

2023 INTERNATIONAL TAX YEAR-END CONSIDERATIONS

Legislative changes and other tax concerns that may affect international tax planning

EXECUTIVE SUMMARY

More than five years have passed since the Tax Cuts and Jobs Act of 2017 (TCJA) brought sweeping changes to the U.S. international tax landscape. Congress continues to balance taxpayer demands for long-overdue guidance on TCJA provisions while focusing on how to address the imminent Pillar Two initiative. Moreover, taxpayers continue to litigate Congress' authority in the courts.

While the fiscal environment remains unclear, taxpayers should prepare for an increase in their global effective tax rate (ETR) and tighter reporting standards over the next couple of years. Less cash on hand and higher interest rates may inspire taxpayers to revisit basic international tax concepts to reduce their tax burden and increase their internal cash flow. Planning is therefore key.

Below we outline several areas that should be considered for year-end international tax planning.

GENERAL CONSIDERATIONS

Partnership K-2 and K-3 reporting

The IRS released [Schedules K-2 and K-3](#) for Forms 1065 (U.S. Return of Partnership Income), 8865 (Return of U.S. Persons With Respect to Certain Foreign Partnerships), and 1120-S (U.S. Income Tax Return for an S Corporation), which apply to tax years beginning in 2021.

Any person required to file Schedule K who has items relevant to determining U.S. tax under the international provisions of the tax code must complete Schedules K-2 and K-3. These schedules, in certain instances, replace and supplement items previously reported on Schedule K-1 and in applicable footnotes, and require detailed amounts relevant to calculating the following:

- Foreign tax credit (FTC) limitation (including research and experimental and interest expense allocations)
- Global intangible low-taxed income (GILTI) and Subpart F inclusions (including section 960 deemed paid credits)

- Inclusions from a passive foreign investment company (PFIC) for which a qualified electing fund election has been made
- Foreign-derived intangible income (FDII) deductions
- Base erosion and anti-abuse tax (BEAT)

Partnerships may qualify for the [domestic filing exception](#) in narrow situations.

Consider this: Keeping tax reporting requirements at the forefront can facilitate a smooth tax return experience for partnerships and partners and limit a taxpayer's Schedule K-2 and K-3 penalty exposure, especially since the transition penalty relief is only available for tax years that began in 2021.



Foreign-derived intangible income planning

The FDII regime in the tax code constitutes an export incentive that allows a U.S. corporation to deduct export sales revenue earned in excess of a 10% return on tangible depreciable assets (that constitute a qualified business asset investment).

The deduction is currently 37.5% of a corporation's FDII, and will decrease to 21.875% beginning in 2026 unless it is repealed or amended. The deduction amount is limited to a corporation's taxable income; it cannot create or extend a net operating loss (NOL).

The FDII deduction has come under scrutiny by the Organisation for Economic Co-operation and Development (OECD) as a harmful tax practice in connection with base erosion and profit shifting (BEPS) Action 5, based in part on the low correlation required between the intangible related eligible income and the performance of the research and development (R&D) functions that create intellectual property.

Take action: Taxpayers should carefully consider whether they are eligible to claim FDII benefits and, if so, model to maximize potential benefits.



The Biden administration proposed repealing the FDII deduction in its entirety for tax years beginning after Dec. 31, 2021, through the Build Back Better Act, but the act did not pass. Therefore, the FDII deduction remains a viable planning opportunity for the foreseeable future.

Global intangible low-taxed income (GILTI) planning

The [GILTI](#) regime subjects most of the earnings of controlled foreign corporations (CFCs) to current U.S. tax. GILTI can apply to a broad swath of taxpayers in any industry. U.S. shareholders should assess whether they may have exposure to this income inclusion. Planning opportunities to limit a taxpayer's exposure to GILTI, including use of the [high-tax exclusion](#) or a [section 962 election](#), are available and should be considered to minimize the impact of this tax scheme.

On Jan. 25, 2022, the Treasury Department and the IRS published final regulations under section 958 on determining stock ownership, along with proposed regulations regarding the treatment of domestic partnerships and S corporations that own stock in PFICs, and their domestic partners and shareholders. In terms of GILTI, the significant takeaway from this guidance pertains to the definition of a controlling domestic shareholder (CDS).

Under the final regulations, aggregate treatment for determining the CDS of a CFC is not extended, while the proposed regulations would revise Treasury Regulations section 1.958-1(d)(2) to provide that aggregate treatment does apply for purposes of determining the CDS of a CFC. Taxpayers should closely monitor forthcoming guidance, as the proposed regulations could have a major impact on determining who is eligible to make a high-tax exclusion election.

Learn more: Taxpayers looking for additional planning opportunities to minimize the impact of GILTI can review [10 quick year-end reminders for GILTI](#).



Base erosion and anti-abuse tax (BEAT) planning

The [BEAT](#) is designed to ensure that corporations with significant base erosion payments made to related foreign parties pay a certain amount of U.S. federal income tax. This tax is in addition to a corporation's regular income tax liability.

Consider this: Taxpayers with more than \$500 million of average annual gross receipts and deductible payments to foreign related parties should carefully consider the impact of tax credits (such as the R&D credit) and NOLs on their potential BEAT liability. Additionally, we encourage taxpayers to review their structure for brother-sister relationships that could create an unintended aggregate group requiring a BEAT calculation.



