LICONY 38th Annual Tax Conference

Thursday, October 27, 2022

9am - 4pm

Reception: 4:30pm-6:30pm

Location: Guardian Life Insurance Company Hudson Yards, NYC

LICONY

State and Local Tax Panel
October 27, 2022

Jerry S. Malanga – CVP New York Life
Regina Saint Jour – AVP Lincoln Financial
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New York – State Tax Issues and Updates

Franchise Tax Controversies / Issues

- GF Credit (ELNY Assessment) – History; Current State; Future Concerns

- Retaliatory Tax Credit
    i. Cash vs liability basis methodology - Audit issues; Tracking, Potential loss of credits, Shifting to MTA, Timing
    ii. Allocation of CT33 and CT33m credit amounts – Audit Issues; NYS Guidance; Managing CT33M Exposure

- Retaliatory Tax Credit – Agent Licenses; States where it's an issue

New York City & New York State Tax Law Updates

- Overpayments of Tax

- American Rescue Act
  - Taxability at State Level - Student Loan Forgiveness
  - 13 States Do Not Comply (Including NYS)

Sales and Use Taxation of Digital Goods and Services

A post-Wayfair approach

October 27, 2022

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Today's agenda

1. Overview and characteristics of digital products
2. Nexus considerations
3. Taxation of digital goods
4. Audits
5. Sourcing

Key takeaways

How do the ever-changing laws and regulations affect a business' reporting and compliance procedures?

Steve Rauch

Managing Director, Indirect Tax
Ernst & Young LLP

What are digital products?

- The term “digital products and services” includes a wide range of transactions.
- Most of these transactions are provided or furnished electronically via the internet or cloud.
- These transactions are described using many popular terms, including: software as a service (SaaS), hosted services, cloud computing, web-enabled and web-based services, managed services, information services, data processing services, and digital goods and services.

Digital products are sold to both businesses and consumers

Sales to businesses include:

- Software sales and licenses
- Data processing services
- Information services
- Searchable databases
- Digital advertising

Sales to consumers include:

- Movies
- Songs
- Photos
- E-books
- Apps
- Video games
- Premium-level subscriptions to online social networks

What is cloud computing?

- SaaS: the customer/user accesses a software application running on the service provider's cloud infrastructure.
- Platform as a service (PaaS): the customer uses the cloud provider's cloud infrastructure and tools to build or deploy applications and content. The customer does not manage or control the underlying cloud infrastructure but controls its deployed applications/content. Third parties can access the customer's applications/content.
- Infrastructure as a service (IaaS): the customer is provided processing, storage, networks, and other fundamental computing resources. The customer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage and deployed applications, and possibly limited control of select networking components (e.g., host firewalls).

What are some characteristics of cloud-based products?

- Location-independent resource pooling
- Ubiquitous network access
- Rapid elasticity
- On-demand self-service

- Pay per use
- Pay per user
- Pay per gigabyte used
- Revenue share
- Monthly or annual subscription

Other electronically delivered services

- Information services
- Data processing services
- Computer services
- Digital automated services

Nexus

The evolvement of nexus

Traditional nexus:

Historically, the Supreme Court jurisprudence recognized a **physical presence** standard for sales and use tax nexus purposes.

- People
- Offices
- Property
- Sales

Economic nexus:

In South Dakota v. Wayfair, the Supreme Court permitted the possibility that **economic presence** could create sales and use tax nexus.

- Dollar amount of sales to a jurisdiction
- Number of transactions within a jurisdiction

Wayfair continued

Despite the fact that all states have passed Wayfair-like legislation, many questions persist regarding how the laws will be implemented. For example:

1. Is it tax on the first dollar you earn in the state or does tax start on the first dollar over the threshold?
2. How long does this economic nexus last?
3. Is it an annual test? By calendar? Fiscal year? Sliding scale?
4. What about wholesale transactions?
5. Do these laws apply equally to sales of goods and services?

Taxation of digital goods

Software taxation issues

Historical issues:

- Custom vs. canned
- Tangible vs. “electronic”

Other issues:

- In-state vs. out-of-state
  - User allocations for software
  - Sourcing
- Maintenance vs. upgrades
  - Defined contractually
- Software vs. service (cloud computing)

Custom vs. canned software

- Pre-written computer software physically transferred to a customer is taxable in every state that imposes a sales tax.
- Customized computer software physically transferred to a customer is exempt in all but a few states (see AL, DC, HI, MS, NE, NM, SC, WV (sometimes)).
- So what qualifies as "customized."
- What about charges for customizing a canned software product? Is that separately charged?

Hard copy vs. electronic transfer

- While all states tax canned computer software physically transferred to customers, some states change that position if the software is electronically transferred (i.e., downloaded).
  - See (AR, CA, CO, FL, GA, ID, MO,NJ (business use exemption), NV, OK, SC, VA)
  - It is now uncommon to have software delivered in a hard-copy format

Cloud computing (SaaS)

- Software is accessed and used over the internet, but never actually transferred to the customer ("software as a service").
  - Even fewer states tax electronically accessed software (SaaS).

- Central issues:
  - Is there a taxable good or service?
  - Is there a sale or use?
  - Does "possession" get transferred?
  - Where is the sale taxed? In-state vs. out-of-state use?

States take different approaches with respect to the taxability of digital products

- Digital products and cloud-based transactions can be subject to tax in a given state depending on the provisions and definitions contained in that state's tax law.
  - Iowa business-to-business (B2B) exemption
  - Ohio vs. New York
- Moreover, states provide partial or full exemptions for digital products and cloud-based transactions in certain circumstances.
  - California
- **You simply have to know the rules in the applicable jurisdiction!**

States have held digital products and cloud-based transactions taxable under the following categories:

- Sale, rental, license or access to prewritten software (as tangible personal property (TPP))
- Data processing or data storage service
- Digital automated service
- Computer service
- Information service
- Protective service
- Digital equivalent to traditional TPP, i.e., “digital goods” (such as e-books, photos and songs)
  - Pennsylvania

Taxation of “other” digital products

- In recent years, many states have began to tax “simple digital products” (i.e., music, videos, e-books).
- Simple digital products usually have limited functionality such that they cannot be characterized as software.
- As so much of our lives are now intertwined with digital content, we can expect more states to begin taxing these products in the future.

New age of taxing digital products

- On 12 February 2021, the Maryland Senate passed the nation's first state tax on digital advertising revenues.
- The tax applies to annual gross revenues derived by large firms from digital advertising services in the state. Excluded from the tax are entities with less than $100 million in global annual gross revenue. The tax rate is progressive, beginning at 2.5% for companies with global annual gross revenues of $100 million to $1 billion and goes up to a rate of 10% for companies with global annual gross revenues exceeding $15 billion.
- Digital advertising services are defined as any advertising services delivered on any type of software, website or application that a person can access on a device.
- The law itself does not provide any rules for determining the state from which revenues from digital advertising services are derived, but instead authorizes the Maryland Comptroller to adopt regulations sourcing such receipts.
- The law is controversial and has kicked off multiple lawsuits.

Audit complexity

- Digital products can create multiple and varying sales tax obligations based on just one transaction.
- Because sales tax is considered a “destination tax,” the location where the customer accesses and uses the product usually controls the imposition of tax.

Variability by state

- NY is likely to allow a user base allocation if the allocation methodology is approved.
- TX is likely to tax the SaaS transaction based on the number of users in the state.
- CT is likely to tax the SaaS transaction, probably at a lower 1% rate applicable to computer and data processing services, also based on usage in the state.
- NJ does not tax true SaaS transactions.

Sourcing sales of digital goods

- Just because a business has nexus with a state does not mean the business has sales/use tax exposure.
- In the post-Wayfair nexus world, “sourcing” sales accurately can impact whether or not a remote business has nexus with a given tax jurisdiction.
- As we know, not all states tax digital goods. You have to know the rules in each state. As described above, the rules are complex and in flux.
- For example, California exempts digital goods. New York taxes digitally accessed or transferred software but exempts other digital products such as music and pictures. On account of these distinctions, it’s important to understand the sourcing rules for the sale of digital goods.

Sourcing: what state rules apply?

- General rule: for software and digital goods, the state where the end user is located typically controls the sourcing.
  - Majority of the states have adopted the SSUTA Rule 310A – “best known information at the time of sale”
  - If the seller follows the hierarchy, they are relieved of liability, but the purchaser may still be liable for taxable uses in other jurisdictions.
- What happens when users are located across various states? Or what if a service is performed for a business with locations in multiple jurisdictions (e.g., software-based accounting services, accounts payable, payroll)?
  - Principal-place-of-business approach.
  - Reasonable estimates of user locations.
  - What books and records does the taxpayer maintain (and should the taxpayer maintain) to demonstrate the proper sourcing?

Sourcing: exemptions and certificates

- Multiple points of use (MPU) exemption certificates
  - A handful of states allow purchasers to provide sellers MPU exemption certificates when certain requirements are met.
    - For example, in order for the exemption to apply, most states require that the software be transferred or accessed digitally and that the software be used by the customer in multiple jurisdictions.
  - These certificates can be a very effective way for a seller to limit its compliance obligation. A seller that receives the exemption certificate is relieved of its obligation to collect tax on the transaction. Rather, the purchaser is obligated to remit the tax to the state once it determines where the software is used by its employees.
- Sourcing is important, and so is the customer's application of the service/digital good, and the status of the customer itself.

Sourcing: enforcement/audit issues

- Frequently, a company’s sales tax obligations are complicated by the manner in which its products are sold. For example, when the company sells multiple products or deliverables (some taxable and some exempt), its sales tax liability can unnecessarily increase if the transaction is not billed properly.
  - Bundling rules: when taxable and exempt items are bundled into a single price, the entire charge can be subject to sales tax.
  - Can the items and services actually be sold separately, even if they are separately stated on an invoice?
- If multiple products are sold (some taxable and some exempt), the company must be able to track the different revenue streams.
  - Sales tax audits are always more difficult and problematic if the taxpayer does not have good records detailing the transactions at issue.

