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## US exits multilateral consensus talks on digital services taxes

In a move that shook up international tax negotiations and prompted at least one country to renew commitments to unilaterally taxing tech giants, Treasury Secretary Steven Mnuchin this week called for a suspension of talks at the Organisation for Economic Co-operation and Development (OECD) aimed at reaching a global consensus on how to tax the digitalized economy.

In a letter sent to the finance ministers of France, Italy, Spain and the UK, Mnuchin said that the discussions – which focused on the tax treatment of companies able to profit in markets without necessarily having a physical presence – had reached an "impasse" and that "the US does not believe 2020 is a suitable time to be conducting such negotiations" because of the ongoing public health crisis and economic challenges.
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200619_1_suppA.pdf

"The amounts involved with Pillar One and digital services taxes are modest compared with the economic challenges facing the world's economies," the letter reads. "Attempting to rush such difficult negotiations is a distraction from far more important matters."

The letter was sent June 12, but news of it was only revealed by the *Financial Times* on June 17. Congressional taxwriters and leaders were not notified of Mnuchin's actions in advance, and Treasury has declined to release a response it received June 18 from the four finance ministers. Treasury's only public comment on reports of Mnuchin's letter – which it did not formally release – was a brief statement noting that "[t]he United States has suggested a pause in the OECD talks on international taxation while governments around the world focus on responding to the COVID-19 pandemic and safely reopening economies."

The US letter reportedly followed a proposal by the four European states to "phase in" new international tax rules that have been under discussion – known as Pillar One – with digital businesses being impacted in the initial phase. (The current public proposal would apply to both digital businesses and consumer-facing companies, but many of the details are still being negotiated.) Mnuchin said in his letter that the US is "unable to agree, even on an interim basis, on changes to fundamental rules to tax more heavily only a limited group of predominately US-based companies."

He called for Pillar One talks to be suspended until "later this year" and reiterated prior US threats to retaliate if the four countries to whom the letter was addressed continue to implement their own digital services taxes (DSTs). (France's DST went into effect last fall, but collection has been suspended since January. The UK and Italy implemented their respective taxes earlier this year, but the first payments are not due until 2021. Spain's tax has been proposed but is not yet law.)

News of the letter broke while US Trade Representative (USTR) Robert Lighthizer was testifying before the House Ways and Means Committee hearing on the administration's trade policy agenda. When Rep. Don Beyer, D-Va., asked him about it, Lighthizer said, "We have a situation where a variety of countries have decided that…the easiest way to raise revenue is to tax somebody else's companies, and they happen…to be ours. And they're also in a position where this is like a leading US industry, this whole digital trade area. So it's a sweet spot, it's easy for them."

At a similar hearing later in the day at the Senate Finance Committee, Lighthizer said, "Unfortunately, the other countries are completely dug in on this. We have to show our strength, and what the secretary said is, 'If you all think you're going to get a consensus around taxing our companies unfairly, we're not going to be a part of it.'"

Tensions between the US and many of its negotiating partners were already running high, recently furthered by the opening of USTR investigations into the proposed or enacted DSTs of nine countries plus the EU. (For prior coverage, see *Tax News & Views*, Vol. 21, No. 30, June 5, 2020.) A similar investigation into France's 3 percent DST last year resulted in USTR finding that the tax was discriminatory towards US companies and threatening 100 percent tariffs on a wide array of French imports to the US. France agreed in January to suspend collection of its DST until the end of 2020 in hopes of reaching a global agreement at the OECD (see *Tax News & Views*, Vol. 21, No. 3, Jan. 24, 2020), but French Finance Minister Bruno Le Maire on June 18 described Mnuchin's letter as a "provocation" for everyone who was negotiating in good faith and told a French radio station, "There will indeed be, as I have always promised, a digital tax in 2020 in France."
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200605_4.html
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200124_1.html

"We were inches away from an agreement on digital taxation at a time when the digital giants are the only ones in the world to have benefited immensely from the coronavirus crisis," Le Maire said, repeating an argument he has made in recent months about what he has deemed to be technology companies profiting during the near-shutdown of many brick-and-mortar business during the global pandemic.

Le Maire said the joint response to Mnuchin's letter reiterated the European countries' position in favor of an international agreement on "fair taxation of digital giants" as soon as possible.

"The speed of the response shows the conviction of the states that signed it," he said.

Paolo Gentiloni, the European Union's (EU) economic commissioner, added the support of the broader EU June 18, tweeting, "We need a digital tax adapted to the reality of the new century. If the American stop makes it impossible, the European Commission will put a new European proposal on the table."