Taxpayers subject, or potentially subject, to BEAT may want to consider taking advantage of certain planning opportunities that can lower (or eliminate) their liability, such as:

- Applying the [BEAT services cost method exception](#). Such an exception allows for certain amounts paid (or accrued) for services to be excluded from the broad base erosion payment definition.
- Utilizing the BEAT waiver election. This election allows taxpayers to reduce the amount of their base erosion tax benefits, which may result in the taxpayer not satisfying the base erosion percentage test.

Foreign tax credit planning

There are many aspects to consider in calculating the FTC, including eligibility, limitations, income/loss allocations, the effect of making or revoking certain elections, and the impact on the global ETR. Having a thorough understanding of all these variables and how they interact can help you make better decisions.

Over the past couple of years, the Treasury and the IRS have issued many FTC regulation packages (e.g., [technical corrections](#), [proposed regulations](#)) and notices (e.g., [Notice 2023-31](#), [Notice 2023-55](#)) setting forth transition rules and elections that may limit taxpayers' ability to use excess FTCs going forward.

Consider the following planning concepts:

- Taxpayers with significant pre-TCJA carryforward or post-TCJA carryback credits should carefully consider how their unused FTCs may be limited and which election(s) may be available to allow for their efficient utilization.
- The Coronavirus Aid, Relief and Economic Security Act ([CARES Act](#)) granted taxpayers an extended carryback period for their NOLs. Taxpayers choosing to take advantage of this extended carryback period should consider how it may affect their [FTC position](#), as a carryback may limit or minimize the capacity to claim credits for prior-year foreign taxes.
- Taxpayers previously subject to the section 965 transition tax should consider amending their prior-year returns to claim additional FTCs under the extended statute of limitations that applies to refund claims based on a claim of credit if any FTCs were taken on "[offset earnings](#)."

Learn more: Taxpayers looking for additional planning opportunities to maximize their FTCs can review [quick reminders for FTC](#).



Base erosion and profit shifting and country-by-country compliance

Consistent with the OECD's BEPS project, the IRS requires annual [country-by-country reporting](#) (CbCR) by U.S. taxpayers that are the ultimate parent of a multinational enterprise (MNE) group. This tax filing requirement applies to companies with \$850 million or more in global group revenues in the immediately preceding reporting period.

Take action: Taxpayers will need to assess whether there is a requirement to file Form 8975, Country-by-Country Report, and its Schedule A, Tax Jurisdiction and Constituent Entity Information, with the IRS. In many cases, filing this form in the United States will satisfy any filing requirements in other countries. The IRS will exchange Form 8975 information automatically with tax authorities with which the United States has entered into a bilateral competent authority agreement. However, a U.S. MNE group's information will only be exchanged with countries in which the U.S. MNE group reports doing business.



While this reporting requirement may no longer be new, it could still be unfamiliar to those reaching new levels of global activity and may require taxpayers to change their information reporting processes significantly. Accordingly, affected taxpayers should carefully review the financial and administrative impact CbCR may have had on their compliance function and reevaluate if necessary.

Many foreign entities within the United States' global structure may be required to comply with additional CbCR reporting requirements, such as CbCR notifications, CbCR local compliance, and completion or lodgment of the master file and local files. While current U.S. tax law does not require such filings, U.S. MNEs will want to carefully analyze the impact on their subsidiaries.

Transfer pricing planning

In addition to assessing and addressing any applicable CbCR requirements, taxpayers should consider a variety of important [transfer pricing](#) issues before year-end, such as:

- Reevaluating existing transfer pricing to account for any changes in the business or in the relationships of the related parties that engage in controlled transactions. [Changing existing transfer pricing policies](#) may help prevent losses from being trapped in one jurisdiction while income accumulates in another.
- Performing year-end transfer pricing true-ups and reconciling financial statement results to those required by any relevant transfer pricing documentation that is in place.
- Planning to submit or renew advance pricing agreements (APAs) in accordance with the [more robust screening process](#) the IRS outlined in its April 25, 2023, interim guidance. The process is designed to streamline IRS workstreams and approvals for APAs. The demand for APAs has continued to grow in recent years as multinational corporations seek to gain certainty with respect to their transfer pricing policies.

Pillar One and Pillar Two planning

To combat tax avoidance, ensure consistency of international tax rules, and ultimately provide a more transparent tax environment, the OECD and its Inclusive Framework on BEPS are rapidly working through finalizing the allocation of taxing rights for international taxpayers conducting business without a physical presence and the guidelines surrounding the implementation of a global minimum tax.

[Pillar One](#) affects digital and consumer-facing companies and is intended to apply to the very largest multinational groups that have revenue of more than 20 billion euros and a profit margin of more than 10%. Rights to tax profits would shift in part from countries of production (or development) to countries of consumption, based on a drafted formulaic approach.

Pillar Two, referred to as Global Anti-Base Erosion (GloBE), affects all sectors through reformed tax laws requiring income to be taxed at a minimum [effective rate of 15%](#). Pillar Two will affect companies with consolidated revenues above 750 million euros or the equivalent, as the OECD intends to mirror the revenue threshold set for CbCR obligations. Nearly 140 countries have agreed to the OECD's two-pillar global tax plan.

Take action: As the Pillar Two GloBE initiative goes into effect in stages, with the first rules being enacted for tax years beginning on or after Dec. 31, 2023 (e.g., 2024 calendar year taxpayers), taxpayers should already be modeling the impact to assess potential incremental tax and compliance costs.



Given that certain countries, including the U.S., have yet to adopt the GloBE rules, taxpayers should closely monitor forthcoming guidance, as new legislation could have a major impact on determining tax obligations. Furthermore, even taxpayers that may initially be able to take advantage of safe harbor mechanisms to mitigate any additional Pillar Two tax burden should not underestimate the significant data and compliance challenges anticipated as a result of these new rules.

