THE OECD BEPS PROJECT, PART III: THE IMPACT OF BEPS IN THE UNITED STATES

This article is the third in our current three part series discussing various impacts of the Organisation for Economic Co-operation and Development's (OECD's) efforts to address the perceived global tax problem of base erosion and profit shifting (BEPS). The first article provided an overview of the key aspects of the OECD's BEPS efforts and an analysis of the current political environment in which those efforts are being shaped. The second article provided an overview of various legislative and regulatory measures that individual countries are developing and implementing to address BEPS while remaining aligned with developing international norms.

This third article will discuss how the OECD's BEPS efforts are affecting international tax reform in the United States and how global decisions on BEPS are shaping US tax policy. Specifically, this article will address: (1) ongoing collaboration between the OECD and the United States on BEPS implementation; (2) the current framework for international tax reform in the US; and (3) the prospects for achieving reforms of the US international system of taxation.

BEPS Implementation in the United States

In June 2015, G-7 leaders (i.e., finance ministers and central bank governors from Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States) met in Germany to renew the commitment they made as members of the G20 to develop a "feasible" BEPS proposal. A statement released by this group gave the following insight:

> We are committed to achieving a fair and modern international tax system which is essential to fairness and prosperity for all. We therefore reaffirm our commitment to finalize concrete and feasible recommendations for the G20/OECD Base Erosion and Profit Shifting (BEPS) Action Plan by the end of this year. Going forward, it will be crucial to ensure its effective implementation, and we encourage the G20 and the OECD to establish a targeted monitoring process to that end. We commit to strongly promoting automatic exchange of information on cross-border tax rulings. Moreover, we look forward to the rapid implementation of the new single global standard for automatic exchange of information by the end of 2017 or 2018, including by all financial centres subject to completing necessary legislative procedures. We also urge jurisdictions that have not yet, or not adequately, implemented the international standard for the exchange of information on request to do so expeditiously.

More recently, and despite a commitment by the Obama Administration that the US will continue working with the OECD on BEPS issues, Robert Stack, US Treasury Deputy Assistant Secretary for International Tax Affairs and the US Delegate to the OECD's Committee on Fiscal Affairs, noted that "the US is extremely disappointed in the output, and our collective failure in the BEPS project to do more, and to do better work than we have done." According to former House Ways and Means Committee Chairman Camp, however, the OECD's aggressive timeline for moving forward with its BEPS efforts *may* actually be part of the problem:

> [T]he risk inherent in this trend is that as soon as one country goes ahead on the OECD consensus process, others are spurred to action, not wanting to be left behind. And as a result, the danger of global tax chaos marked by the massive reemergence of double taxation, which the OECD action plan itself warned, may have markedly increased.

US tax-writers have expressed similar concerns. In fact, following a recent OECD conference to further discussions surrounding their BEPS efforts, Senate Finance Committee Chairman Orrin Hatch (R-UT) and House Ways and Means Committee Chairman Paul Ryan (R-WI) sent a letter to Treasury Secretary Jack Lew noting that they "have been monitoring, and continue to monitor, the BEPS project, and…understand the significance it carries in the global community and its potential impact on US workers and their multinational employers." Having already expressed concerns about the privacy issues raised with the automatic exchange of information with other countries' tax authorities, Chairmen Hatch and Ryan requested "that, before finalizing any decisions, the Treasury Department and IRS provide the tax-writing committees with a legal memorandum detailing its authority for requesting and collecting this [country-by-country] information from certain US multinationals and master file information from US subsidiaries of foreign multinationals."

Earlier this year Treasury representative Brian Jenn indicated that the US intends to meet the OECD's target dates for implementation of country-by-country reporting, specifically forms will be due in 2017 with respect to tax years beginning in 2016. So, the pressure from Congress to ensure shared information is secure and that US BEPS implementation is a collaborative process between the Administration and Congress could run up against pressing time constraints.

More recently, frustrated that the process is being done "behind closed doors" and wary of proposals that would require US businesses to report more detailed information to foreign governments, Chairman Hatch again emphasized that Congress "must play a significant role" in the OECD BEPS Project and would likely need to approve any such proposals before they could take effect in the US.

US Framework for International Tax Reform

In an upcoming G-20 Summit scheduled for November, leaders of G-20 nations will discuss the BEPS Project and related recommendations for tax reform, including proposals that would generally allow member countries to collect more tax revenues from multinational corporations. In light of this upcoming summit and the pace of the OECD's work thus far, Chairman Ryan has underscored that these OECD's international tax reform efforts "add[ ] pressure to the situation…Everybody is worried about an international grab of the tax base. It is a worldwide concern." As such, it is clear the pressing need felt by many in Congress and elsewhere to enact a US international tax reform legislation is in part being driven by the OECD's BEPS Project.