(In 2018, the EU considered a proposed directive for an interim DST and a longer-term measure to revise permanent establishment rules, but it did not receive the unanimous agreement required within the trading bloc and was set aside.)

Especially in the wake of the global pandemic and economic crisis, as countries look for new revenue sources, there is broad concern in the business community that there will be an even greater proliferation of unilateral digital taxes and that some – like one recently expanded in India – will go beyond the scope of the European DSTs to target virtually all e-commerce.

“It’s a natural inclination to tax somebody else’s citizens if you can do it, because there’s no political price for it,” Lighthizer said at this week’s Finance hearing.

**A more narrow path forward?**

Mnuchin’s letter encouraged the continuation of talks at the OECD on Pillar Two (a global minimum tax), saying that the countries “are much closer to an agreement” on that front and should be able to conclude those negotiations this year. However, while a minimum tax could be implemented individually by countries and does not necessarily require global consensus, it is unclear if the political agreement will exist for work to continue on Pillar Two without Pillar One.

Angel Gurría, the Secretary General of the OECD, on June 18 released a statement vowing to move forward and warning of the unilateral actions and potential trade war likely without a global solution.

“All members of the Inclusive Framework should remain engaged in the negotiation towards the goal of reaching a global solution by year end, drawing on all the technical work that has been done during the last three years, including throughout the COVID-19 crisis,” Gurría said. “Absent a multilateral solution, more countries will take unilateral measures and those that have them already may no longer continue to hold them back. This, in turn, would trigger tax disputes and, inevitably, heightened trade tensions. A trade war, especially at this point in time, where the world economy is going through a historical downturn, would hurt the economy, jobs, and confidence even further. A multilateral solution based on the work of the 137 members of the Inclusive Framework…at the OECD is clearly the best way forward.”

Gurría also said the OECD will maintain its schedule of meetings “to offer all members of the Inclusive Framework a place in the design of a multilateral approach.” The steering group met virtually June 15-17, and it still has the goals – considered highly ambitious even before this week’s events – of policy agreement by October and political agreement by the end of 2020.

**Congressional response**

During the Finance Committee’s June 18 hearing, ranking Democrat Ron Wyden of Oregon characterized the administration’s decision to step away from the OECD talks as akin to saying, “Hey, we’re just walking out of here; we’re not going to do anything about the process.” According to Wyden, the DSTs that are likely to proliferate without a global agreement would hit US technology companies “like a wrecking ball.”

However, in a joint statement with Chairman Charles Grassley, R-Iowa, later in the day, Wyden joined in encouraging negotiating countries at the OECD “to continue working toward an agreement on a more realistic timeline given the COVID-19 crisis.”
**URL:** https://www.finance.senate.gov/chairmans-news/grassley-wyden-joint-statement-on-oecd-digital-economy-tax-negotiations

“We support Treasury continuing to negotiate on these important issues and urge the Inclusive Framework to find areas of consensus that do not unfairly target and discriminate against US companies,” Grassley and Wyden said.

In a statement released June 17, Rep. Kevin Brady, R-Texas, the ranking member of the House Ways and Means Committee, supported Mnuchin’s pushback on “a punitive new tax on mainly US companies” that would erode the US tax base and said, “Members of Congress will continue working with the administration to ensure that the OECD is realistic and open to our ideas on how to move forward. It would be a mistake for European governments to impose taxes unilaterally that target American companies.”
**URL:** https://gop-waysandmeans.house.gov/brady-mnuchin-is-right-now-is-not-the-time-for-countries-to-impose-new-digital-taxes/

Brady told reporters, “European countries really precipitated this issue by moving unilaterally, and it could be a huge mistake for them to continue in that direction.”

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## Ways and Means panel divided over economic recovery prescription for workers and families

Debate over the best way to help workers and families emerge from the economic recession induced by the coronavirus pandemic broke along party lines during a House Ways and Means Select Revenue Measures Subcommittee hearing on June 18, with Democrats touting direct payments and an expansion of refundable tax credits to cushion the blow of lost wages and Republicans promoting incentives to reopen the economy and get individuals back to work.