Planning for payments between and from foreign subsidiaries

Payments made between offshore foreign corporations that qualify as CFCs may trigger income inclusions for a U.S. shareholder under the Subpart F rules, even if the U.S. shareholder receives no distributions. The Consolidated Appropriations Act of 2021 extended an exception to the Subpart F rules through 2025.

Under the exception, dividends, interest, rents and royalties that a CFC receives from related CFCs might not be treated as Subpart F income—and therefore might not be currently includable in the CFC's U.S. shareholder income—if the payments are attributable to active income of the related CFCs. This exception had been set to expire at the end of 2020.

In addition, the Treasury and the IRS issued regulations addressing the deduction for [dividends received](#) from certain foreign corporations. These rules are extremely complex and limit the deduction in significant ways.

Consider this: Taxpayers should weigh their planning alternatives in order to mitigate potential income inclusions arising from payments between foreign subsidiaries, or with respect to distributions from those subsidiaries, especially since the IRS released rules to [curtail section 951\(a\)\(2\)\(B\) tax planning](#).



Intercompany loan planning

[Under current law](#), a loan to a U.S. shareholder by a related foreign subsidiary can result in an income inclusion to the U.S. shareholder. Even a guarantee by a foreign subsidiary can trigger an income inclusion.

Many taxpayers are unaware of this rule and may have such U.S. investments in place at any given time. However, taxpayers can minimize the adverse impact of this rule by reducing or eliminating U.S. investments or guarantees by foreign subsidiaries before the end of the year.

The changes to the anti-deferral rules under the TCJA should result in fewer taxpayers having exposure to this rule. Further, a new exception allows U.S. corporate shareholders to obtain credit support from a related foreign subsidiary without incurring U.S. tax, provided certain conditions are met.

Transfer pricing considerations for LIBOR transition

The [publication](#) of the London Interbank Offered Rate ([LIBOR](#)), a global reference point for variable interest rates paid on financial instruments, ceased after June 30, 2023. Alternative government-approved benchmarks for a risk-free rate have officially replaced the LIBOR-based index for determining all types of variable interest rates for contractual arrangements and financial instruments. Given the universal application of variable rate loans and other financial agreements between related entities, the termination of LIBOR will affect existing and new intercompany agreements based on the index.

Take action: Taxpayers affected by the termination of LIBOR should identify existing intercompany agreements containing LIBOR references and renegotiate agreements to mitigate or prevent any future business disruptions.



The transition away from LIBOR may also present opportunities to identify and implement additional tax-efficient solutions without deviating from the arm's-length standard. Floating-rate loans or short-term loans may allow additional flexibility to renegotiate interest rates at a later date for taxpayers considering new loan arrangements, depending on the outcome.

Transfer pricing considerations for intangible property agreements and DEMPE compliance

The IRS on Nov. 18, 2020, won a high-profile \$3.3 billion transfer pricing case against The Coca-Cola Co. over royalties it received from foreign subsidiaries. In *Coca-Cola Co. v. Commissioner*, 155 T.C. No. 10 (2020), the tax court held that the IRS did not abuse its discretion by reallocating royalty income to Coca-Cola U.S. from foreign subsidiaries.

With the recent focus on BEPS, this case is a reminder that companies operating in traditional manufacturing and distribution sectors can still be exposed to substantial transfer pricing adjustments. Taxpayers need to ensure that their transfer pricing policies and intercompany agreements reflect the business's operational structure as it continues to evolve.

Consider the following:

- As many countries continue to adopt the recommendations of BEPS Action 8, taxpayers with a regional or global footprint and valuable intangible assets developed and used in multiple jurisdictions should maintain a sufficient degree of substance to ensure that the associated economic returns are appropriately aligned with value creation.
- Taxpayers with intellectual property used or developed across multiple jurisdictions should perform detailed development, enhancement, maintenance, protection and exploitation (DEMPE) analysis to support the functions and risks performed with respect to the company's intangible property. This determination is critical in establishing which entity or entities are entitled to the residual income attributable to the company's intangible property. Legal ownership of the intangible property is not, in and of itself, sufficient to support that entitlement to the group's residual income.
- Taxpayers should review existing transfer pricing documentation to ensure that all DEMPE activities associated with intangible property are accurately reported and meet the compliance requirements of U.S. and non-U.S. transfer pricing rules.

For an overview of the legal issues in *Coca-Cola*, see the [Tax Court rules in favor of IRS in \\$3.3 billion transfer pricing case](#).

Cost-sharing agreements

A final action by the U.S. Supreme Court provides taxpayers clarity on recent case law from the 9th Circuit reversing a 2015 U.S. Tax Court decision that effectively invalidated IRS cost-sharing regulations. The U.S. Supreme Court declined review, allowing the regulations to stand.

Consider this: Many taxpayers have taken positions for financial accounting purposes and in protective tax returns claiming a benefit under the decision of the tax court. These taxpayers should evaluate the impact of the U.S. Supreme Court's final resolution.



Learn more: For additional information on this issue, please read our tax alert [Altera seeks Supreme Court review after Ninth Circuit reversal](#), which highlights the case the U.S. Supreme Court ultimately declined to hear.



Interest-charge domestic international sales corporation (IC-DISC)

An [IC-DISC](#) is an export incentive designed to provide a tax benefit to U.S. companies involved in (1) exporting property manufactured, produced, grown or extracted in the United States, or (2) providing architectural or engineering services for construction projects outside the United States.