Questions and answers

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New York Convenience of Employer Test in a Post-Pandemic Era

October 27, 2022

New York – Taxation of Residents and Nonresidents

New York - Resident, Non-Resident, and Part-Year Resident for Income Tax Purposes

- **Resident**
  - Domiciled is New York State or
  - You maintain a permanent place of abode in New York for substantially all of the taxable year and spend 184 days or more in New York State During the taxable year, whether you are domiciled in New York for any portion of the taxable year. Any part of a day is a “day” for determining residency.
- **Nonresident**
  - A New York State Nonresident is if you are not a resident or New York State for any part of the year
- **Part-Year Resident**
  - A New York State Part-Year resident is if you meet the part of the definition of resident or non-resident for only part of the year.

If you fall into the resident, non-resident, or part-year category, you could be subject to taxation in the State of New York. New York’s “Convenience of Employer” Test could be the reason a nonresident or part-year resident is subject to taxation.

New York – Tax Return Requirements

- **Resident and Nonresident Return Requirements**
  - As a resident, you pay state tax (and city tax if a New York City or Yonkers resident) on all your income no matter where it is earned.
  - As a nonresident, you only pay tax on New York source income, which includes earnings from work performed in New York State, and income from real property located in the state.
- **Residents**
  - If you are a New York State resident you must file Form IT-201, Resident Income Tax Return, if you meet any of the following conditions:
    - You have to file a federal return.
    - You did not have to file a federal return but your recomputed federal adjusted gross income plus New York additions was more than $4,000 ($3,100 if you are single and can be claimed as a dependent on another taxpayer's federal return).
    - You want to claim a refund of any New York State, New York City, or Yonkers income taxes withheld from your pay.
    - You want to claim any of the refundable or carryover credits available.
- **Nonresidents or Part-Year Residents**
  - If you do not meet the requirements to be a resident, you may still owe New York tax as a nonresident if you have income from New York sources.

  - If you were a resident for only a portion of the year, your income subject to tax will be split, with part taxed according to resident rules and the remainder subject to nonresident rules. To compute tax, you first calculate your tax as if you were a full year resident, then determine how much to allocate to New York by an income percentage based on your New York source income and your federal income.

New York – Convenience of Employer Rule

- **New York (Performance of Employment Service Within and Without the State)**
  - Section 601(e) of the New York State Tax Law imposes a personal income tax on a nonresident individual's taxable income that is derived from New York sources. The tax is equal to the tax computed as if the individual were a New York State resident for the entire year, reduced by certain credits, multiplied by the income percentage.
- **Convenience of Employer Rule**
  - If a nonresident employee (including corporate officers, but excluding employees provided for in section 132.17 of this Part) performs services for his employer both within and without New York State, his income derived from New York State sources includes that proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State. The items of gain, loss and deduction (other than deductions entering into the New York itemized deduction) of the employee attributable to his employment, derived from or connected with New York State sources, are similarly determined. However, any allowance claimed for days worked outside New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. In making the allocation provided for in this section, no account is taken of nonworking days, including Saturdays, Sundays, holidays, days of absence because of illness or personal injury, vacation, or leave with or without pay.
- **Work Days Defined – Form IT-203-B**
  - Work days are days on which you were required to perform the usual duties of your job. Any allowance for days worked outside New York State must be based upon the performance of services which, because of necessity (not convenience) of the employer, obligate the employee to out-of-state duties in the service of his employer. Such duties are those which, by their very nature, cannot be performed at the employer's place of business.

New York – Pandemic Update "Convenience of Employer"

- **October 2020 New York Update**
  - If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in [New York] unless your employer has established a bona fide employer office at your telecommuting location.
- **Under the Bona fide employer office exception - most work-from-home employment still would be treated as New York-sourced income.**
  - New York Department memorandum TSB-M-06(5)I, for tax years beginning in 2006, a day of work spent at a home office is treated as a day worked outside of New York "if the taxpayer's home office is a bona fide employer office."
    - An employer office must satisfy either (1) a primary factor or (2) at least four secondary and three other factors.
    - The primary factor is that the "home office contains or is near specialized facilities."
    - Secondary factors are the following: (1) the home office is a condition of employment, (2) the employer has a bona fide purpose for the home office location, (3) the employee performs core duties from the home office, (4) the employee meets or deals with clients regularly at the home office, (5) the employer does not provide the employee with a designated office space at its regular places of business and (6) the employer provides reimbursement of substantially all expenses for the home office.
    - Other factors are (1) the employer maintains a separate telephone line for the home office, (2) the home office address is listed on business letterhead, (3) the employee uses a specific area of the home exclusively for the business, (4) the employee keeps inventory of products or samples at the home office, (5) business records are stored at the home office, (6) the home office has a sign indicating that it is a place of business, (7) advertising for the employer lists the home office, (8) the home office is covered by business insurance, (9) the employee is entitled to home office expense deductions and (10) the employee is not an officer of the company

New York – Interpretation & Case Law

- ***Huckaby vs. New York State Division of Tax Appeals*** **(04-1734)**
  - Appeals Court Held - New York's "convenience of the employer" test, which provides that when a nonresident is employed by a New York employer, income derived from work in another state is taxable by New York unless performed out of state for the necessity of the employer. Here, the taxpayer, a Tennessee resident who works for a New York employer, contends that the convenience test violates the statute that it implements as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. We disagree, and uphold the challenged tax as applied to this taxpayer.
- ***Zelinsky v. Tax App. Trib., 1 N.Y.3d 85 (N.Y. 2003) cert. denied 541 U.S. 1009 (2004)***
  - New York's convenience of the employer test upheld as constitutional even though it resulted in double taxation of an individual's income by Connecticut and New York due to Connecticut's refusal to credit the individual with all the nonresident income tax paid to New York
- ***New Hampshire V. Massachusetts cert. denied (2021)***
  - The Massachusetts Department of Revenue promulgated an emergency regulation that treated nonresidents who worked in Massachusetts before the pandemic as if they were still working in Massachusetts during the pandemic. New Hampshire does not impose a personal income tax on its residents. Thus, New Hampshire residents who work in New Hampshire typically don't pay income tax in any state. New Hampshire viewed this tax on its residents as an infringement on its sovereignty. Thus, the state sought to enjoin Massachusetts from taxing its residents using the COVID Sourcing Regulation on constitutional grounds. The Supreme Court declined cert on this issue.


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International Tax Update

October 27, 2022

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Agenda

1. OECD: Pillar 1
    - Overview
    - Insurance industry

2. OECD: Pillar 2
    - Overview
    - Scope & Timelines
    - US tax considerations

3. Jurisdictional Tax Reforms
    - US
    - UK; Germany; Ireland; Italy; Netherlands; Singapore; Etc.
    - Bermuda / Cayman Islands??

01

OECD: Pillar 1

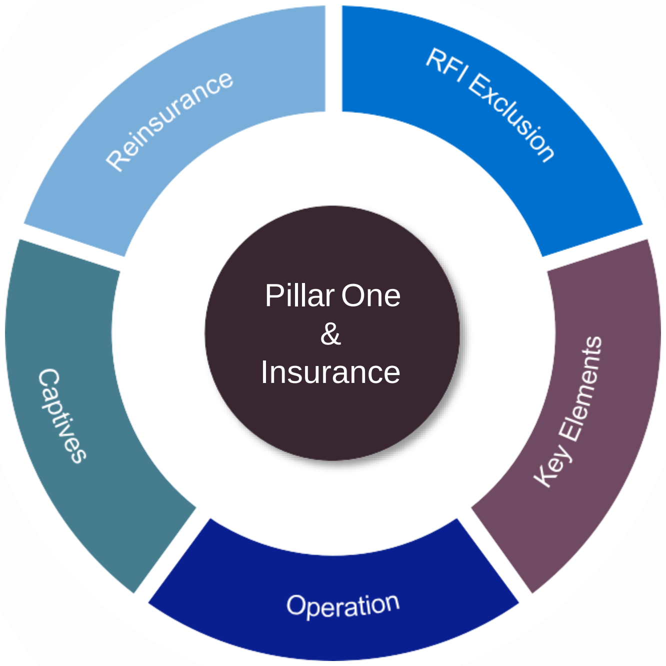
OECD: Pillar 1
Overview

- **In general, Pillar One determines the allocation of taxing rights between jurisdictions:**
    - Introduces a new taxation right that focuses on the reallocation of certain amounts of taxable income to market jurisdictions without regard to whether the company has physical presence in those market countries
    - Scope: Multinational companies (MNE’s) with global Qualifying Revenues above $20 billion (€20B) and profitability above 10% of revenue. (Possibly decreased to $10 billion in 2030)

- **Needed Components for Tax Calculation:**
    - Amount A - A new taxing right for market countries to reallocate a share of an MNE’s residual profit, resulting in a change in effective tax rate and cash tax obligations
    - Amount B - A fixed return for certain baseline marketing and distribution activities performed in a market country. Amount B is intended to simplify the administration of transfer pricing rules for tax administrations and reduce compliance costs for taxpayers
    - Tax certainty - Prevention and resolution mechanisms in relation with Amounts A and B computation

- **Applicable Tax:**
    - 25% tax rate on profits in excess of 10% of revenue subject to tax in market jurisdictions

OECD: Pillar 1 – "Exclusions"
Insurance Industry



Regulated Financial Institutions (RFI) Exclusion

- In general, RFIs would be excluded from the scope of Pillar One
- RFIs include Insurance, Asset Management, Depository Institutions, Investment Institutions, Mortgage Institution, Mixed Financial Institution and RFI Service Entities.