**Direct assistance, refundable tax credits**

Subcommittee Chairman Mike Thompson, D-Calif., contended in his opening statement that "the pre-pandemic prosperity never reached millions of American workers and families" and the current recession has left them "facing financial catastrophe." The Republican-controlled Senate, he said, should take up and pass The Heroes Act (H.R.6800), the $3 trillion-plus coronavirus response package that cleared the House in May that would, among other things, authorize a new – and significantly expanded – round of economic recovery payments; enhance the earned income tax credit, the child tax credit, and the child and dependent care assistance tax credit; and make the child tax credit and child and dependent care assistance credit fully refundable for 2020. (For prior coverage, see *Tax News & Views*, Vol. 21, No 27, May 15, 2020.)
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200515_1.html

Thompson asked witness Indivar Dutta-Gupta – a former Ways and Means Committee staff member who now is with the Georgetown Center on Poverty and Inequality at the Georgetown University Law Center – to comment on what the current recession has revealed about the level of economic security among middle- and working-class families.

Dutta-Gupta replied that the pandemic and the resulting recession exposed the economic fragility of less affluent households, noting that in many cases families are not in a position to handle an emergency expense of even a few hundred dollars. Policy changes such as expanding the earned income tax credit, providing additional funding for child care, and increasing the minimum wage can work together to help families weather future economic crises, he said.

Taxwriter Linda Sanchez, D-Calif., asked witnesses how Congress can target tax policy to assist family caregivers.

Amy Matsui of the National Women's Law Center replied that the most effective approach would be to expand refundable tax credits – similar to what has been proposed in The Heroes Act – and couple that relief with additional investments in child care funding and paid family leave.

Subcommittee member Don Beyer, D-Va., suggested that Congress should be taking a longer-term view of the economy as it contemplates the next stimulus package.

Dutta-Gupta – who in his opening statement said that the economic responses to the coronavirus that have been enacted thus far amount to a "down payment" and that future relief should be "substantial and sustained" – agreed with Beyer that lawmakers should look beyond "temporary, targeted, and timely responses" and instead think about "how we can lay the foundation for a much stronger economy."

"Do we want to build the same sort of structure or do we want to build a new one?" he asked.

**Keeping businesses' door open**

On the GOP side, ranking member Adrian Smith of Nebraska commented in his opening statement that the pre-pandemic economy was "on incredibly strong footing" – in part due to the 2017 GOP tax code overhaul known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97) – and that the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-36) enacted in March has been largely successful in addressing the downturn resulting from the pandemic. He acknowledged that "more help may be needed" but argued that Congress should focus on "explor[ing] additional ideas to help businesses maintain liquidity during these trying times, which will help them keep their doors open and employees on the payroll as we resume our economy." He specifically endorsed proposals to increase research and development incentives and permanently extend 100 percent bonus depreciation.

Kyle Pomerleau of the American Enterprise Institute, the GOP's sole invited witness, noted during an exchange with Smith that a number of the business-focused provisions in the CARES Act such as the deferral of employer-side payroll tax payments provide direct benefits to individuals since they are aimed at helping businesses to keep employees on the payroll.

Republican subcommittee member Tom Rice of South Carolina asked whether additional stimulus payments or incentives to get people back to work would be more effective at alleviating economic distress for individuals.

Pomerleau explained that policy decisions would have to be dictated by what happens with the coronavirus. If people feel that it's safe for businesses to reopen, then back-to-work incentives would be preferable. If the virus remains a widespread threat, then direct assistance payments might be a more appropriate course of action.

GOP taxwriter Dave Schweikert of Arizona asked Pomerleau what tax policies would be most effective at helping individuals and promoting economic expansion.

Pomerleau reiterated that another round of stimulus payments for individuals would be appropriate if the economic downturn continues. For businesses, he said that Congress could consider extending the CARES Act provisions that loosened restrictions on net operating loss carrybacks and relaxed the limitation on the deduction for business interest expenses, as well as certain TCJA provisions – such as 100 percent bonus depreciation and expensing of intellectual property investments – that are scheduled to expire or phase out after 2022.

He cautioned, though, that "we should be modest about the impact that tax policy can have at a time like this. …In tax policy, whether it's for economic growth or anything [else], there's no silver bullet."

**Contours of potential 'phase 4' bill still in flux**

Even as House taxwriters used the Select Revenue Measures Subcommittee hearing as a platform to push some of their favored policies, Congress as a whole made little apparent progress this week in determining the scope and contours of a potential "phase 4" coronavirus relief bill (outside of, on the tax side, some continued bipartisan rumblings related to expanding the employee retention tax credit, and talk among Republicans about offering some type of "back to work bonus" potentially working in lieu of, or in concert with, enhanced federal unemployment benefits).

Still, most observers continue to believe that a confluence of factors – especially, Congress's usual departure from Washington for its August recess and the scheduled expiration at the end of July of the extra $600-per-week unemployment insurance benefit funded by the federal government – will force action on some sort of coronavirus-related legislation during July, though the cramped schedule and the large number of complex areas of disagreement all pose challenges for lawmakers working towards a deal.