An IC-DISC is a separate corporation, normally formed by a related supplier or the owners of a related supplier, which elects to be treated as an IC-DISC within the first 90 days of the tax year for which the status will be effective. If certain tests are met (described below), the IC-DISC is generally not subject to federal income tax. However, shareholders of the IC-DISC are taxed on dividends from the IC-DISC and are required to pay interest on the income accumulated in the IC-DISC.

The IC-DISC cannot manufacture, produce, grow or extract the export property. Typically the property is manufactured, produced, grown or extracted by a related party and the IC-DISC purchases the property from the supplier for purposes of resale, or the IC-DISC sells the property on behalf of the supplier and receives a commission fee.

In a commission arrangement, the supplier may claim a tax deduction for the commission fee without a corresponding income inclusion for the IC-DISC. When the income is distributed by the IC-DISC as a dividend, qualified individuals who own shares (directly or through a partnership, trust or disregarded entity) are often taxed on the dividends at reduced capital gains rates.

To qualify as an IC-DISC, at least 95% of the corporation's revenue must be qualified export receipts, and at least 95% of the corporation's assets must be qualified export assets. Qualified export receipts include primarily receipts from the sale, lease, or other disposition of export property, commissions and management service fees earned in conjunction with export property, or the provision of engineering and architectural services for a construction project located outside the United States. Qualified export assets include principally inventory held for export, property used in the sale, lease, storage, transportation, minor assembly, or servicing of export property, and receivables from an export transaction.

The scope of the IC-DISC benefit extends beyond traditional manufacturers of exported products to component part manufacturers and growers that sell goods or agricultural products to U.S. companies that on-sell the products to foreign persons. U.S. developers of software and other copyrighted articles that are selling or licensing rights outside the United States may also benefit from the use of an IC-DISC.

Section 174 planning

Prior to Dec. 31, 2021, R&D expenditures could be expensed as incurred, or electively capitalized and recovered over a period of not less than 60 months. As such, businesses that have been expensing their R&D expenditures may not have tracked all section 174 expenditures. Going forward, taxpayers will need to identify the R&D expenditures not only of their U.S. companies, but of their foreign subsidiaries as well. Foreign R&D expenditures must be capitalized and recovered over 15 years.

Taxpayers will face hardships associated with implementation (i.e., identifying R&D costs of foreign subsidiaries), and should consider that these changes may have other unanticipated international tax consequences.

For instance, capitalization could drastically affect GILTI through increased tested income, a modified GILTI inclusion percentage and/or an altered ability to claim the high-tax exception election. On the other side, capitalization could be beneficial to a taxpayer claiming an FTC through an increase to foreign source income due to less apportionable section 174 R&D. Other income tax consequences could include changes to a taxpayer's Subpart F inclusion, FDII deduction, quarterly estimates and/or year-end provisions.

Take action: Taxpayers should model the impact of section 174 changes to assess potential incremental tax and compliance costs. Depending on a taxpayer's fact pattern, these changes could produce widely different results.



Learn more: RSM's section 174 [resource center](#) is a one-stop shop on guidance for mandatory capitalization of R&D expenditures.



Section 965 reminders and planning

The U.S. Supreme Court has agreed to hear a constitutional challenge to the validity of the section 965 transition tax in the case of [Moore v. United States](#). The TCJA amended section 965 to require U.S. shareholders of a foreign corporation to take into account their pro rata share of the deferred earnings of the foreign corporation (deferred income). If the Supreme Court finds section 965 unconstitutional, taxpayers who paid section 965 tax may be entitled to a refund, depending on their situation.

Consider this: Taxpayers that file a protective claim for refund within two years of when they paid the tax may prevent possible refund claims from expiring before the Supreme Court decides the *Moore* case.



Taxpayers that made a valid section 965(h) election must continue to pay their section 965 liability in eight annual installments. The 2023 filing season marks the seventh annual installment, for which the amount due increases to 20% of the balance due.

S corporation shareholders that made a valid section 965(i) election to defer payment of a net section 965 tax liability with respect to an S corporation must continue to properly track and [report](#) their section 965 liability until a triggering event under section 965(i)(2)(A)(ii) has occurred.

Passive foreign investment company analysis

In January 2022, final section 958 regulations were issued. Similar to the GILTI regulations finalized in June 2019, they provide that U.S. partnerships are no longer treated as inclusion shareholders for Subpart F purposes. As a result, U.S. partners no longer take into account a distributive share of Subpart F or GILTI income through the U.S. partnership and are required to independently determine their own Subpart F and GILTI amounts.

Since the Subpart F and GILTI regimes only apply to a U.S. taxpayer who holds 10% or more in a CFC (directly, indirectly or constructively), U.S. partners who own less than 10% of a CFC indirectly through a U.S. partnership are no longer subject to the Subpart F or GILTI regimes with respect to shares in a CFC held through a U.S. partnership.

Previously, taxpayers would have taken the position that the section 1297(d) CFC/PFIC overlap rule blocked the application of the PFIC regime to the U.S. partners holding less than 10%. As a result, U.S. taxpayers may not have performed a PFIC analysis on CFCs held through a U.S. partnership. The final section 958 regulations apply to tax years beginning after Jan. 25, 2022. Therefore, for calendar year taxpayers, the section 958 regulations apply to the 2023 tax year.

Consider this: U.S. taxpayers should review their foreign holdings and perform a PFIC analysis to determine whether they are a U.S. partner who owns less than 10% of a CFC indirectly through a U.S. partnership and may now be subject to the PFIC regime.



