

## Report on recent US international tax developments - 30 November 2018

---

### **NEW!** EY Tax News Update: Global Edition

EY's new Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access more information about the tool and registration [here](#).

Also available is our [EY Global Tax Alert Library](#) on ey.com.

---

The United States (US) Government moved forward with more *Tax Cuts and Jobs Act* (TCJA) international guidance this week with the release of proposed regulations on computing the interest expense limitation under Internal Revenue Code<sup>1</sup> Section 163(j) and proposed foreign tax credit regulations.

On 26 November 2018, the Internal Revenue Service (IRS) released proposed regulations ([REG-106089-18](#)) on the interest expense limitation under Section 163(j), which was modified by last year's tax reform. The proposed regulations package also includes proposed regulations under Sections 381, 382, 383, 469, 860C and 1502.

The proposed regulations include provisions on:

- ▶ What constitutes interest for purposes of Section 163(j)
- ▶ The interaction of the Section 163(j) limitation with other provisions of the Code
- ▶ The application of Section 163(j) to consolidated groups, partnerships, S corporations, controlled foreign corporations and foreign persons with effectively connected income
- ▶ The treatment of disallowed business interest expense carryforwards
- ▶ Making available elections under Section 163(j)
- ▶ The allocation of interest expense, interest income and other tax items when the taxpayer conducts a trade or business that is not subject to Section 163(j), as well as a trade or business that is subject to Section 163(j)

Along with the proposed regulations, the IRS also released [frequently asked questions](#) about the Section 163(j) limitation and [Revenue Procedure 2018-59](#). The latter provides a safe harbor under which taxpayers may treat certain infrastructure trades or businesses as real property trades or businesses solely for purposes of qualifying as electing real property trades or businesses under Section 163(j)(7)(B).

The proposed regulations would apply to tax years ending after the date the Treasury decision adopting the regulations as final regulations is published in the Federal Register. Taxpayers and their related parties may, however, apply the proposed regulations to a tax year beginning after 31 December 2017, so long as the taxpayers and their related parties consistently apply the Section 163(j) proposed regulations, and if applicable, other relevant proposed regulations to those tax years. Thus, unlike some of the other proposed regulations issued in response to the TCJA, the proposed regulations would not be retroactive to the date that the TCJA was enacted.

Also on 28 November, the Government issued very complex proposed regulations ([REG-105600-18](#)) providing guidance on determining the foreign tax credit under the Internal Revenue Code. The over 300-pages of guidance relates to changes made to the applicable law by last year's tax reform, as well as guidance on other foreign tax credit issues, including in relation to pre-TCJA statutory amendments.

Issues addressed by the proposed regulations include:

- ▶ The allocation and apportionment of deductions and adjustments to the foreign tax credit limitation
- ▶ Transition rules for an overall foreign loss, separate limitation loss, and overall domestic loss accounts, and for the carryover and carryback of unused foreign taxes
- ▶ The addition of separate categories for the foreign tax credit limitation and other necessary updates to the regulations, including modification to the look-through provisions
- ▶ Calculation of the exception from subpart F income for high-taxed income
- ▶ The determination of deemed paid credits and the corresponding gross-up
- ▶ Application of the election to not apply the net operating loss deduction to the Section 965 inclusion

At a high level, the proposed regulations would:

- ▶ Require deductions to be allocated to the Global Intangible Low-taxed Income (GILTI) basket, but treat assets that generate Foreign Derived Intangible Income (FDII) and GILTI as partially-exempt assets for expense apportionment purposes
- ▶ Not treat Section 78 dividends relating to fiscal-year foreign corporations as dividends for purposes of Section 245A (absent this rule, US shareholders owning fiscal-year foreign corporations might claim a Section 245A deduction with respect to Section 78 dividends attributable to Section 965 inclusions in 2018)
- ▶ Require a direct tracing of interest income and interest expense with respect to loans made to certain controlled partnerships
- ▶ Include an election that allows for the carryover of foreign taxes into post-2017 periods to be assigned to the foreign branch basket
- ▶ Modify the controlled foreign corporation (CFC) netting rules to no longer treat hybrid debt as related group indebtedness
- ▶ Eliminate the foreign tax credit with respect to Section 956 inclusions
- ▶ Not provide for look-through treatment to the GILTI basket for interest, rents and royalties that are paid to a related party and reduce a CFC's tested income
- ▶ Not basket, with limited exceptions, income attributable to the disposition of a foreign branch as foreign branch income
- ▶ Clarify that income attributable to a Section 78 gross-up is "basketed" based on reference to the underlying income that gave rise to the income inclusion

In general, portions of these proposed regulations that relate to statutory changes to the TCJA apply to taxable years beginning after 22 December 2017. Other portions of the proposed regulations that do not apply to the TCJA changes apply to taxable years ending on or after the date of filing of the proposed regulations in the Federal Register. Special applicability dates apply to portions of the proposed rules that apply both to the TCJA and to prior enacted provisions, as well as to certain specific provisions.



**About EY**

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit [ey.com](http://ey.com).

© 2018 EYGM Limited.  
All Rights Reserved.

EYG no. 012060-18GbI

1508-1600216 NY  
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

**[ey.com](http://ey.com)**