Moreover, because the White House is said to favor waiting until after July 4 to begin negotiations with Democrats in earnest – a timeline National Economic Council Director Larry Kudlow mentioned during a television interview earlier this month – the window for talks will be narrow.

Part of the White House's calculation on timing may relate to the expected July 3 release of the June unemployment report from the Labor Department's Bureau of Labor Statistics. The results of that report, in tandem with the May unemployment numbers – which showed stronger-than-expected headline numbers on job gains and the unemployment rate – will undoubtedly influence the debate among policymakers.

**Size still unclear:** Against that backdrop, the size of any forthcoming deal also remains difficult to project, though in general it seems to be bounded on the upper end by the House-passed Heroes Act – which, according to the nonpartisan Congressional Budget Office, would swell the federal deficit by more than $3.4 trillion over the next decade – and on the lower end by the $1 trillion figure previously put forward by Senate Majority Leader Mitch McConnell, R-Ky.

White House trade adviser Peter Navarro, meanwhile, noted in a June 12 Fox Business television interview that President Trump would prefer a deal substantially larger than what Sen. McConnell has suggested.

"The president is very interested in something on the order of at least $2 trillion," Navarro said.

**White House reportedly considering large-scale infrastructure plan:** Adding to the uncertainty over the phase 4 discussions, a June 16 Bloomberg News report indicated that the White House is preparing a $1 trillion infrastructure proposal that it hopes to move before the November election. That news appeared to catch some Senate GOP lawmakers by surprise, in no small part because the upper chamber is already struggling to coalesce around a more traditional five-year reauthorization of the Highway Trust Fund that is estimated to cost about $287 billion and which would require lawmakers (due to a perennial shortfall in projected gas tax revenues) to identify roughly $90 billion in budget offsets.

The Senate bill, the America's Transportation Infrastructure Act (ATIA), was reported by the Senate Environment and Public Works Committee in July of 2019 and represents a not-insignificant 27 percent increase in total funding compared to the current highway bill. Absent congressional action to reauthorize the trust fund, federal highway and transit spending will lapse on October 1, 2020.

The Senate Finance Committee would likely be charged with developing policies to pay for a significant portion, if not all, of the ATIA's funding shortfall.

"It's already been passed out of committee, the question is how to pay for it," Senate Finance Committee member Rob Portman, R-Ohio, said on June 16.

Speaking of the administration's reported plan, Senate taxwriter Pat Toomey, R-Pa., called it a "very heavy lift" while Portman noted the $1 trillion figure "may be a little rich."

For her part, Sen. Lisa Murkowski, R-Alaska, noted June 16 that there were still a number of unanswered questions – both as to policy and process – that must be overcome before the administration's plan could advance through Congress.

"The question is, 'What does it look like? Where do we put it? Is it something within the next [COVID-19] relief? Is it a stand-alone?" she said.

Across the Capitol, the House Transportation and Infrastructure Committee this week reported its own $500 billion reauthorization that Republicans have largely dismissed. (For prior coverage of the House bill, see *Tax News & Views*, Vol. 21, No. 30, June 5, 2020.) Democrats are planning to merge proposals from several committees into a single, $1.5 trillion package which, according to a fact sheet released by Ways and Means Committee Chairman Richard Neal, D-Mass., will include proposals to expand the new markets tax credit and make it permanent, expand the historic tax credit and the low-income housing tax credit, and reinstate Build America Bonds and Advance Refunding Bonds. (Aside from the bond provisions, the plan in its current form does not appear to include a significant revenue title.)
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/200605_3.html
**URL:**
https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Fact%20sheet%20HR%202%20Moving%20Forward%20Act%20.pdf

**Coronavirus guidance and resources**

In other developments, this week saw the release of new guidance and forms related to the Paycheck Protection Program (PPP), relief for taxpayers who have been unable to complete certain time-sensitive new markets tax credit transactions due to business disruptions related to the coronavirus, and guidance addressing CARES Act provisions that relax the rules for retirement account withdrawals and plan loans to cover emergency expenses resulting from the pandemic.