Dollar approximate separate transactions method (DASTM)

The International Practices Task Force (IPTF) of the Center for Audit Quality monitors the status of highly inflationary countries. A hyperinflationary currency is defined under Treasury Regulations section 1.985-1(b)(2)(ii) (D) as the currency of a country in which there is cumulative inflation during the base period (base period means, with respect to any taxable year, the 36 calendar months immediately preceding the first day of the current calendar year) of at least 100% as determined by reference to the consumer price index of the country listed in the monthly issues of the International Financial Statistics or a successor publication of the International Monetary Fund.

Once a currency has been deemed hyperinflationary, DASTM is the method that must be utilized for U.S. tax purposes in determining profit or loss or earnings and profits in U.S. dollars. Normal translation rules do not properly reflect income because the hyperinflationary currency depreciates significantly against other currencies. Given the current economic environment, more and more countries have been added to the IPTF watchlist. As of May 10, 2023, countries with three-year cumulative inflation rates exceeding 100% are as follows:

- Argentina
- Ethiopia
- Haiti
- Iran
- Lebanon
- South Sudan
- Sudan
- Suriname
- Turkey
- Venezuela
- Zimbabwe

Take action: For calendar year taxpayers, the three-year cumulative inflation rate will be determined Dec. 31. The cumulative three-year rate should be reevaluated on Dec. 31, 2023, for DASTM purposes. Taxpayers with entities located in any of these countries should closely monitor guidance and plan ahead to comply with DASTM.



Section 163(j) planning

Beginning Jan. 1, 2022, depreciation, amortization and depletion may no longer be added back to a company's adjusted taxable income (ATI) calculation. ATI, which closely mimicked EBITDA (earnings before interest, taxes, depreciation and amortization), now more closely resembles EBIT (earnings before interest and taxes).

This delayed TCJA update could significantly hinder a taxpayer's ability to deduct interest expense beginning after Dec. 31, 2021. The application of section 163(j) is relevant when calculating tested income for GILTI purposes and/or in determining whether a CFC group election should be made.

Learn more: Taxpayers looking for additional planning opportunities to minimize their section 163(j) liability can review [Final section 163\(j\) regulations helpful for multinational businesses](#) and [With no year-end tax package, businesses face unfavorable changes](#).



Impact of the corporate alternative minimum tax (CAMT) on foreign-owned U.S. companies

With the passing of the IRA, foreign-owned U.S. companies need to analyze whether the 15% [CAMT](#) will apply to tax years beginning after Dec. 31, 2022.

In general, the CAMT provision imposes a minimum tax equal to the excess of 15% of a C corporation's adjusted financial statement income (AFSI) over its corporate AMT FTC. Applicability involves a three-year look-back period to determine whether a C corporation had average annual AFSI greater than \$1 billion, and in the case of [foreign-owned U.S. companies](#), at least \$100 million AFSI of the U.S. subgroup. Once a corporation is an applicable corporation, it remains an applicable corporation unless an exception applies.

Taxpayers should be asking the following questions for tax years beginning after Dec. 31, 2022:

- Who will be subject to the new CAMT rules?
- Are foreign-owned U.S. companies subject to special rules and provisions?
- Will a company's ETR be affected?
- Is the new CAMT considered a qualified income inclusion rule tax under Pillar Two?

Anti-hybrid analysis

The implementation of the anti-tax avoidance directive II (ATAD II) in Europe (effective as of Jan. 1, 2020) introduced several anti-hybrid rules. If these apply, deductions for payments among related parties may cease to be deductible.

Existing global transaction structures should be reviewed to avoid negative tax impacts; new structures should take into account the new rules. In addition to the European Union, several other jurisdictions have implemented anti-hybrid rules. Generally speaking, these rules disallow deductions for payments made to related parties when the payment is not taxed in the country of the recipient because of the hybridity of an instrument or entity. Taxpayers may be subject to the anti-hybrid regime if their business structure contains:

- Hybrid entities that are taxed as corporations locally but treated as fiscally transparent for U.S. tax purposes
- Hybrid financial instruments or payments that are treated as debt in one country and equity in another country
- Hybrid entity payments (e.g., loans and licensing agreements)
- An entity in which a foreign jurisdiction views a U.S. entity as a hybrid entity

Learn more: Taxpayers looking for additional information on the anti-hybrid rules can view RSM's previous global thought leadership insight articles ([European anti-hybrid laws target common U.S. holding structures](#), [The potential impact of Australia's imported hybrid mismatch rules](#), and [The Netherlands: Impact of ATAD2 to U.S. multinationals](#)).



Treaty analysis

The Treasury has taken monumental steps forward in its efforts to expand the U.S. tax treaty network. Since the passage of the TCJA, treaties have stalled due to concerns over language on the BEAT and relief from double taxation (i.e., the FTC).

On Dec. 7, 2022, Treasury signed a comprehensive [income tax treaty with Croatia](#), the first comprehensive tax treaty the U.S. had signed in over 10 years. This treaty is the first of its kind between the countries and aims at further strengthening their trade and commercial ties.

On June 22, 2023, the Senate voted 95 to 2 in favor of ratifying the tax treaty between the United States and [Chile](#). The Senate's two-thirds majority vote officially sends this treaty to President Biden for ratification and back to Chile for approval from its Congress. Once this treaty enters into force, Chile will become the third Latin American, and second South American, country with a double tax treaty with the U.S.

