

## House taxwriters square off over global tax pact as OECD releases new guidance

In a week when international tax issues were front and center for the corporate tax community, the OECD released much-anticipated technical guidance on various aspects of its emerging global tax agreement; meanwhile, on Capitol Hill, House Republican taxwriters blasted the Treasury Department's role in negotiating the agreement on behalf of the US during a Ways and Means Tax Subcommittee hearing and unveiled a new retaliatory tax measure against companies based in countries that implement the new OECD rules.

### OECD guidance

Following up on an outcome statement it published July 10, the OECD Inclusive Framework this week released several eagerly awaited documents that are part of the international tax system revisions known as Pillar One and Pillar Two. (For coverage of the July 10 outcome statement, see *Tax News & Views*, Vol. 24, No. 26, July 14, 2023.)

**URL:** [https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230714\\_1.html](https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230714_1.html)

This week's Pillar One updates included a consultation document on Amount B, which aims to simplify and streamline the application of the arm's-length principle to baseline marketing and distribution activities. Pillar Two updates included additional administrative guidance for the implementation of OECD model rules, including two new safe harbors, a finalized global information return, and model treaty articles to implement a "subject to tax" rule.

**Some wins for the US?:** Some components of the latest OECD guidance seem to make clear that those working on the technical details and rules have kept a close eye on US lawmakers and the near certainty that the current Congress will not pass legislative changes necessary to bring the Internal Revenue Code into compliance with Pillar Two before 2025 at the earliest. Case in point: one of the safe harbors announced this week would delay until 2026 the application of the undertaxed profits rule (UTPR)—the Pillar Two component that congressional Republicans have most vociferously criticized.

A UTPR, which is a so-called backstop to the Pillar Two primary and secondary rules, will impact only those in-scope multinational groups whose parent is based in a jurisdiction that does not have a qualified domestic minimum top-up tax (QDMTT, the primary Pillar Two rule) or an income inclusion rule (IIR, the secondary rule) intended to ensure a 15 percent minimum tax is paid on global income. The US does not have either a QDMTT or an IIR and is unlikely to advance legislation during this Congress to bring US tax law in line with the OECD rules, leaving US-based groups open to having UTPRs imposed on them by other countries.

Also rolled out this week was a clarification from the OECD that transferable tax credits—such as many of the clean energy credits included in the Inflation Reduction Act of 2022 (P.L. 117-169), which Congress approved and President Biden signed into law last year—will be treated more favorably than some companies had feared. This is in contrast to the less favorable treatment under Pillar Two for nonrefundable tax credits (such as the US's credit for research and development expenses), compared to refundable credits. Nonrefundable credits are more common in the US, while refundable credits are more common in jurisdictions outside the US.

The disparity in treatment of the two types of credits under the Pillar Two rules continues to be a sore point for Republican and Democratic taxwriters alike.

**URL:** <https://www.taxnotes.com/research/federal/legislative-documents/public-laws-and-legislative-history/inflation-reduction-act-of-2022-%28p.l.-117-169%29/7dybc>

The OECD's recent announcement that there could be a further pause of one or two years on most new digital services taxes (DSTs) also seemed to stem in part from recognition that US lawmakers from both sides of the aisle would likely consider retaliatory measures against other countries if DSTs began to proliferate again as they did before the OECD process began, and that such an outcome would jeopardize further progress on a broader agreement.

Although the Biden administration signed onto the global tax pact in 2021 with about 140 other countries, Congress's support is necessary for its implementation in the US, with Pillar One likely to require passage of a multilateral treaty down the road and Pillar Two requiring changes to current US tax law, unless the Inclusive Framework were to change course and deem the Global Intangible Low Tax Income (GILTI) regime to be a compliant tax measure.

**More details to come:** Additional information and insights on the new guidance will be available in a forthcoming alert from Deloitte Tax LLP. (In the meantime, observations on the OECD's guidance related to Pillar Two and the consultation document on Pillar One Amount B are available from Deloitte United Kingdom.)

**URL:** <https://www.taxathand.com/article/32204/OECD/2023/Pillar-Two-OECD-Pillar-Two-updates/32204/OECD/2023/Pillar-Two-OECD-Pillar-Two-updates>

**URL:** <https://www.taxathand.com/article/32209/OECD/2023/OECD-Pillar-One-Amount-B-report-and-public-consultation>

## **Ways and Means Republicans grill Treasury official at Pillar Two hearing**

As the OECD unveiled its latest round of technical guidance, the House Ways and Means Tax Subcommittee held a hearing July 19 on the OECD process—which the Republican majority referred to as President Biden's "global tax surrender"—with Treasury Deputy Assistant Secretary for International Tax Affairs Michael Plowgian in the witness chair.

While Plowgian and Democratic taxwriters argued that the new tax rules being rolled out will "level the international playing field" and that the US needs to stay at the negotiating table and begin implementing Pillar Two, Republicans criticized the Biden administration for what they said was a takeover of tax policymaking by the Biden administration that would lose revenue for the US.

"What you're doing is a backdoor, coercive strategy to force Congress to have to raise taxes," Rep. Jodey Arrington, R-Texas, told Plowgian during the hearing, adding, "I think the most outrageous aspect of this whole thing . . . is the fact that the tax base will be ceded to foreign jurisdictions for their people, their programs and, their policies . . . that we will subsidize, but we will also undermine our sovereignty."

**Was Congress consulted?:** Ways and Means Chairman Jason Smith, R-Mo., who has consistently argued that the Treasury Department usurped congressional authority in negotiating the global tax rules with the OECD,

posed a series of pointed questions to Plowgian regarding whether Treasury ever consulted with Congress on specific components of the agreement, such as the UTPR and the treatment of nonrefundable tax credits, the 15 percent global corporate minimum tax rate, and the fact that the US GILTI is not deemed a compliant minimum tax.