Key Elements

- The definition for each type of Regulated Financial Institution generally contains three elements, all of which must be satisfied:
  - a licensing requirement;
  - a regulatory capital requirement;
  - and an activities requirement.
- These conditions recognize the uniquely regulated nature of financial services.

Operation

- The exclusion is operated on an Entity-by-Entity basis:
  - An Entity that meets the definition of Regulated Financial Institution is wholly excluded from this regime.
  - An Entity that does not meet that definition is wholly included in Pillar One (Amount A) scope.
  - An Entity includes any branches, whether or not there is a permanent establishment under domestic law and the applicable tax treaty, and the Entity is tested as a whole.

Captives

- Certain type of entities such as captive insurers would not qualify for the Regulated Financial Service exclusion

Reinsurance

- On 26 May 2022, the OECD published the responses to its consultation on whether reinsurance should be included within the exclusion
- The consultation paper stated that certain OECD members consider reinsurance activities should not benefit from the financial services exclusion
- However, the industry was unanimous in asserting that reinsurance should be included within the exclusion's scope

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02

OECD: Pillar 2

OECD: Pillar 2
Scope & Global Insurance Market

APPLICABLE TO:

All Multinational Groups with global revenue above €750m

Including insurance companies

SPECIAL CONSIDERATIONS FOR INSURANCE COMPANIES

Special Regulatory, Accounting and Tax rules

Rules for businesses that sell physical products or perform services and realize profits in a relatively defined period would probably produce undesirable estimate of taxes paid by insurance companies

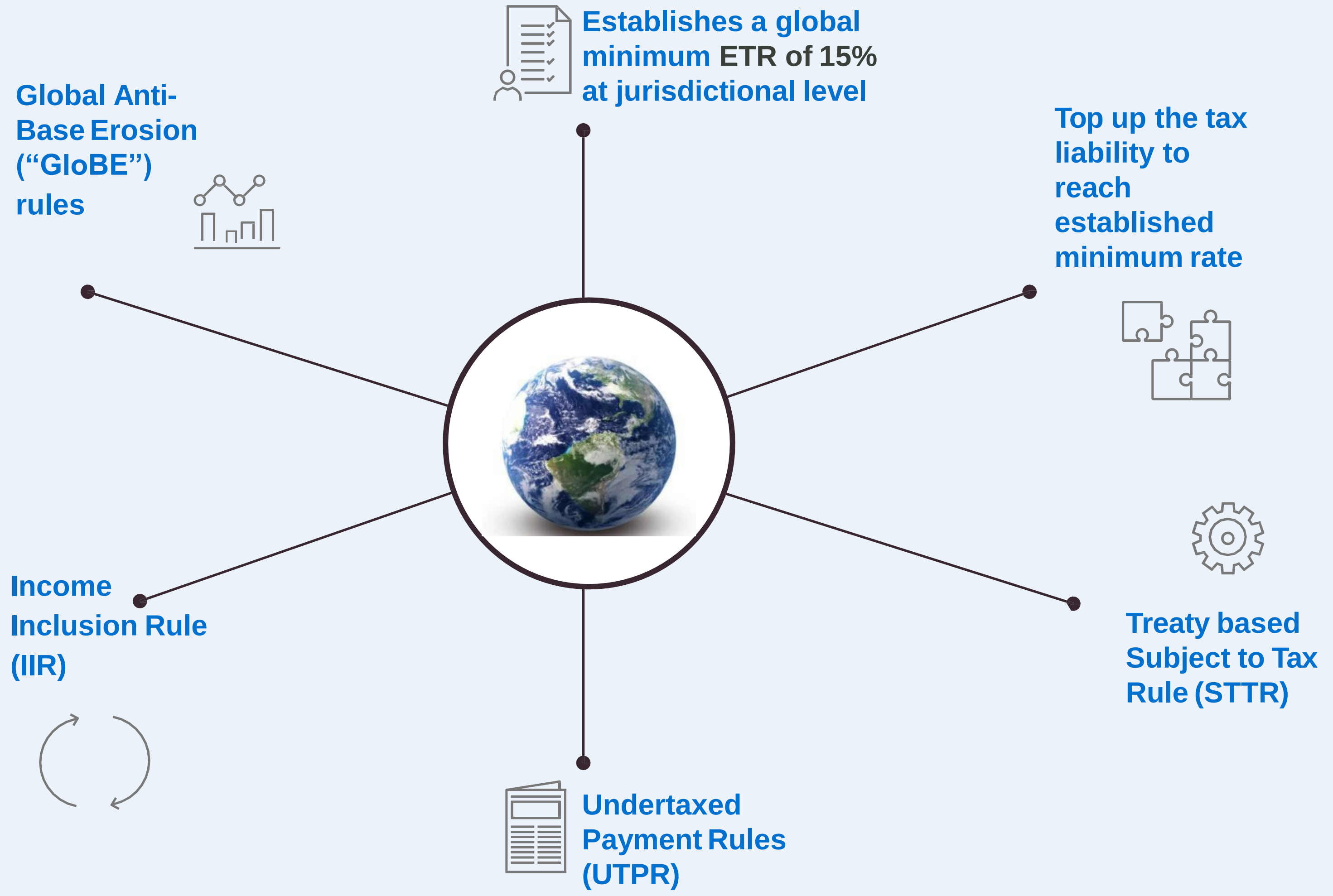
From the day an insurance policy is sold or reinsured (income recognition) until the insured risk occurs (loss recognition), every interim reporting of profit or loss is an estimate

The insurance industry is at different stages of development around the world. Pillar Two as proposed could substantially affect the industry's development (i.e., excessive administrative burden on relatively small insurance companies)

Insurance MNEs would probably incur global minimum taxes, although the insurance companies were otherwise fairly taxed, because simplified assumptions applicable to other industries would be applied to this unique industry

GLOBE costs would likely result in higher premiums for the local insured

OECD: Pillar 2
Overview

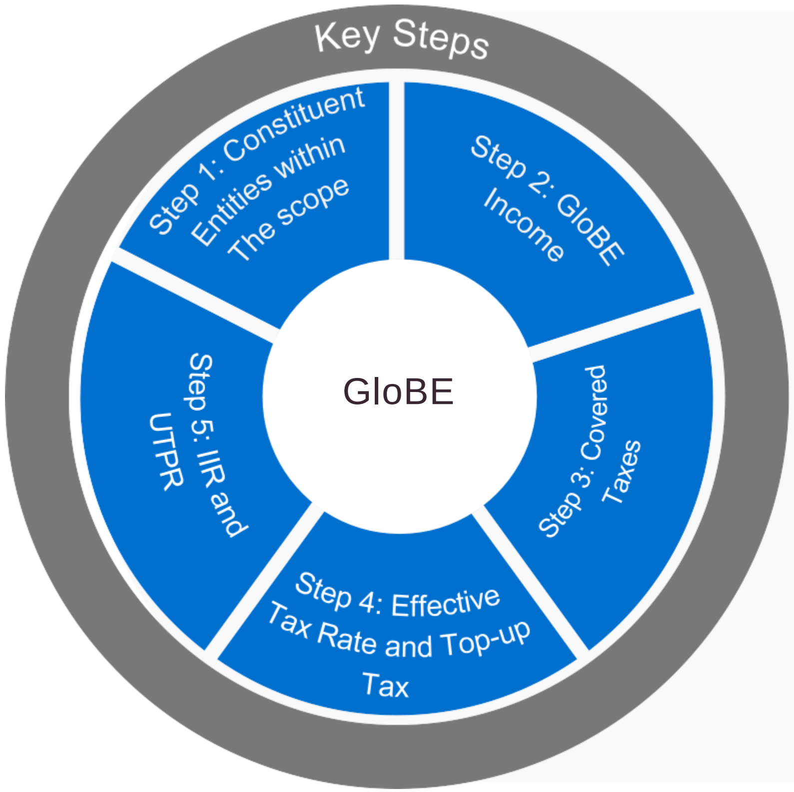


OECD: Pillar 2
Key Definitions

- **GloBE:** The OECD released "Global Anti-Base Erosion rules" to assist in implementing a landmark reform to the international tax system, which will ensure Multinational Enterprises ("MNEs") will be subject to a minimum of 15% tax rate.
- **IIR:** The "Income Inclusion Rule" is the primary mechanism that will require a parent company of an MNE to top-up its effective taxes paid in any tax jurisdiction it does business in, through a subsidiary or through a permanent establishment, to yield a 15 percent rate.
- **MNE:** Multinational enterprises are defined as companies that hold assets or employees in more than one country.
- **QDMTT:** The "Qualified Domestic Minimum Top-up Taxes" is a minimum tax that is incorporated into the domestic law of a country. It should compute profits and calculate any top-up tax due in the same way as the Pillar 2 rules themselves.
- **STTR:** The treaty-based Subject to Tax Rule allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate. The STTR will be creditable as a covered tax under the GloBE rules.
- **UTPR:** The Undertaxed Payments Rule requires a taxpayer that is a member of an MNE Group to make an adjustment in respect of any top-up tax that is allocated to that taxpayer from a low-tax Constituent Entity of the same group.

OECD: Pillar 2

Key Steps & Operative Computation Rules



Calculate the effective tax rate

Chapters 3 and 4 of the OECD Model Rules identify the pools of low taxed income on a jurisdictional basis. They do this by calculating the income (or loss) under Chapter 3, and the tax attributable to that income under Chapter 4.

Calculate the top-up tax

Where there is low taxed income in a jurisdiction, the resulting top-up tax calculation is done under the rules in Chapter 5. The rate of tax owed is the difference between the 15% minimum rate and the ETR in the jurisdiction.