Consider this: Taxpayers with activity in these countries should closely monitor forthcoming guidance to determine when and if they can take advantage of treaty benefits such as:

- Reduced rates of withholding on dividends, interest and royalties
- Exemption from taxation on certain items of income they receive from sources within the United States



VALUE-ADDED TAX (VAT) CONSIDERATIONS

E-invoicing: A mandatory requirement

E-invoicing is becoming more common as tax authorities seek ways to control and ensure VAT data and collections. It provides the tax authority with visibility of each transaction and the ability to track the amount of VAT each taxpayer owes.

It is also worth remembering that e-invoicing affects invoices issued by a taxpayer (through its billing and accounts receivable functions) as well as invoices received from vendors through its accounts payable function. A critical requirement of e-invoicing is the need to establish a direct connection with the tax authority portal to enable the transmission of data. In addition, most taxpayers will need to deploy or configure new technology and establish new processes.

New technology and processes may be needed to comply with current and upcoming e-invoicing regulations in a number of countries. In 2023, taxpayers should be prepared to:

- Understand where e-invoicing is mandatory and the timetable for new countries to come onstream.
- Assess invoicing data quality and internal systems to ensure they can meet the data requirements.
- Establish new processes and technology to enable timely compliance.
- Consider outsourcing the task to a third party.

KEY GLOBAL INFORMATION REPORTING ACTION POINTS

The Biden administration's proposed tax plan

The Biden administration's tax plan includes comprehensive measures focused on information reporting that could have a significant impact on companies, including banks and other financial institutions, for the upcoming year.

These measures will significantly affect the data required to comply with information reporting and withholding obligations and should be considered as businesses develop budgets for systems and compliance programs next year. More specifically, the provisions:

- Require "brokers" to report sales of cryptocurrency and other digital assets on information returns, and expand the definition of broker in section 6045 of the regulations to include "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."
- Mandate electronic filing of certain information returns, such as Forms 1042, 8886 and 8300, to increase their accuracy.
- Require businesses receiving any crypto-assets with a fair market value over \$10,000 to report those assets.
- Require increased reporting and disclosure of information on cryptocurrency and crypto-asset-denominated transactions through information exchange agreements with other participating jurisdictions.
- Lower the federal reporting threshold for filing Form 1099-K, Payment Card and Third Party Network Transactions, from \$20,000 and 200 or more transactions to over \$600 with no minimum number of transactions.

These changes may result in increased volumes of reportable data with different naming conventions across multiple systems that should be considered as businesses develop budgets for changes to systems and compliance plans next year.

E-filing update

The Treasury released final regulations amending e-filing requirements and thresholds for numerous information returns that will likely affect your processes for filing information returns, such as Forms 1099 and 1042, due in 2024. Prior rules required withholding agents filing 250 or more information returns to file the forms electronically. The new rules change this threshold from 250 to 10 or more returns for 2023 filings and beyond.

The rules are particularly burdensome for partnerships, as there is no minimum filing threshold for those with more than 10 partners. As such, all partnerships should be prepared to file all information returns electronically. Notably, the final rules leave little room for exceptions, but hardship waivers may still be requested; corrected returns must be filed in the same fashion as original returns.

Lower 1099-K reporting thresholds

As online sales have increased and the gig economy and payment platforms have evolved, the tax reporting requirements for these payments have also become more complex. Form 1099-K is used to report payment card transactions and payments from third-party settlement organizations. As such, taxpayers who sell items online, drive for a ride-sharing service, or own a business that accepts payments via credit or debit cards likely have a Form 1099-K filing obligation and will be affected by new changes in the rules.

The American Rescue Plan Act changed the reporting threshold for certain filers of Form 1099-K. Up until 2022, third-party settlement organizations, such as payment platforms, were only required to report payments on Form 1099-K when the aggregate amount paid to a recipient in the calendar year was \$20,000 or more and when there were over 200 transactions.

Beginning with payments made in tax year 2023 that are reportable on 1099-K forms filed in January 2024, however, the threshold has been lowered to over \$600, with no minimum number of transactions. Although the IRS temporarily delayed implementation of the lower reporting threshold from 2022 until 2023, it is now in effect.

Take action: Companies should anticipate significant increases in the number of 1099-K forms they are required to file and should plan for and update their systems and budgets accordingly. Likewise, withholding agents must collect taxpayer identification numbers (TINs) or W-9 forms to ensure they have the information required to file 1099-K forms. Otherwise, backup withholding at a rate of 24% may apply to recipients with missing or incorrect TINs.



The Joint Committee on Taxation estimates that this change in the 1099-K reporting threshold, which is aimed at better tracking income for the gig economy, will raise \$8.4 billion over a 10-year period. Some states have already dropped state-equivalent Form 1099-K reporting thresholds to match the federal threshold, which has proven burdensome for taxpayers to track.

Take action: Companies should review their controls for tracking reporting thresholds and should enhance their TIN matching processes now in anticipation of increased volumes of 1099-K forms. These changes may result in increased volumes of reportable data across multiple systems that should be considered as companies develop budgets for changes to their systems and compliance plans going forward.



New W-9 forms with special field for partnerships and flow-throughs

In July 2023, the IRS published a new draft Form W-9, Request for Taxpayer Identification Number and Certification, with a revision date of October 2023, that is expected to be finalized before year-end. Companies should prepare now to begin collecting the new version of the form.

The most significant change on the draft is the addition of a line 3b checkbox for partnerships (including LLCs classified as partnerships for U.S. tax purposes), trusts or estates that have direct or indirect foreign partners, beneficiaries or owners.

