Significant changes expected to several international regulations issued in 2016

Executive summary

On 20 October 2017, the United States (US) Department of the Treasury (Treasury) released its 2017-2018 Priority Guidance Plan (the Plan). The Plan identifies the guidance projects that Treasury and the Internal Revenue Service (the IRS) intend to prioritize during the 12-month period from 1 July 2017 through 30 June 2018 (the Plan Year).

Unlike prior years’ plans, the Plan separates the guidance projects into four parts:

- Part 1 addresses the eight regulations from 2016 that were identified for review pursuant to Presidential Executive Order 13789 (Identifying and Reducing Tax Regulatory Burdens) and Treasury’s intended actions with respect to those regulations.
- Part 2 describes certain burden-reducing projects that Treasury believes it can complete before the end of the Plan Year.
- Part 3 describes various projects related to implementing the new statutory partnership audit regime.
Part 4, consistent with past years’ plans, identifies projects (grouped by subject area) on which Treasury will focus the balance of its efforts for the Plan Year.

The Plan includes 27 international guidance projects, of which 24 projects either carry over from the 2016-2017 Priority Guidance Plan (the Prior Year Plan) or address regulations that were issued under the Prior Year Plan. In particular, the regulations under Internal Revenue Code Sections 385, 367 and 987 that were issued in 2016 are included in Part 1 of the Plan.

As in previous years, Treasury indicates that the Plan will be updated and republished periodically to reflect additional priority items and guidance published during the Plan Year.

Detailed discussion

The Plan identifies guidance projects that are priorities for allocating resources during the Plan Year. The Plan does not place deadlines on the projects’ completion. Listed below are the international guidance projects and the descriptions (verbatim) included in the Plan. Bolded notes indicate if the project is new, has new references to guidance issued since the Prior Year Plan, or has material differences in scope this year.

Part 1 – Executive Order 13789 – Identifying and Reducing Regulatory Burdens

- Delay and proposed removal of documentation regulations under Section 385 [in Treasury Regulations Section 1.385-2] and review of other regulations under Section 385. Treasury regulations were published on 21 October, 2016. Final, temporary and proposed regulations were published since the Prior Year Plan’s release. The Treasury Report stated that Treasury and IRS are working to develop a proposal that would expand the scope of the active trade or business exception to include relief for outbound transfers of foreign goodwill and going-concern value in certain circumstances.

- Proposed modification of regulations under Section 987 on income and currency gain or loss with respect to a Section 987 qualified business unit. Final regulations were published on 8 December 2016 (Final regulations were published since the Prior Year Plan’s release. Notice 2017-57 delayed the applicability of the final regulations by two years. The Treasury Report indicated that Treasury and the IRS intend to propose modifications to the final regulations to permit taxpayers to elect to adopt a simplified method of calculating and translating Section 987 gains and losses).

Part 2 – Near-Term Burden Reduction

- Guidance under Section 871(m), including with respect to non-delta-one transactions. Notice 2017-42 extended parts of the phase-in period for one additional year.

- Guidance under Chapter 3 (Sections 1441-1446) and Chapter 4 (Sections 1471-1474). Final and temporary regulations were published on 6 January 2017. Guidance may include the following: (1) addressing withholding on gross proceeds and foreign pass-thru payments under Chapter 4; (2) coordinating certain documentation requirements for participating foreign financial institutions with the requirements under Intergovernmental Agreements (IGAs); (3) revising the withholding requirements on insurance premiums under Chapter 4; (4) addressing certain due diligence requirements of withholding agents under Chapter 3, including the requirement to collect and report foreign taxpayer identification numbers of certain account holders; and (5) addressing refunds and credits under Chapter 3, Chapter 4, and related provisions. Notice 2015-10 (regarding refunds and credits) was published on 18 May 2015. Final and temporary regulations were published since the release of the Prior Year Plan. Notice 2017-46 provides procedures with which foreign financial institutions must comply to avoid determination of significant noncompliance under a Model 1 IGA as a result of a failure to report US taxpayer identification numbers.)
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• Guidance under Section 954(c) regarding foreign currency gains.
• Guidance under Section 954, including regarding the use of foreign statement reserves for purposes of measuring qualified insurance income under Section 954(i).

Part 3 – Bipartisan Budget Act of 2015 – Partnership Audit Regulations
• Regulations addressing the operation of certain international provisions in the context of the centralized partnership audit regime, including rules relating to the withholding of tax on foreign persons, withholding of tax to enforce reporting on certain foreign accounts, and the treatment of creditable foreign tax expenditures of a partnership. (New item.)

Part 4 – General Guidance

Subpart F/deferral
• Guidance on the treatment of upfront payments on swaps under Section 956. Temporary and proposed regulations were published on 8 May 2015.
• Guidance on the treatment under Section 956(c) of certain property temporarily stored in the US following Hurricane Irma or Hurricane Maria. (New item.)
• Guidance under Sections 1295, 1297 and 1298 on passive foreign investment companies. Proposed regulations regarding foreign insurance companies were published on 24 April 2015.