Determine the liability for the top-up tax

If top-up tax is owed, the charging provisions in Chapter 2 apply. These provisions describe which entity within the MNE will be liable for top-up tax in respect of low taxed income arising in a jurisdiction.

Apply the IIR and UTPR

Identifying the parent liable for the top-up tax under the IIR and allocating the liability for any residual top-up tax through a UTPR adjustment.

OECD: Pillar 2
Timeline

October 2021

- G20 Finance Ministers Political Endorsement

December 2021

- EU Draft Directive for Pillar Two
- Pillar Two GloBE model rules

2022

- July 16: G-20 Finance Ministers and Central Bank governors meeting: Chair Summary Statement & and US concerns on Pillar Two rules
- July 20: UK Proposed Legislation

2023

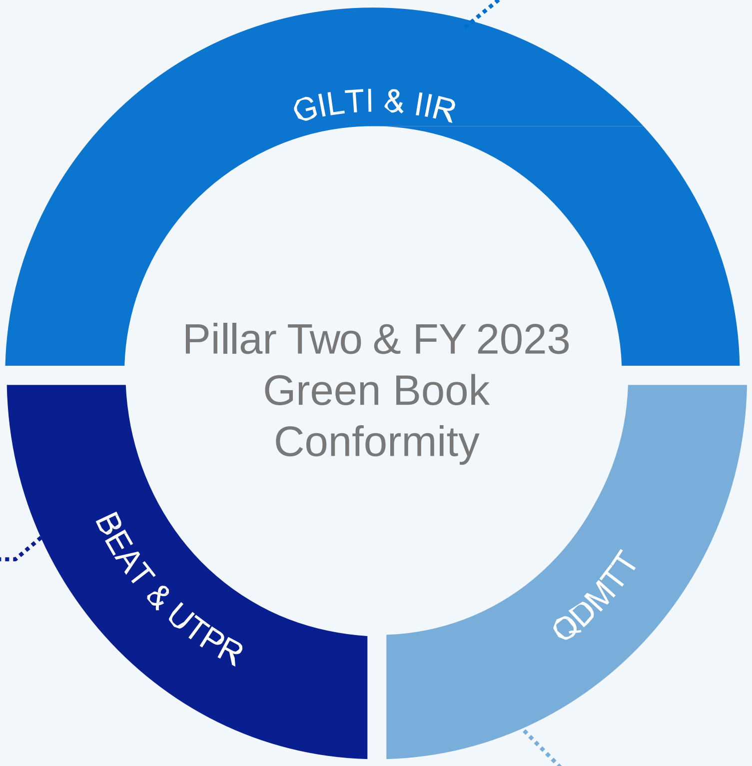
- Pillar One Multilateral Convention ratification and entry into force and effect
- Pillars One & Two expected implementation in the EU

2024

- Implementation of some Inclusive Framework countries with slower processes
- UTPR to come into effect

OECD: Pillar 2
US Tax Considerations

- Although the BBB retained the BEAT with some modifications, the FY 2023 Green Book would repeal the BEAT and replace it with a new undertaxed profits rule (UTPR) that is intended to be consistent with the UTPR described in the OECD Pillar Two Model Rules
- It would apply to foreign-parented multinationals operating in low-tax jurisdictions that have global annual revenue of $850 million or more

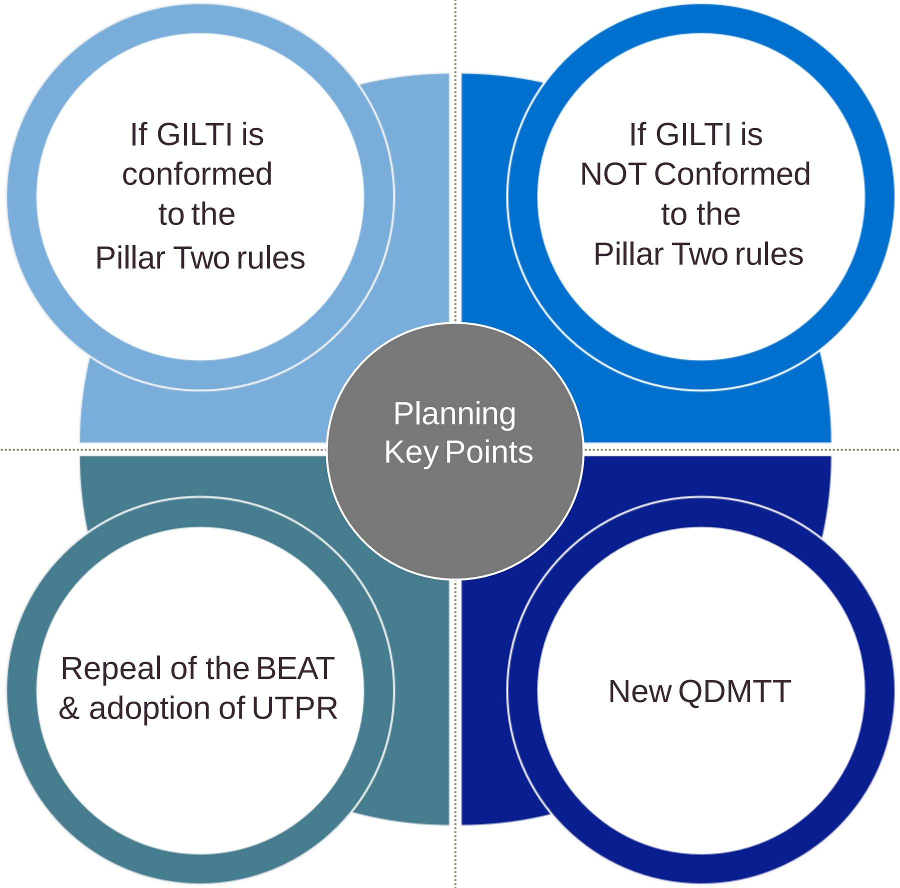


- GILTI rate of 15.8%
- Application on a country-by-country basis
- 5% haircut = 95% FTC
- Repeal of most expense apportionment to GILTI

- Treasury also proposes adopting a Qualified Domestic Minimum Top up Tax (QDMTT) that taxes US companies at a 15%minimum rate as contemplated under the Pillar Two Model Rules
- The proposed QDMTT would prevent the application of UTPR or IIRs to US income

OECD: Pillar 2
Practical Considerations

- IIR and UTPR will unlikely apply to foreign entities within a US-parented group
- Low-taxed income earned within the US and low-taxed incomed earned by US-owned foreign branches could be subject to the UTPR



- The IIR and/or UTPR will likely apply at other entities within a US-parented group
- Local UTPR regimes should be carefully monitored

- See above. Planning strategies would largely depend on whether GILTI is conformed to the Pillar Two rules

- The QDMTT would effectively ensure that the US can collect the top-up tax on any US low-taxed income, rather than having the allocated amounts go to a country with a UTPR

03

Jurisdictional Tax Reform

Jurisdictional – Responsive Tax Law Changes

- US
  - As noted in above slides, the implementation of Pillar 2 in the US remains stalled, given the fact that proposed changes to the current US global intangible low-taxed income (GILTI) were not included in final recently enacted tax Inflation Reduction Act.
  - The new 15% minimum tax on financial statement income for certain large corporations is likely **NOT** a Qualified Domestic Minimum Top-up Tax (QDMTT) per the current OECD guidelines. Unless the OECD provides changes to the Pillar 2 guidelines, or the US congress passes legislative tax law changes, the US may be left out in collecting some potential Top-up Tax. Thus, there is currently some uncertainty in this respect.
- Other jurisdiction: Currently, the following major jurisdictions (as well as numerous other states) have introduced legislations to meet the Pillar 2 requirements in varying stages of finalization.
  - UK, Germany, Ireland, Italy, Netherlands, Singapore, United Arab Emirate, etc.

Jurisdictional – Responsive Tax Law Changes

- Bermuda / Cayman Islands

  - **Will these jurisdictions impose an income tax???**

    - Currently there is no income tax in the above jurisdictions…

    - However, Pillar 2 rules would impose a 15% tax on earnings in these jurisdictions, with the tax being collected in other countries.

    - Many tax advisors have cautioned that an income tax is not out of the realm of possibilities, but there is no current indications.

QUESTIONS

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LICONY 38th Annual
Tax Conference
LICONY
Thursday,
October 27, 2022
9am - 4pm
Reception:
4:30pm-6:30pm
Location:
Guardian Life
Insurance Company
Hudson Yards, NYC

Insurance Tax M&A

Christopher Peters | October 27, 2022

Outline

- Basics of Reinsurance
- Deferred Acquisition Costs (“DAC”)
- Applicable Asset Acquisitions & Section 1060
- Section 338 & Insurance Transactions
- Unified Loss Rules – 1.1502-36
- Product Taxes

Basics of Reinsurance

Two Forms of Reinsurance

- "Indemnity reinsurance" and "assumption reinsurance"

- Two main types of indemnity reinsurance:
  - Coinsurance
  - Modified Coinsurance ("Modco")

- The parties involved in a reinsurance transaction are the "ceding company"/"cedant" and the "reinsurer." The ceding company transfers risk with respect to insurance contracts to the reinsurer.