Plowgian said the administration “received input from Congress” in various ways, but Smith pushed back, saying that Treasury staff has not ever reached out to him or other Republican taxwriters for guidance in negotiating the agreement.

**Impact on US revenues:** Republicans on the panel also highlighted recent estimates from the Joint Committee on Taxation (JCT) showing that enactment of Pillar Two could cost the US \$122 billion in lost revenue over the next decade if the rest of the world moves ahead with the agreement and the US stays on the sidelines—and that even if the US does implement Pillar Two in 2025, the domestic revenue loss could still total \$56.5 billion. (For prior coverage, see *Tax News & Views*, Vol. 24, No. 25, June 23, 2023.)

**URL:** [https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230623\\_1.html](https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230623_1.html)

Plowgian and some of the subcommittee’s Democratic members countered that JCT provided a wide range of estimates for Pillar Two’s impact on US revenue, depending on which countries implement the new rules and how multinational corporations shift their profits in response to implementation. At the high end of the estimates, the JCT indicates that if Pillar Two is enacted only by those 45 or so countries that have already enacted or proposed legislation to do so (with no additional countries signing on) and the US implements Pillar Two in 2025, US revenues would increase by \$236.5 billion.

**A level playing field?:** Republicans rejected assertions by Plowgian and some Democrats on the subcommittee that the new Pillar Two rules will “level the playing field” by ensuring all large companies around the world pay a minimum level of tax, in a way similar to the GILTI regime the US created in 2017. Rep. Drew Ferguson, R-Ga., called that argument “a farce.”

“We are about the American people, the American workers, and American businesses, innovators, and creators. We are not about leveling the playing field with the rest of the countries,” Ferguson said. “We’re about being number one, day in and day out. . . . I don’t want to be number one tied with five other countries or 20 other countries.”

**If you’re not at the table, you’re on the menu:** For their part, Democrats at the hearing noted that gains the US has made through the OECD negotiations—including the new UTPR safe harbor and favorable treatment of transferable tax credits—are reason for the US to continue participating in the discussions. They also pushed for Congress to pass legislation to bring the US GILTI regime into alignment with the new rules and implement Pillar Two.

“There are jurisdictions that have already implemented Pillar Two,” Plowgian said in response to a question from Rep. John Larson, D-Conn., about whether the US could unilaterally prevent the new rules from moving forward. “We need to be at the negotiating table to represent US interests.”

During the 117th Congress—when the House and Senate were under Democratic control—many Democrats hoped to include provisions in the Inflation Reduction Act, which was enacted with no support from the GOP, that would have brought US tax laws more in line with the new system. (They likewise sought to include similar provisions in their “Build Back Better” legislation—the predecessor to the Inflation Reduction Act that cleared the House in 2021 but ultimately stalled in the Senate.) But with Democrats holding the narrowest possible majority in the Senate and unable to afford a single defection among their 50 members, those proposed changes proved to be a bridge too far and were not included in the legislation that was eventually signed into law.

### **UTPR in the legislative crosshairs—again**

In other Pillar Two developments, Ways and Means Committee Republican Ron Estes of Kansas unveiled legislation on July 19 that would tighten the US base erosion and anti-avoidance tax (BEAT) rules for companies based in jurisdictions that impose a UTPR or other extraterritorial tax on US multinationals.

The Unfair Tax Prevention Act is co-sponsored by Ways and Means Chairman Smith and several other GOP taxwriters. According to a high-level summary included in a Ways and Means Committee release, the legislation would:

**URL:** [https://estes.house.gov/uploadedfiles/estes\\_unfair\\_tax\\_prevention\\_act.pdf](https://estes.house.gov/uploadedfiles/estes_unfair_tax_prevention_act.pdf)

**URL:** <https://waysandmeans.house.gov/rep-estes-introduces-legislation-to-protect-americans-from-unfair-taxes-in-global-tax-pact/>

- Define “foreign-owned extraterritorial tax regime entities” (FETR entities) as foreign-controlled entities connected with entities operating in jurisdictions with extraterritorial taxes aimed at US business operations, including the UTPR surtax;
- Strengthen the BEAT rules by eliminating the 3 percent base erosion percentage floor and the \$500 million gross receipts test for FETR entities;
- Revoke the ability of FETR entities to disregard certain service payments and payments subject to withholding taxes, and treat 50 percent of cost of goods sold as a base erosion tax benefit; and
- Accelerate the scheduled BEAT rate increase and tax credit changes for FETR entities.

“[T]his legislation protects the US tax base from unfair extraterritorial taxes by foreign countries—and imposes stiff penalties on those countries if they implement them,” Estes said in the Ways and Means release. “It’s time for the OECD and foreign countries to abandon the UTPR surtax and its fundamental flaws.”

The proposal is the second tax measure targeting the UTPR to be put forward by House Republican taxwriters in recent weeks. In late May, Chairman Smith and his GOP colleagues on the Ways and Means Committee introduced legislation that would impose retaliatory taxes—subject to annual increases—on the US income of foreign entities and individuals from countries implementing a UTPR or similar measure. (For prior coverage, see *Tax News & Views*, Vol. 24, No. 19, May 26, 2023.) Neither measure has been scheduled for consideration by the full House of Representatives, and neither one, if approved in the House, would be taken up in the Democratic-controlled Senate; however, both send a strong signal to the OECD and member nations about the

possible future direction of US international tax policy if Republicans were to win control both chambers of Congress.

**URL:** <https://gop-waysandmeans.house.gov/wp-content/uploads/2023/05/Defending-American-Jobs-and-Investment.pdf>

**URL:** [https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230526\\_2.html](https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2023/TNV/230526_2.html)

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