**Paycheck Protection Program:** The Small Business Administration this week released revised regulations and several new forms under the PPP that reflect recent legislative changes enacted in the Paycheck Protection Program Flexibility Act (P.L. 116-142), including:

- Revised interim final rules that, among other things, establish the compensation caps for loan forgiveness under the 8-week covered period in effect for the PPP as originally enacted in the CARES Act in March and the 24-week covered period established in the Paycheck Protection Program Flexibility Act. (Under the new law, which was enacted on June 5, borrowers who received PPP loans under the earlier rules retain the option to use an 8-week covered period.)
  **URL:** https://home.treasury.gov/system/files/136/PPP-IFR--Revisions-to-the-Third-and-Sixth-Interim-Final-Rules.pdf
- An updated borrower application form and lender application form;
  **URL:** https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Revised-June-12-2020.pdf
  **URL:** https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Revised-June-12-2020.pdf
- An updated loan forgiveness application and instructions; and
  **URL:** https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf
  URL: https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Instructions_1_0.pdf
- A new "EZ" loan forgiveness application and instructions intended to simplify the loan forgiveness process for smaller businesses participating in the program.
  **URL:** https://home.treasury.gov/system/files/136/PPP-Forgiveness-Application-3508EZ.pdf
  **URL:** https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-EZ-Instructions.pdf

**New markets tax credit transactions:** The IRS on June 12 released Notice 2020-49, which provides community development entities and qualified active low-income community businesses that are affected by the coronavirus pandemic additional time to complete certain new markets tax credit transactions that are due to be performed between April 1, 2020, and December 31, 2020, to satisfy the requirements under section 45D and its regulations. Under the guidance, these entities now have until December 31, 2020, to invest cash received in a qualified low-income community investment (QLICI), reinvest certain amounts of cash or payment in a QLICI, and expend certain amounts for the construction of real property.
**URL:** https://www.irs.gov/pub/irs-drop/n-20-49.pdf

**Retirement plan distributions and loans:** The IRS on June 19 released Notice 2020-50, which provides guidance on who is a "qualified individual" for purposes of coronavirus-related retirement account distributions and plan loans. It also explains how plans may report these distributions and how account holders and plan participants may report them on their individual federal income tax returns.
**URL:** https://www.irs.gov/pub/irs-drop/n-20-50.pdf

**Find out more:** A running list of guidance and other resources that address significant tax issues stemming from the pandemic is available from Deloitte Tax LLP.
**URL:** https://newsletters.usdbriefs.com/2020/Tax/TNV/Stimulus-Resource-Table.pdf

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## Guidance on business interest limitation, GILTI high-tax exception reaches OIRA

The Office of Information and Regulatory Affairs (OIRA) indicated in updates on its website this week that guidance on the limitation on the deduction for business interest expense under section 163(j) and on the high-tax income exception under the global intangible low-taxed income (GILTI) rules has been submitted for review by the Treasury Department.

OIRA is part of the White House Office of Management and Budget. Its review of a regulatory project is one of the final actions taken before the guidance is released to the public.

**Business interest expense**

Final and proposed regulations on the limitation on the deduction for business interest expense under section 163(j), which were submitted on June 15, are making their second trip through OIRA. Earlier this year, OIRA completed its review of proposed and final rules reflecting changes to the section 163(j) limitation enacted in the 2017 tax code overhaul informally known as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97); but Treasury delayed the release of

those regulations largely in light of temporary changes to the TCJA provisions enacted in March in the Coronavirus Aid, Recovery, and Economic Security (CARES) Act (P.L. 116-36).
**URL:** https://www.reginfo.gov/public/do/eoDetails?rrid=130708
**URL:** https://www.reginfo.gov/public/do/eoDetails?rrid=130709

The section 163(j) limitation under TCJA generally capped the deduction for business interest expense at the sum of (1) the taxpayer's business interest income; (2) 30 percent of the taxpayer's adjusted taxable income (ATI); and (3) the taxpayer's floor plan financing interest expense for the taxable year.

The CARES Act relaxed that limitation by increasing the 30 percent of ATI threshold to 50 percent for taxable years beginning in 2019 and 2020 and allowing taxpayers to elect to use their 2019 ATI as their ATI in 2020. Special partnership rules also apply.

**GILTI high-tax income exception**

Also arriving at OIRA this week are final regulations on the GILTI high-tax exclusion and proposed rules under section 954(b)(4) (addressing high-taxed subpart F income) and section 964 (determining the earnings and profits of a foreign corporation).
**URL:** https://www.reginfo.gov/public/do/eoDetails?rrid=130716
**URL:** https://www.reginfo.gov/public/do/eoDetails?rrid=130717

The GILTI rules, which were enacted as part of the TCJA's anti-base-erosion regime, generally require a US shareholder of a controlled foreign corporation to include its GILTI in gross income. GILTI is determined based on complex calculations and deductions, and the TCJA provides, among other things, that gross income excluded from foreign base company income or insurance income by reason of the high-tax exception under section 954(b)(4) is not taken into account in calculating "tested income" for purposes of determining GILTI.

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