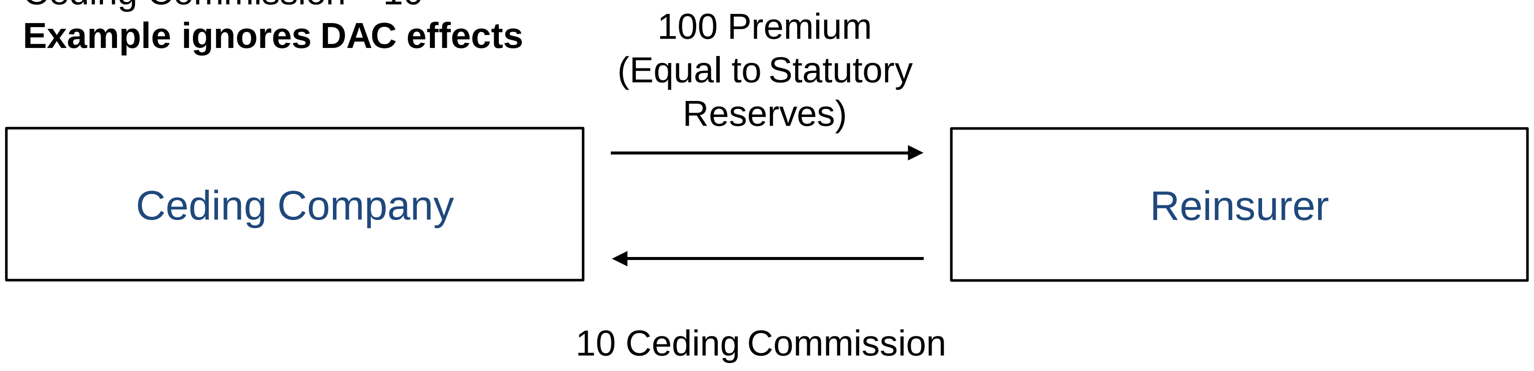
Indemnity Reinsurance – Basic Tax Consequences

	Ceding Company	Reinsurer
Reserves	Ordinary income equal to reserve reduction §803(a)(2)	Ordinary deduction equal to reserve increase §805(a)(2)
Reinsurance premium	Ordinary deduction equal to reinsurance premium paid §803(a)(1)(B)	Ordinary income equal to the reinsurance premium received §803(a)(1)(A)
Ceding commission *Note: Does not address DAC	Ordinary income (deduction) equal to ceding commission received (paid) §803(a)(3)	Specific insurance contracts: Ordinary deduction (income) for ceding commission paid (received), subject to §848(g) Other contracts: ceding commission is amortized over life of the reinsured contracts *Colonial American Life Insurance Company v. Commissioner* (491 U.S. 244, 1989)

Example 1a – Indemnity Reinsurance

Assumptions:

Statutory Reserves = 100
Tax Reserves = 80
Ceding Commission = 10
Example ignores DAC effects



Taxable income (deductions):

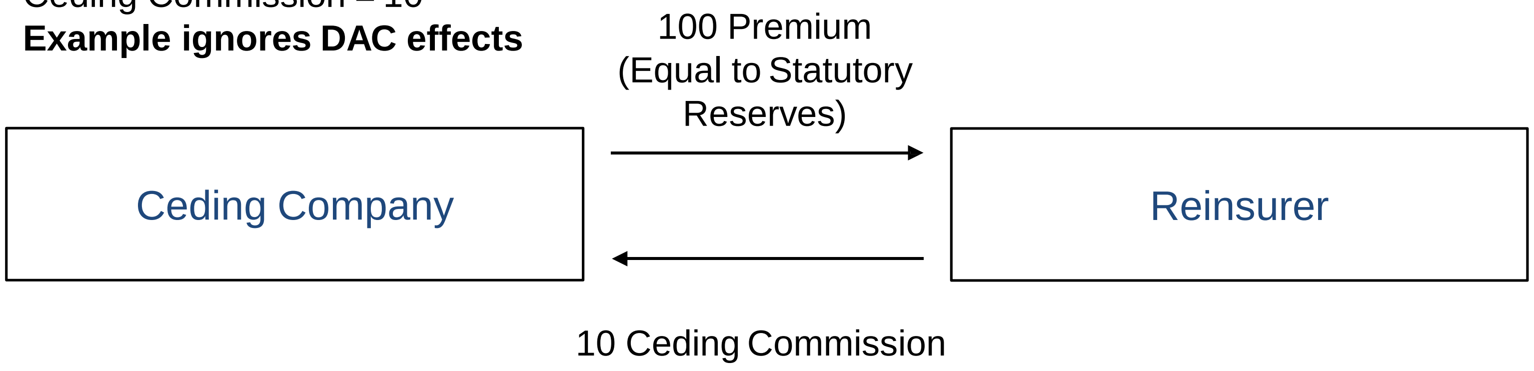
(100)	Premium paid
80	Decrease in tax reserves
10	Ceding commission
(10)	Overall net deduction

100	Premium received
(80)	Increase in tax reserves
(10)	Ceding commission
10	Overall net income

Example 1b – Indemnity Reinsurance

Assumptions:

Statutory Reserves = 100
Tax Reserves = 100
Ceding Commission = 10
Example ignores DAC effects



Taxable income (deductions):

(100)	Premium paid
100	Decrease in tax reserves
10	Ceding commission
10	Overall net income

100	Premium received
(100)	Increase in tax reserves
(10)	Ceding commission
(10)	Overall net deduction

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Example 1a and 1b – Tax Considerations

- Ceding Company has gain/loss on transfer of underlying assets (i.e., premium) in a traditional coinsurance transaction.
- Note that under current law/post-TCJA, the deduction for reserve increases is limited to 92.81% of the statutory reserve amount.
- ModCo has different tax results.
- FET considerations.

Assumption Reinsurance – Basic Tax Consequences

- Basic tax consequences are similar to indemnity reinsurance
- However, under § 197(f)(5), the excess of the ceding commission over any DAC amount is amortized over 15 years (and not immediately deductible)
- Pre-TCJA, the 15-year amortization period under § 197 was longer than the 10-year amortization period under § 848 (DAC rules)

Note: Not a common form of asset acquisition – assigning insurance contracts to the reinsurer (including obtaining holder consent) could be challenging.

Deferred Acquisition Costs (DAC)

Deferred Acquisition Costs (DAC)

- The DAC rules require a life insurance company to capitalize a portion of its general deductions § 848

- The insurance company is required to capitalize “specified policy acquisition expenses” (often referred to as the DAC amount)

- The DAC amount is amortized over a 15-year period § 848(a)

  - Pre-TCJA, the DAC amount was amortized over a 10-year period

Deferred Acquisition Costs (DAC) – Specified Policy Acquisition Expenses

- "Specified policy acquisition expenses" – the amount required to be capitalized – equals a statutory percentage of "net premiums" § 848(c).

- Statutory Percentage:
  - 2.09% for annuity contracts (previously 1.75%)
  - 2.45% for group life insurance contracts (previously 2.05%)
  - 9.20% for other specified insurance contracts (previously 7.7%)

- Note that these are not the actual expenses of the contract, they are a statutorily determined amount.
- An increase in DAC means a company is required to capitalize additional amounts, with potentially lower immediate deductions.

DAC Election under Section 848

- The net negative consideration that a party to a reinsurance agreement may take into account is reduced if the other party to the transaction has a "capitalization shortfall"
- Capitalization shortfall = available general deductions are less than the amount that is required to be capitalized
- This reduction does not apply if the ceding company and the reinsurer make an election under § 1.848-2(g)(8)
- If the election is made, the party with net positive consideration must:
  - Increase its DAC balance without regard to the general deduction limitation and
  - Reduce its other deductions by the amount of the capitalization shortfall

Reinsurance vs. Applicable Asset Acquisition

Section 1060 - Applicable Asset Acquisitions

- “The mere reinsurance of insurance contracts by an insurance company is not an applicable asset acquisition, even if it enables the reinsurer to establish a customer relationship with the owners of the reinsured contracts. However, a transfer of an insurance business is an applicable asset acquisition if the purchaser acquires significant business assets, in addition to insurance contracts, to which goodwill and going concern value could attach.”

  § 1.1060-1(b)(9)

Applicable Asset Acquisitions – Effects

- If a reinsurance transaction is treated as an applicable asset acquisition:
  - ADSP and AGUB are allocated to Class I-VII assets using the residual method under § 1.338-6 and -7, as modified by the principles of § 1.338-11(a) through (d) (discussed below)
  - The residual method applies to both assumption reinsurance and indemnity reinsurance transactions
  - Insurance contracts are a Class VI asset (regardless of whether they are a § 197 intangible)

§ 1.1060-1(c)(5)

When Does Section 1060 Apply to a Reinsurance Transaction?

- § 1.1060-1(b)(9): "However, a transfer of an insurance business is an applicable asset acquisition if the purchaser acquires significant business assets, in addition to insurance contracts, to which goodwill and going concern value could attach"

- In practice –
  - Does the transaction also involve transfer of sales force/employees?
  - Does the transaction include computer programs or other intangible assets?

Section 338(h)(10) & Section 336(e) Elections

Section 338(h)(10)/336(e) Elections

- Consequences of the election
  - Generally, treated as a sale by target (“Old T”) of all of its assets to New T, followed by a liquidation of Old T.
  - The sale and liquidation is treated as occurring while Old T is a member of Seller’s consolidated group. Thus, Seller is generally liable for tax on the sale (unlike a standard § 338(g) election).

- When T is an insurance company, the sale of Old T’s insurance contracts is treated as an assumption reinsurance transaction between Old T and New T.