In fact, as Representative Pat Tiberi (R-OH) recently suggested, the OECD's BEPS Project draft recommendations appear to have supplanted concerns over funding the Highway Trust Fund as the biggest driver for tax reform. With pressure both from fellow lawmakers and the business community to take action – and soon – Chairmen Ryan and Hatch have made their position clear that the BEPS Project will not delay US tax reform efforts. Moreover, according to senior Republican tax-writer Kevin Brady (R-TX), "[i]t's important we not allow other countries to dictate the tax climate, especially in ways that hurts our companies' competitiveness and drives them overseas. It's very much on our radar." In addition, Senate Finance Committee member Dan Coats (R-IN) underscored that "[i]f OECD is recommending things that put us at a disadvantage, we ought to examine that. We are not captive to what OECD thinks is the best thing to do." Ironically, this last sentiment is the same as that expressed by countries like the United Kingdom and Australia, which have implemented or discussed at length their own BEPS-related reform measures outside of what has been agreed to as part of the OECD's BEPS Project, and which have been criticized by participants in the OECD BEPS Project, including the United States.

Still, to help alleviate concerns and protect an already shrinking US tax base, tax-writers in both the House and Senate have begun to develop proposals that would fit into the OECD's broad tax reform efforts (e.g., developing "patent boxes"). To see the influence of these efforts, one need look no further than the Senate Finance Committee's International Tax Reform Working Group, which on July 8 released a report to help "spur congressional [ ] tax reform efforts" this Congress. The report discussed various topics, including: (1) ending the "lock-out" effect; (2) creating an "innovation box" regime; (3) preserving the base; (4) implementing a deemed repatriation tax on existing earnings as part of an effort to move to a hybrid territorial system of taxation; (5) expanding interest expense limitations; (6) enhancing foreign investment in US property; and (7) addressing individual international tax issues. Specifically, the report recognizes that "[i]f policymakers fail to implement new rules in a timely fashion to combat overseas action, BEPS-related and unilateral actions around the globe will undoubtedly result in far more taxes paid into foreign coffers by US multinational companies, with a corresponding revenue and job loss here in the United States." Although the report addressed many international tax areas in which reform would be beneficial, the details on what that reform would look like were extremely sparse giving an indication of the difficulty this bi-partisan group had in agreeing on specifics. Our in-depth analysis of the report is available online.

So far this Congress, House tax-writers have not released any specific international tax reform proposal, though Chairman Ryan and House leadership have made clear they intend to pursue international tax reform and it is understood that members of the House Ways and Means Committee staff consulted with representatives of Senators Rob Portman (R-OH) and Chuck Schumer (D-NY) with respect to their recently released international tax reform proposals. Moreover, Chairman Ryan, senior Ways and Means Committee member Charles Boustany (R-LA), and other Committee members and staff are hard at work figuring out how to revamp the international tax provisions in the Internal Revenue Code. With regard to international reform generally, Representative Boustany – who recently released draft legislative language of an innovation box proposal (more on that below) – has indicated that he has "a sense of urgency about [international tax reform]." However, for a more comprehensive approach to reform of the Federal tax system as a whole, Representative Boustany has suggested that Congress is unlikely to move until 2017 or even 2018. As such, he proposed that comprehensive tax reform is most achievable through a two-phase approach: international tax reform now, with more comprehensive reforms to corporate/business and individual tax provisions to be addressed later.

Prospects for International Tax Reform

Despite lawmakers' considerable efforts this Congress, comprehensive tax reform (i.e., reform of both the US individual and corporate income tax laws) is largely considered to be off the table until after the 2016 elections, as Republicans and Democrats are simply too far apart on individual tax reform to come to an agreement at this time. While there has been a push to accomplish business-only tax reform earlier this year, this also looks unlikely, as lawmakers have been unable to come up with a solution that adequately addresses concerns of the small business community. This leaves the focus for discussions on international tax reform, which an increasing number of US lawmakers agree is necessary. Even in this area, however, they are having difficulty agreeing on how best to convert that growing consensus to act on international reform into specific legislation.

In looking ahead, the timing and perhaps the substance of the next phase of international tax reform is likely to be heavily influenced by how lawmakers choose to proceed with funding the Highway Trust Fund. Just days before the Highway Trust Fund was scheduled to run out of funding on July 31 and after several weeks of gamesmanship between the House – which sought a five month extension of highway funding through year's end – and the Senate – which sought a six year highway reauthorization with three years' worth of funding – lawmakers were ultimately able to come to a compromise and voted to extend highway funding for three months (i.e., through October 31).

Though the three-month extension is significantly shorter than what House lawmakers were seeking (especially given that much of that time will be lost due to August recess and the impending fight over funding the government), it still appears that Chairman Ryan hopes to move a six-year highway bill, international tax reform, and possibly a package of permanent tax extenders at some point later in the year. As noted above and further suggesting that the Ways and Means Committee intends to pursue international tax reform this fall, Representative Boustany has released his innovation box proposal, which is aimed at keeping companies in the US, providing US companies with a competitive edge, and curbing the rate of corporate tax inversions. With staff actively seeking public feedback on the proposal, this piece is seen as a key aspect of the House's overall approach to international tax reform. Notably, such a proposal may use "deemed repatriation" to help finance both the highway bill and a transition to a hybrid territorial system of taxation, thus hitching tax-writers' hopes for international tax reform to the Highway Trust Fund.

While the likelihood that Congress will be able to pass international tax reform this year remains uncertain, the topic will remain at the forefront of debate for tax-writers for the balance of this year – particularly in light of the OECD's BEPS discussions and the imminent need for long-term highway funding.

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20328/08/15