Inbound transactions
• Regulations under Sections 897 and 1445 (FIRPTA) relating to changes in the Protecting Americans from Tax Hikes Act of 2015.14

Outbound transactions
• Regulations under Section 367. Notice 2016-73, regarding the treatment of certain triangular reorganizations involving foreign corporations, and the amount of an income inclusion required in certain inbound nonrecognition transactions, was released 6 December 2016.15 Notice 2014-32, regarding triangular reorganizations involving foreign corporations, was released 25 April 2014. (The Plan adds the reference to Notice 2016-73, and removes a reference to Notice 2012-15 regarding Section 304 transactions.)

Guidance on transfers of property to partnerships with related foreign partners and controlled transactions involving partnerships. Temporary and proposed regulations were published 19 January 2017.16 (Temporary and proposed regulations were published since the release of the Prior Year Plan.)

Foreign tax credits
• Guidance under Section 901, including on the allocation of foreign tax imposed on disregarded entities and partnerships.
• Final regulations under Section 901(m) on covered asset acquisitions. Temporary and proposed regulations were published on 7 December 2016.17 (Temporary and proposed regulations were published since the release of the Prior Year Plan.)
• Guidance under Section 905, including final regulations under Section 905(c) on foreign tax redeterminations. Temporary and proposed regulations were published on 7 November 2007.18 Notice 2016-10 was released on 15 January 2016.19

Transfer pricing
• Guidance under Section 482, including with respect to the treatment and allocation of risk. Temporary and proposed regulations were published on 16 September 2015.20
• Annual Report on the Advance Pricing Agreement Program. Announcement 2017-03 was released on 27 March 2017.21 (Announcement 2017-03 was published since the release of the Prior Year Plan.)

Sourcing and expense allocation
• Regulations and other guidance under Section 861, regarding the allocation and apportionment of interest expense, including guidance related to interest expense attributable to certain loans to related partnerships. (The Plan adds the reference to guidance on interest expense attributable to certain loans to related partnerships.)
• Regulations under Section 861 on the character of income, including income arising in transactions involving intellectual property and the provision of digital goods and services. (The Plan limits the scope of the project relative to the Prior Year Plan, which referred to guidance under Sections 861, 862 and 863(a) on the character and source of income.)

Treaties
• Guidance under Section 894 and treaties, including regarding the application of various treaty provisions to hybrid entities and instruments.
Other

- Guidance on the physical presence of certain individuals in the Commonwealth of Puerto Rico or the US Virgin Islands under Section 937(a) following Hurricane Irma or Hurricane Maria. (New item.)

- Guidance under Chapter 3 (Sections 1441-1446) and Chapter 4 (Sections 1471-1474), including regulations on verification requirements for sponsoring entities for Chapter 4 purposes, and regulations regarding the withholding obligations on deemed distributions from conversion ratio adjustments on convertible debt and stock. Final, temporary, and proposed regulations under chapters 3 and 4 were published on 6 January 2017. Proposed regulations (regarding verification requirements for sponsoring entities) were published on 6 January 2017. Proposed regulations (regarding conversion ratio adjustments) were published on 13 April 2016. (The Plan revised the described scope of the guidance. Final, temporary and proposed regulations were issued since the release of the Prior Year Plan.)

- Regulations and other guidance under Sections 6039F, 6048 and 6677 on foreign trust reporting and reporting with respect to foreign gifts, and under Sections 643(i) and 679 relating to certain transactions between US persons and foreign trusts.

- Regulations and other guidance under Section 7701. (The Plan removes a reference to proposed regulations that were published on 10 May 2016.)

- Regulations under Section 1256(g)(2) regarding the definition of a foreign currency contract, in light of the decision in Wright v. Commissioner, 809 F.3d 877 (6th Cir. 2016).

Implications

The sequence of the Plan’s four Parts reflects Treasury’s order of priority. Accordingly, Treasury’s first priority this Plan Year will be to address, as described above, the regulations under Sections 385, 367 and 987 that were issued in 2016. Furthermore, Treasury asserted in the Plan that, even in issuing new guidance, it will be guided by burden-reducing principles and policies. The fact that a guidance project is included in the Plan (or listed in a particular sequence therein) should not be taken as an assurance that Treasury will issue relevant guidance before the end of the Plan Year (or in that sequence). This is especially true in view of current efforts to enact significant tax reform, which could require Treasury to divert resources or render certain projects unnecessary. As in years past, Treasury intends to update the Plan on a quarterly basis.

Endnotes

1. 82 F.R. 19,317.

2. All “Section” references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.


6. T.D. 9803. See EY Global Tax Alert, US final regulations retroactively eliminate Section 367(d)’s exception for foreign goodwill and going concern value and narrow Section 367(a)’s active trade or business exception, dated 22 December 2016.


18. T.D. 9362 and REG-209020-86. Note that the temporary regulations have sunset.


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