- The § 338(h)(10)/1060 rules apply and provide:
  - Residual method of allocation of consideration among assets acquired (including insurance contracts) pursuant to a waterfall
  - DAC capitalization (if relevant)
  - Amount allocated to insurance contracts in excess of DAC capitalization constitutes a § 197 intangible

Section 338 Regulations & Insurance

- A § 338(h)(10) election with respect to an insurance company results in a deemed sale of the target's insurance contracts through an assumption reinsurance transaction between Old T as ceding company and New T as reinsurer

- Old T recognizes ADSP and New T recognizes AGUB
  - ADSP/AGUB = purchase price plus assumed liabilities
  - Target's tax reserves are treated as an assumed liability

- Reinsurance premium equals the amount of T's reserves – as a result, New T will generally not recognize income on the transaction

- Ceding commission = ADSP/AGUB allocated to acquired insurance contracts

Section 338 Regulations & Insurance - continued

- Allocate ADSP/AGUB to Class I-VII assets under the regular residual method
- Insurance contracts are Class VI assets
- FMV of insurance contracts is deemed to equal the amount of ceding commission that a reinsurer would pay to a ceding company in an arm's-length transaction assuming the gross reinsurance premium is equal to old target's tax reserves
- DAC rules apply to net negative/positive consideration

§ 1.338-11(c)

Example 1 – Applicable Asset Acquisition

- Assumptions (same facts as Example 1 but reinsurance transaction is part of an applicable asset acquisition, buyer also acquires hard assets and goodwill)
  - Statutory reserves = 100
  - Tax reserves = 80
  - Hard assets = 5
  - Purchase price = 25 (inclusive of 10 arm's-length ceding commission)
  - FMV of insurance contracts determined under § 1.338-8(b)(2) principles = 0
  - Example ignores DAC effects
- Determine ADSP/AGUB = 105 = (80 tax reserves + 25 purchase price)
- Allocate 105 of ADSP/AGUB under residual method:
  - 100 Assets transferred with respect to reserves (Class I – III assets)
  - 5 Hard assets (Class V assets)
  - 0 Reinsurance contracts (Class VI assets)
  - 0 Goodwill (Class VII assets)

Example 1 – Applicable Asset Acquisition, continued

- Deemed reinsurance transaction consequences:

Ceding company:

(80)	Premium paid
80	Decrease in tax reserves
0	Ceding commission
0	

Reinsurer:

80	Premium received
(80)	Increase in tax reserves
0	Ceding commission
0	

- Reinsurance contract has same economics as Ex. 1 for reinsurance, but under § 338 principles, reinsurer does not recognize current income (instead, no step-up in goodwill)

Example 2 – Applicable Asset Acquisition

- Assumptions:
  - Statutory reserves = 100
  - Tax reserves = 80
  - Purchase price = 15 (inclusive of 5 arm's-length ceding commission)
  - FMV of insurance contracts determined under 1.338-8(b)(2) principles = 0
- Determine ADSP/AGUB:
  - = 95 (80 tax reserves + 15 purchase price)
- Allocate 95 ADSP/AGUB:

95	Assets transferred with respect to reserves (Class I – III assets)
0	Hard assets (Class V assets)
0	Reinsurance contracts (Class VI assets)
0	Goodwill (Class VII assets)

- Ceding company:
  - 80 (reduction in tax reserves) – 80 (premium) + 0 (ceding commission) = 0
- Reinsurer:
  - Deemed assumption reinsurance transaction
  - 80 (premium) – 80 (increase in tax reserves) – 0 (ceding commission) = 0
- "Negative" tax ceding commission with respect to reinsurance transaction reduces tax basis of assets (Class V and then Class I – III)
- Ceding company does not recognize current income but may recognize income as assets backing reserves mature or are disposed of

Section 338(h)(10)/336(e) Elections

- When is an election desirable for the Seller?
  - Case 1: when the Target's inside basis is higher than Seller's outside stock basis (or Seller has an ELA in target stock);
  - Case 2: Seller has otherwise expiring losses, or Target has significant losses that would be limited by Code Section 382 post-closing;
  - Case 3: Seller is retaining appreciated assets owned by Target (pre-closing distribution of assets treated as transferred in connection with non-taxable liquidating distribution);
  - Case 4: § 1.1502-36 rules would reduce or eliminate losses on sale of stock without the election.

Section 1.1502-36 Rules

Application and Impact of the § 1.1502-36 Rules

- Goal – the regulations target “non-economic” and/or “duplicated” losses

- Focus on two types of transactions:
  - Son of mirrors
  - Duplicated loss

- History

- Relevance to insurance transactions?

§ 1.1502-36 Rules – Non-Economic Loss / Son of Mirrors

- Son of Mirrors:
  - P purchases T's stock for $500. T owns two assets, Sellacre (FV $250, basis $100) which P wants to sell, and Keepacre (FV $250, basis $150), which P wants to keep. P and T file a consolidated return.
  - P causes T to distribute Keepacre as a dividend
    - Keepacre dividend triggers a $100 gain under § 311(b) that is deferred until P sells the T stock.
    - P's basis in its T stock then equals $350 ($500 (purchase price) - $250 (FV of Keepacre) + $100 (311(b) gain))
  - P then sells the stock of T (which owns only Sellacre) to Buyer for $250
    - P recognizes $100 loss on sale, offsetting the § 311(b) gain on the distribution
- Absent the -36 rules, this transaction allows P to avoid § 311(b) gain on distribution. This result has been disallowed under all versions of the regulations.
- Under the current version of regulations, this loss is disallowed by reducing basis of the T stock by the amount of the investment adjustments.

§ 1.1502-36 – Duplicated Loss

- Example: P purchases T's stock for $500. T's assets have a value and basis of $500 at that time. During the year T's assets decline in value by $100. At year end P sells T's stock to Buyer for $400.
  - P recognizes $100 loss on sale of stock.
  - T has a $100 built-in loss on its assets that Buyer's group can recognize post-closing.

- Concern is that the tax system will recognize two tax losses from a single economic loss: the reduction in value of T assets.

- Current regulations allow P the loss, with a reduction in T's attributes to prevent Buyer from using a "duplicate" loss.

Transactions *not* implicated by § 1.1502-36

- The -36 rules only apply to “loss shares” i.e., shares sold at a loss.

- Distributions or losses that reduce gain (rather than reducing a loss) do not come within the scope of the -36 rules. This could happen if Target assets appreciated after acquisition of Target, and Target subsequently sold.

§ 1.1502-36 – Basic Operation

- § 1.1502-36 applies when consolidated group member disposes or transfers a loss share of subsidiary stock
- Three-part mechanism, applied sequentially:
  - Basis Redetermination (§ 1.1502-36(b))
  - Basis Reduction (§ 1.1502-36(c))
  - Attribute Reduction (§ 1.1502-36(d))
- The basis redetermination rule is used to adjust for disparate basis among different shares, and may not apply in an M&A deal since the basis redetermination would not apply to taxable disposal of entire interest.
  - What about entering into a JV?

Basis Reduction – § 1.1502-36(c)

- Under the stock basis reduction rule, if after application of the basis redetermination rules, the T shares remain loss shares, the T share basis is reduced (but not below fair value) by the lesser of:

- Net positive investment adjustments (for example, from income recognized by subsidiary) and
- “Basis disconformity amount” (basically, outside basis over net inside attribute amount (tax attributes over liabilities))

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Basis Reduction – § 1.1502-36(c) – continued

- On 1/1 year 1, P purchases the sole outstanding share of T stock for $100. T owns asset 1 (FV $40, basis $0) and asset 2 (FV $60, basis $60). During year 1 T sells asset 1 for $40, recognizing $40 gain and increasing P’s basis in the T share by $40. P then sells the T share for $100.
  - P’s basis in its T share is $140 ($100 basis + $40 (gain recognized on selling asset 1)), and P's sale of the T share is a sale of a loss share (FV $100, basis $140), that is subject to -36.
  - The basis redetermination rule does not apply because P has disposed of all its T stock.
  - Basis reduction rule: P’s basis in its T share is reduced, but not below FV, by the lesser of (1) T share’s $40 net positive adjustment from T’s asset sale gain and (2) the $40 basis disconformity amount (roughly, the excess of (i) P’s basis of 140 in T stock, *over* (ii) T’s 100 net inside basis).
  - Accordingly, P’s basis in its T share is reduced by $40, from $140 to $100, causing P to recognize no gain or loss on the sale of its T share.

§ 1.1502-36(d) – Attribute Reduction Rules

- The real action for purposes of negotiating the provisions of an SPA are in the third step: attribute reduction.
- Basis redetermination and basis reduction are mandatory and mechanical: there is no “optionality.”
- Attribute reduction, however, offers the Buyer and Seller flexibility. While the rules are intended to prevent non-economic losses, they permit Buyer and Seller to determine who will be entitled to the benefit of tax losses.

§ 1.1502-36(d) – Attribute Reduction Rules

- If there are still loss shares after application of basis redetermination and reduction rules, the attribute reduction rules apply. § 1.1502-36(d)(4)
- Basic rules serve to reduce attributes by the “attribute reduction amount”

- Attribute reduction amount = lesser of “net stock loss” or subsidiary’s “aggregate inside loss”
  - Net stock loss = excess of aggregate basis of all transferred T shares over FMV of the transferred T shares
  - Aggregate inside loss = excess of T’s net inside attribute amount over the fair value of T’s stock.
    - Net inside attribute amount is sum of T’s net operating and capital loss carryovers, deferred deductions, money, and basis in other assets reduced by the amount of T’s liabilities

- Attributes eligible for reduction = net operating loss carryovers; capital loss carryovers; deferred deductions; basis of assets other than cash

§ 1.1502-36(d) – Attribute Reduction Rules, Example

- P purchases T stock for $500.
- T owns an asset with $500 FMV and basis.
- T's asset FMV declines to $400, and P sells T to Buyer for $400.

- The T shares are loss shares, since P has $100 loss on the sale.
- The basis redetermination and basis reduction rules do not apply here, but attribute reduction rules do apply.
- Attribute reduction amount = $100, the lesser of net stock loss and aggregate inside loss
  - Net stock loss = $100 (500 stock basis and 400 stock value)
  - Aggregate inside loss = $100 (500 asset basis over 400 stock value)

- P has a $100 loss on its sale of the T stock ($500 basis over $400 PP)
- Buyer acquires T. T's asset basis is reduced by $100 from $500 to $400.