This is a significant development for flow-through entities and the asset management industry in particular, as it has the potential to trigger divestiture of non-U.S. persons and additional onboarding procedures for funds with non-U.S. investors, in particular.

The new checkbox on line 3b is intended to more explicitly inform withholding agents of the presence of indirect foreign connections within flow-through entities. Instructions for the draft form specifically state that a partnership that provides a Form W-9 and checks box 3b may be required to complete Schedules K-2 and K-3 of Form 1065. Thus, by mandating the completion of line 3b, the IRS aims to provide entities with a clearer means of indicating the status of their indirect foreign partners, owners or beneficiaries.

The draft W-9 form has a revised date of October 2023 but has not been finalized to date. Once finalized, withholding agents will likely be required to accept the new version of the Form W-9 going forward, but can still rely on W-9 forms on file for existing vendors, investors or account holders.

Take action: Withholding agents must be prepared for these changes and should update their systems and processes for collection and review of new Forms W-9 accordingly. Likewise, U.S. partnerships, trusts and estates opening new bank accounts should be prepared to complete the new form and answer line 3b.



Companies may also need to update substitute W-9 forms, including those on signature cards or in subscription documents, to include changes from the new Form W-9. Finally, domestic partnerships, including asset managers and other financial institutions considering admitting foreign partners or new account holders, should evaluate the impact of changes to the form on their operations and may also consider divesting themselves of interests in partnerships with foreign partners if appropriate.

Debt forgiveness reporting implications

Lenders canceling or restructuring debts this year should consider the reporting implications going forward and plan accordingly. The IRS clarified in Notice 2020-12 that lenders are not required to file Form 1099-C, Cancellation of Debt, to report the amount of qualifying forgiveness with respect to covered loans made to small businesses under the Paycheck Protection Program (PPP) administered by the Small Business Administration under Title I of the CARES Act.

Section 6050P of the tax code and sections 1.6050P-1 and 1.6050P-2 of the Treasury Regulations generally require certain entities that discharge at least \$600 of a borrower's indebtedness to file a Form 1099-C with the IRS and furnish a copy of the form to the borrower.

However, according to Notice 2020-12, when all or a portion of the stated principal amount of a PPP loan is forgiven because the eligible recipient satisfies the forgiveness requirements of the CARES Act, for federal income tax purposes only, the lender is not required to, and should not, file a Form 1099-C as a result of the qualifying forgiveness. Lenders should therefore evaluate loans to confirm reporting requirements as soon as possible before year-end to avoid issuance of Form 1099-C when not required.

Continued focus on nonresident aliens and Foreign Account Tax Compliance Act exams

Before the global pandemic and post-TCJA, the Large Business and International Division of the IRS announced several compliance campaigns focused on enforcement of withholding, deposit and reporting requirements for payments made to U.S. nonresident aliens that are expected to continue. The campaigns are being enforced through a variety of mechanisms, including examinations and penalty assessments.

The IRS also announced the launch of a campaign focused on identifying U.S. and foreign financial institutions that have failed to file Foreign Account Tax Compliance Act (FATCA) reports. Examinations have already begun, which means that companies have a very narrow window of opportunity to become compliant and should file any missing returns as soon as possible. Additionally, we anticipate increased enforcement of Common Reporting Standard (CRS) requirements, as several jurisdictions have introduced new penalty regimes this year.

Take action: Companies should plan to spend the close of the year identifying and remediating any gaps in processes, submitting any unfiled returns, and implementing policies and procedures for ongoing compliance with these rules. The IRS has indicated that it will accept voluntary disclosures regarding noncompliance before institutions receive notices. However, penalty abatement will not be an option once a notice has been received, so act now.



FATCA and CRS status of entities in a group

To the extent that companies have acquired or created new legal entities, restructured their group this year, moved into jurisdictions that have adopted the CRS, or entered into an intergovernmental agreement under [FATCA](#), the company should plan to reevaluate or confirm the FATCA and CRS status of legal entities in the group. Entities that accept deposits, have custody of assets, perform investment activities, or serve as captive insurance companies or certain holding companies may be considered foreign financial institutions and may have FATCA and CRS reporting obligations.

Collection of new W-8's

To manage withholding and due diligence requirements, companies should begin requesting new or updated W-8 forms and CRS self-certifications from their customers, shareholders, or investors opening new accounts, or from those with forms that will expire after Dec. 31, 2023.

Note, however, that valid, unexpired W-8 forms can still be relied on and do not need to be replaced until they expire (generally within three years), unless there is a change in circumstances that mandates collection of a new form. The IRS published new versions of most W-8 forms in 2021, so withholding agents should make sure that investors and account holders provide the latest versions of the forms.

In May 2023, the IRS announced that it expects to publish a revised IRS Form W-8 EXP, which will include new certifications for qualified foreign pension funds. Companies should continue to monitor changes and developments with respect to tax withholding certificates and should update fields to address any changes in the forms now.

Beneficial ownership information (BOI) reporting

Starting Jan. 1, 2024, new regulations implementing rules under the U.S. Corporate Transparency Act will require certain companies organized or doing business in the U.S. to disclose information about the underlying beneficial owners and organizers of those entities to the U.S. Financial Crimes Enforcement Network (FinCEN). Those that fail to do so may be subject to civil penalties of up to \$500 per day or criminal penalties of up to \$10,000 and imprisonment if willful intent is found for failing to comply with the rules. Refer to [FinCEN's website](#) for additional details.

