written testimony.

However, John C. Bogle, founder of the Vanguard Group, stressed in his written testimony that "the investor class, those at the very top of the income ladder, need little additional support for their retirement." He explained that for taxpayers at lower income levels, providing tax incentives in the form of credits as opposed to tax deductions would be a wiser policy. An "ideal system for retirement savings," Bogle argued, would include, among other things, Social Security remaining intact in its present form, a single defined contribution plan structure for financially able retirees, and continued tax deferral for retirement savings but with a dollar limitation on aggregate annual contributions and deductible amounts.

Other issues

The hearing also discussed other impediments to retirement savings. Brigitte C. Madrian of Harvard University explained "there are other barriers to saving not addressed by traditional policy solutions," including procrastination, lack of financial literacy, inattention, temptation to spend, and complexity of tax incentives. She suggested tweaking the current tax code to allow employers to offer immediate financial incentives – gift cards, for example – to encourage employees to enroll in company-sponsored retirement savings plans. "The literature on employee behavior suggests that small financial awards are incredibly effective," she explained in response to a question from Sen. Debbie Stabenow, D-Mich.

Sen. Charles Grassley, R-Iowa, asked Reid whether it would be more effective for Congress to consolidate retirement accounts, as Ways and Means Chairman Dave Camp, R-Mich., proposed in the comprehensive tax reform plan he released in February, or if lawmakers should give employers more options.

Reid stated that he supported simplification but feared that narrowing the tax incentives could make it more difficult for small employers to offer plans. He stated in his written testimony that he generally supported proposals that enhanced and broadened the scope of retirement tax incentives.

— Victoria Glover
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Dbriefs webcast: OECD releases guidance on intangibles, transfer pricing documentation, country-by-country reporting

As expected, the Organization for Economic Cooperation and Development (OECD) on September 16 issued the first seven deliverables under the Base Erosion and Profit Shifting (BEPS) Action Plan that had been endorsed by G20 leaders in September 2013. The deliverables include a revised Chapter V of the OECD's transfer pricing guidelines on documentation and country-by-country reporting, a revised Chapter VI on intangibles, and related changes to Chapter I.
URL: http://www2.deloitte.com/global/en/pages/tax/articles/base-erosion-and-profit-shifting-beps.html?id=us:em:na:tnv:eng:tax:091914

Deloitte will host a 90-minute special edition Dbriefs webcast at 11:00 a.m. (Eastern time) on September 24 to discuss the OECD's newly released transfer pricing guidance. (See webcast details and register now.)
URL: http://www.deloitte.com/view/en_US/us/Insights/Browse-by-Content-Type/dbriefs-webcasts/4a5f39b27ed58410VgnVCM2000003356f70aRCRD.htm?id=us:em:na:tnv:eng:tax:091914

Deloitte's transfer pricing practice is also preparing in-depth analyses of the new transfer pricing guidance, which it will release as a special issue of its newsletter, *Arm's Length Standard*, on September 22. If you would like to receive a copy of Deloitte's analysis and are not already a subscriber, please subscribe today.
URL: http://www2.deloitte.com/global/en/pages/tax/articles/arms-length-standard.html
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