§ 1.1502-36(d) – Attribute Reduction Rules Election

- Instead of reducing the asset basis of the transferred entity, P can make certain elections to preserve the T's asset basis – effectively keeping the cost of the § 1.1502-36 rules with P instead of shifting to Buyer.

- Elections available to P:
  - Reduce all or any portion of basis in subsidiary's stock to retain attributes (§ 1.1502-36(d)(6)(i)(A))
  - Reattribute all or a portion of subsidiary's attributes (here limited to capital loss carryovers, NOL carryovers, and deferred deductions) to parent (§ 1.1502-36(d)(6)(i)(B))
  - Any combination of the above (§ 1.1502-36(d)(6)(i)(C))

- Election is made via a "Section 1.1502-36 Statement" filed with the group's tax return for the taxable year when the transfer occurred

§ 1.1502-36(d) – Attribute Reduction Rules, Example

- P purchases T stock for $500. T owns an asset with $500 FMV and basis.   T's asset FMV declines to $400, and P sells T to Buyer for $400.
  - The T shares are loss shares, since P has $100 loss on the sale.
  - The basis redetermination and basis reduction rules do not apply here, but attribute reduction rules do apply.
  - Attribute reduction amount = $100, the lesser of net stock loss and aggregate inside loss
    - Net stock loss = $100 (500 stock basis and 400 stock value)
    - Aggregate inside loss = $100 (500 asset basis over 400 stock value)

- Parent and Buyer agree to make an election to reduce P's basis in T, preserving the $100 loss in T's asset
- P's basis in T stock is reduced to $400, and P recognizes no loss (or gain) on the sale.
- Buyer acquires T with T's asset basis remaining at $500.

§ 1.1502-36(d) – Deal Considerations

- Sellers
  - Need to know stock basis and attributes of Target
  - May be reluctant to share information in the diligence/negotiation phases

- Buyers
  - Need to develop a view on value of tax attributes – even if tax attributes do not otherwise form part of the business case for the acquisition

- Note that the default is the reduction of T’s tax attributes – and the implications for sellers and buyers

Product Taxes

Product Taxes

- What are “product taxes” and why are they different?
- Relevant SPA sections
  - Product tax representations
  - Indemnity (often as a standalone section)
- Note that product tax provisions tend to be relevant to life insurance companies, and that insurance companies will often have specific teams/people who work on product tax insurance issues

Product Tax Representations

- Tax treatment of insurance and annuity contracts issued by the company is consistent with the reasonable expectations of policyholders (tax-free death benefit) and disclosures made during marketing
- No unintended “modified endowment contracts” (MECs)
- Compliance with tax reporting, withholding and disclosure requirements for policyholders and properly maintained compliance records
- Information technology and related processes and procedures used to maintain tax qualification (7702 and 7702A testing) or to facilitate compliance (information reporting and withholding) are adequate
- No prior or pending requests for IRS relief for failed contracts
- No audits or investigations relating to the tax qualification of contracts
- No indemnities or “hold harmless” agreements
- Separate accounts are adequately diversified and assets are treated as owned by the company

Product Tax Representations – Practice Points

- Marketing Materials – "Provided by the Company in writing" vs. statements by sales force
- MECs – Policyholders consent in writing vs. notification of MEC status
- Adequacy of testing – technology "properly designed" vs. "properly designed, implemented and performed"
- Ongoing Tax Audits – limited by "knowledge" of Company?

Product Tax Indemnity

- Allocation of post-closing costs for failed products, problems in IT and operating systems, withholding and information reporting failures.

- What costs?
  - Fines and penalties for pre-closing contract failures discovered before closing or after closing
  - Fines and penalties for post-closing contract failures attributable to system failures
  - Cost of fixing/replacing non-performing IT or other inadequate systems
  - Cost of obtaining relief from the IRS for inadvertent contract failures (e.g., under Rev. Proc. 2009-38, Rev. Proc. 2008-40; Rev. Proc. 2008-42, Notice 2007-15).
    - Can include legal, accounting and actuarial fees, payments to the IRS and cost of remediating failed contract
  - Costs attributable to third-party (customer) claims over failed contracts or inadvertent MECs

Product Tax Indemnity – Practice Points

- Known vs. Unknown problems – liability for contract failures and systems issues disclosed before closing.
- Survival – for how long is buyer protected?
  - Different standards for pre- and post-closing failures? Third-party claims?
  - Different standard for systems failures?
- Control
  - Can buyer "self-report" contract failures to IRS?
  - Who decides if contract really fails?
  - System remediation – "gold plated solution" vs. "duct tape"
  - Must buyer follow seller's practices and procedures?
  - Who talks to the IRS? Policyholders?
- Systems failures v. contract failures?
- Employee compensation and other internal costs?
- Caps and baskets? Other cost sharing?
- "Typical" fix for alleged issue


LICONY 38th Annual
Tax Conference
Thursday,
October 27, 2022
9am - 4pm
Reception:
4:30pm-6:30pm
LICONY
Location:
Guardian Life
Insurance Company
Hudson Yards, NYC

Company Tax Update Panel

- Eli Katz, Managing Direction, Deloitte Tax
- Samuel Schwartz, Head of Tax, Equitable
- KT Gim, Head of Tax, Guardian

Agenda

Topic	Timing
Introductions	5 minutes
Discussion of the Inflation Reduction Act (IRA) with a specific focus on the book minimum tax	20 minutes
Accounting, Tax, and Other Considerations in light of the current interest rate environment	20 minutes
Return to office success and challenges and the latest tax department operating models	15 minutes

Discussion of the Inflation Reduction Act (IRA) with a specific focus on the book minimum tax

Inflation Reduction Act Overview

Corporate Minimum Tax

- Creates a 15% alternative minimum tax (AMT) for corporations with more than $1 billion of average adjusted financial statement income (AFSI) over a 3-year period (or less if the company has been in existence less than 3 years); the $1 billion threshold is not indexed for inflation. Certain items are excluded from AFSI, including income and costs associated with defined benefit pension plans, depreciation deductions for tangible assets, and amortization deductions for qualified wireless spectrum used in the business of a wireless telecom carrier.
- Does not apply to S corporations, regulated investments companies (RICs), and real estate investment trusts (REITS)
- Effective for taxable years beginning after 12/31/22
- Raises $222.25 billion over 10 years

Other Tax Provisions

- Excise tax on stock repurchases
  - Creates a new 1% excise tax on the fair market value of stock repurchases by publicly-traded corporations, subject to some exceptions
  - Effective for repurchases made after 12/31/2022
  - Raises $73.69 billion over 10 years
- Clean energy credits and incentives
  - Provides $271 billion of tax incentives for clean energy over 10 years.
- Tax enforcement
  - The IRS will receive $45.6 billion for tax enforcement. CBO estimates enhanced enforcement will increase revenue that is owed, but not timely paid, by $203.71 billion over 10 years.

Corporate Alternative Minimum Tax

General Overview

- Creates a 15% alternative minimum tax (AMT) for applicable corporations with more than \$1 billion of average adjusted financial statement income (AFSI) over a 3-year period (or less if the company has been in existence less than 3 years).
  - The \$1 billion threshold is not indexed for inflation.
- Corporate AMT does not apply to S corporations, regulated investments companies (RICs), and real estate investment trusts (REITS).
- An applicable corporation’s corporate AMT is:

$$\text{Corporate AMT} = \text{Tentative Minimum Tax (“TMT”)} - \text{Regular tax (plus any BEAT)}$$

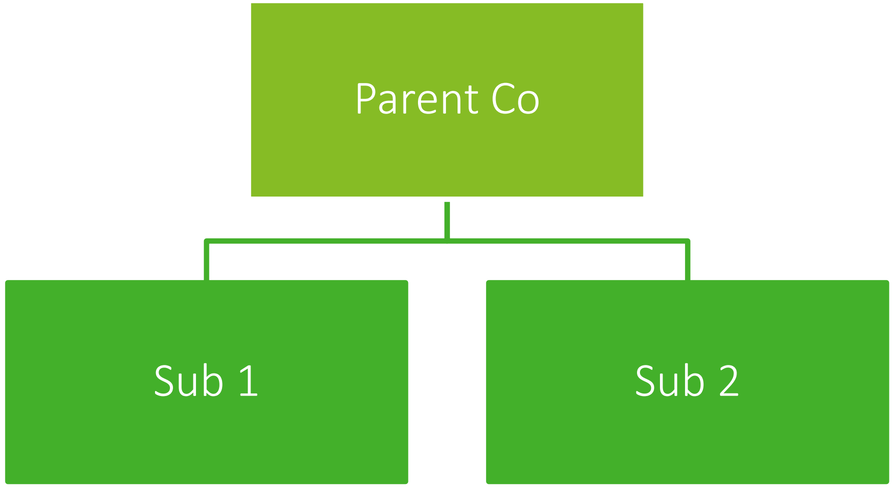
- An applicable corporation’s Tentative Minimum Tax (TMT) is:

$$\text{TMT} = \left[\text{AFSI} - \text{MIN}\left\{\begin{array}{c}\text{FS NOL,}\\ \text{80\% x AFSI}\end{array}\right\}\right] \times 15\% - \text{Corporate AMT foreign tax credit (“AMT FTC”)}$$

  - AFSI is reduced by the lesser of (i) the aggregate amount of financial statement NOL carryovers to the tax year, or (ii) 80% of AFSI. Any unused portion of the financial statement NOL is carried over to the following tax year with no expiration.
  - A financial statement NOL is the amount of net loss (if any) set forth on the corporation’s AFS (after adjustments) for a tax year ending after 12/31/2019.
- A corporation is eligible to claim a credit against regular tax (plus any BEAT) for corporate AMT paid in prior years.
- General Business Credits, including R&D, may generally offset up to approximately 75% of the sum of a corporation’s regular tax and AMT.
- Effective for taxable years beginning after 12/31/22.