Because we expect that many companies will be affected by these rules, which are beyond the scope of services currently offered by RSM, we recommend that you consult with your legal counsel now to determine your BOI reporting obligations, evaluate your eligibility for exceptions, identify reportable owners, and remediate any gaps in your systems and procedures for complying with the rules.

Cryptocurrency and digital assets

In August 2023, Treasury published [proposed REG-122793-19](#) under sections 6045 and 6050W, requiring brokers to report sales and exchanges of certain digital assets that occur on or after Jan. 1, 2025. The proposed regulations call for a phased-in approach to reporting and require brokers to track the cost basis of assets from Jan. 1, 2023, and to file the first reports of gross proceeds from sales of digital assets occurring on or after Jan. 1, 2025, starting in January 2026, on the pending new IRS Form 1099-DA.

Take action: Given the need to collect and report on basis information from Jan. 1, 2023, brokers should confirm now that their existing systems have the functionality to calculate and track cost basis as required under the proposed regulations. They should also plan for and request a budget allowance for any modifications needed to remediate potential gaps in systems and processes that are quick hits and can be easily addressed now instead of waiting for final regulations to be published.



The proposed regulations adopt many long-standing concepts that apply to sales of securities, but also expand on and redefine certain key terms, such as "broker" and "digital assets," and introduce a new "in a position to know" standard as opposed to the usual "knows or has reason to know" standard for brokers. These definitions and standards are not typically used in other parts of the tax code and regulations governing reporting requirements; they will apply uniquely to digital assets and should be considered as you evaluate the impact of the regulations on your operations for next year and going forward.

Most notably, the regulations provide an extremely broad definition of broker, to include nearly every business model imaginable for facilitating sales or exchanges of digital assets, including digital asset trading platforms, hosted wallets, digital payment processors, and other models that critics argue may not align with the intent of the rules.

The revised definition of broker would also include centralized and decentralized digital asset trading platforms, crypto payment processors, wallet providers that allow users to buy, sell, and trade digital assets, and bitcoin automated teller machines and other physical kiosks. Notably, however, the regulations continue to exclude persons solely engaged in proof-of-work or proof-of-stake validation activity from the definition of broker.

The proposed regulations also clarify what is considered a “digital asset” subject to reporting under the rules: “any digital representation of value that is recorded on a cryptographically secured distributed ledger (or any similar technology).” According to the preamble, the definition was intended to be expansive and includes non-fungible tokens (NFTs), ether, bitcoin, stablecoins and certain tokens that are characterized as securities, commodities or derivatives under nontax legal.

Given these more expansive definitions of broker and digital asset, many entities and products that may not have been in scope for reporting under prior guidance will need to be reevaluated. Newly identified brokers should be prepared and may need to design and implement systems, procedures and controls for compliance, including processes for flagging and identifying reportable payments, calculating any required withholding, and properly coding digital assets on their product masters for reporting purposes.

CRS and the final Crypto-Asset Reporting Framework

Non-U.S. financial institutions in countries that have adopted the OECD's CRS should keep a close watch on new developments for CRS reporting of transactions involving digital assets and should evaluate their structures to identify entities that may have new CRS reporting obligations.

In June 2023, the OECD published International Standards for the Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 Update to the Common Reporting Standard.

CARF, as it's known, is the OECD's new global tax transparency framework, which provides for the automatic exchange of tax information on transactions in crypto-assets in a standardized manner and is designed to ensure the collection and exchange of information on crypto-asset transactions.

While crypto-assets have not historically been in scope for CRS, with the OECD's newly released plan, it has become clear that many banks, exchanges and other financial market participants offering products or services in connection with digital assets could be significantly affected by this regime.

Take action: Companies in CRS participating countries that sell or exchange crypto-assets should evaluate their structure, products, systems and controls now to identify and address any gaps in their ability to comply with the proposed rules under CARF and the CRS amendments.



According to the OECD, CARF and the CRS amendments are necessary because while CRS has improved international tax transparency, crypto-assets generally do not fall within the scope of the CRS. Further, in rare instances where some crypto-assets are in scope, reporting still may not be required, as assets could be held directly by individuals through “cold wallets,” or crypto exchanges that do not currently have reporting obligations under the CRS.

The OECD has indicated that it will continue to work on developing coordinated timelines, an implementation package and mechanisms for automatically exchanging information pursuant to the amended CRS requirements. In the meantime, financial institutions that include brokers who participate in transactions involving crypto-assets and who are residents of CRS participating jurisdictions should have a plan for monitoring and complying with requirements under the CARF going forward.

+1 800 274 3978
rsmus.com

This document contains general information, may be based on authorities that are subject to change, and is not a substitute for professional advice or services. This document does not constitute assurance, tax, consulting, business, financial, investment, legal or other professional advice, and you should consult a qualified professional advisor before taking any action based on the information herein. RSM US LLP, its affiliates and related entities are not responsible for any loss resulting from or relating to reliance on this document by any person. Internal Revenue Service rules require us to inform you that this communication may be deemed a solicitation to provide tax services. This communication is being sent to individuals who have subscribed to receive it or who we believe would have an interest in the topics discussed.

RSM US LLP is a limited liability partnership and the U.S. member firm of RSM International, a global network of independent assurance, tax and consulting firms. The member firms of RSM International collaborate to provide services to global clients, but are separate and distinct legal entities that cannot obligate each other. Each member firm is responsible only for its own acts and omissions, and not those of any other party. Visit rsmus.com/aboutus for more information regarding RSM US LLP and RSM International.

RSM, the RSM logo and *the power of being understood* are registered trademarks of RSM International Association.