The IRA - Corporate Alternative Minimum Tax

Illustrative Example



Facts:

- Parent Co files a Consolidated Tax Return and is an applicable taxpayer subject to Corporate Minimum Tax ("CMT").
- Sub 1 is a large insurer with a history of earnings.
- Sub 2 is a run-off insurer with historical losses & large reversing DTAs.

Analysis:

	Consolidated	Parent Co	Sub 1	Sub 2
PTBI	$390	$(10)	$300	$100
Tax Adjs. (incl NOL)	(190)	-	25	(215)
Taxable Income	200	(10)	325	(115)
Regular Tax @ 21%	42	(2)	68	(24)
CMT	17			
Total Tax Due	59			

Corporate Alternative Minimum Tax

ACLI Comment Letter Items

Items for which guidance is most urgent for life insurance companies:

- Embedded Derivatives in Funds Withheld and Modified Coinsurance
- Accounting for Separate Accounts
- Life-Nonlife Consolidated Returns
- Carryback and Carryforward of Losses
- Long-Duration Targeted Improvements (LDTI)
- Acquisitions and Dispositions
- Hierarchy of Financial Statements
- Partnership Adjustments
- Investments in Subsidiaries

Corporate Alternative Minimum Tax

Statutory Issues & Considerations

- CMT Allocation and Funding:
  - Who should bear the cost of this tax? Consider:
    - TSA application, revisions/ regulatory approvals needed
    - Complexity and data requirements needed to compute CMT at Subsidiary levels
  - If tax is NOT allocated to subsidiary, what holding company liquidity impacts should be considered?
  - If tax IS allocated to subsidiaries, will surplus be negatively impacted? Consider:
    - Potential non-admission of any allocated CMT credit
  - Possibility of larger reduction in DTA for entities expected to pay CMT over next 3 years

- NAIC Interpretation (INT 22-02: Third Quarter 2022 Reporting of the Inflation Reduction Act - Corporate Alternative Minimum Tax) of SSAP No. 101—Income Taxes – Comment deadline 10/14/2022.
  - Does not require financial reporting changes for third quarter 2022 because a reasonable estimate of CAMT implications cannot be made. However, certain disclosures shall be made.
  - For third quarter 2022 reporting, CAMT updated estimates or other calculation affected by the Act determined subsequent to third quarter statutory financial statement or filing date shall not be recognized as Type I subsequent events.
- NAIC Interpretation (INT 22-03: Inflation Reduction Act - Corporate Alternative Minimum Tax) of SSAP No. 101—Income Taxes – Comment deadline 10/28/2022.
  - Addresses fourth quarter 2022 and interim 2023 reporting.
  - Requires reporting when reasonable estimates of CAMT implications can be made.
  - Provides some subsequent events exceptions regarding CAMT to allow estimates to be updated as information becomes available.
  - Companies subject to the CAMT are required to have their estimates recognized fully by year end 2023.
  - Provides disclosures.

Accounting, Tax, and Other Considerations in light of the current interest rate environment

Need for a valuation allowance

Realizability of deferred tax assets (DTA)

- Valuation allowance required when all or some portion of DTA will not be realized
- Realizability based on whether more-likely-than-not asset will be realized (MLTN probability level > 50%)
- Partial or full valuation allowance may be required – valuation allowance equal to amount needed to reduce deferred tax asset to amount MLTN to be realized
- Realization depends on sufficient income of right character, jurisdiction and timing

Other things to consider

- Evaluation required for Gross DTAs even if Net DTL position (character and timing of reversing DTLs must be assessed)
- Evaluation of need for VA made AFTER considering unrecognized tax benefits

Assess evidence

ASC 740-10-30-17

- All available evidence, both positive and negative, shall be considered to determine whether, based on weight of that evidence, a valuation allowance for deferred tax assets is needed
- Information about an entity's current financial position and its results of operations for current and preceding years ordinarily is readily available

Keep in mind

- "All available evidence" includes historical information supplemented by all currently available information about future years
- Certain events that occur after year-end but before financial statements are released should be considered if such events provide relevant additional evidence (positive or negative)

ASC 740-10-30-23

- The more negative evidence that exists, the more positive evidence necessary and the more difficult to support a conclusion that a partial or full valuation allowance is not needed

Examples of positive and negative evidence

Positive evidence (ASC 740-10-30-22)	Negative evidence (ASC 740-10-30-21)
Existing contracts or firm sales backlog that will produce more than enough taxable income to realize deferred tax asset based on existing sales prices and cost structures	Cumulative losses in recent years
	Losses expected in early future years
Excess of appreciated asset value over tax basis of entity's net assets sufficient to realize deferred tax asset	History of tax attributes expiring unused
	Unsettled circumstances that, if unfavorably resolved, may likely adversely affect future results
Strong earnings history exclusive of loss that created future deductible amount coupled with evidence indicating loss is an aberration rather than a continuing condition	Carryback/carryforward periods that are so brief it may likely limit realization of tax benefits if a significant deductible temporary difference is expected to reverse in a single year or an entity operates in a jurisdiction in a traditionally cyclical business

Cumulative losses

Overview

- Most objectively verifiable form of negative evidence
- ASC 740 does not provide a definition and guidance is not a bright line test
- Generally, pretax results from all sources adjusted for certain permanent items (current and prior two years)
- Analysis must be done separately for each tax-paying component in each tax jurisdiction
- SEC often questions registrants with 3-year cumulative loss and no valuation allowance
  - Inquiries as to why no valuation allowance
  - Requests for documentation supporting conclusion

Calculation

Includes

- Continuing operations
- Discontinued operations
- Other comprehensive income (OCI) items

Excludes

- Cumulative effect of accounting changes

! Consultation with your attest firm is recommended as there may be diversity in practice for different accounting firms on the mechanics of the calculation.

Cumulative losses — Illustration

Assumptions

	2021	2020	2019	Cumulative
Book income (loss) (Including OCI)	$300	$350	$100	$750
Recurring permanent items	$(200)	$(360)	$(200)	$(760)
Earnings/(Loss)	$100	$(10)	$(100)	$(10)

Question

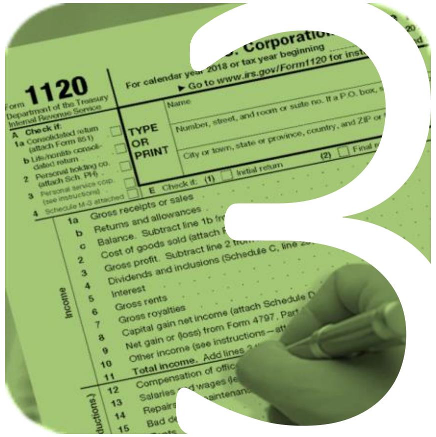
- What should be considered in the analysis?

Consultation with your attest firm is recommended as there may be diversity in practice for different accounting firms on the mechanics of the calculation.

Sources of taxable income (ASC 740-10-30-18)

Reversal of existing taxable temporary differences

Future taxable income exclusive of reversing temporary differences and carryforwards



Taxable income in prior carryback year(s) if carryback permitted under tax law

Tax-planning considerations

Tax and Other considerations on realizing capital loss from sale of bonds

- Coordinated effort/decision with many different stakeholders within company (investment, accounting, capital management/risk team)
  - Tax
    - Determine the carryback capacity and how it impacts other tax attributes and calculation (NOL, tax credits etc.)
    - Educate other stakeholders on capital loss carryback/forward rule and other consideration (e.g., wash sale)
    - Consider steps to file carryback claim and timing of refund (1139, amended tax return, audit etc.)
  - Investment
    - Consider transaction cost, realized loss, new investment yield/return, and other performance measures
    - Keep accounting and tax team updated with trades
  - Accounting/capital management/risk
    - Monitor Interest Maintenance Reserve (IMR) and impact to after-tax capital
    - If positive IMR, no impact to capital and reduction in NII in the future years
    - If no IMR, immediate impact to capital (after-tax) due to non-admitted negative IMR asset. Reduction in NII in the future years, but no overall capital impact as non-admitted negative IMR asset unwinds.

ASC 740 Developments

FASB Income Tax Disclosure Project

- During the May 11, 2022 meeting, the Board discussed:
  - Income Taxes Paid - Three potential types of disaggregation to be applied to the disclosure:
    - Jurisdiction Approach – top jurisdictions based on metric determined by the Board or application of a quantitative threshold
    - Time Period Approach – amount paid for the current period vs. amount paid for prior periods
    - Payment nature Approach – by type (e.g., general corporate tax payments, GILTI, BEAT, etc.) or by frequency of occurrence
- Rate reconciliation disclosure, including the application of a threshold to disclose individual reconciling items and/or prescription of a list of specific categories requiring separate disclosure.
- Expected to receive proposed ASU guidance in 2023.

Proposed ASU, *Accounting for Investments in Tax Credit Structures Using the Proportional Amortization Method* (Topic 323)

- The proposed ASU would provide that if certain conditions are met, an entity may elect to account for its tax equity investments by using the proportional amortization method regardless of the program from which it receives income tax credits.
- Any such election would be available on a program-by-program basis.
- In addition, the proposed ASU would require certain disclosures about the nature and effects of the entity’s investments that generate income tax credits and other income tax benefits.

Return to office success and challenges and the latest tax department operating models

Return to Office

The New Normal

- Industry Trends
- Hybrid work models

Insourcing vs. Outsourcing

- Current role of third-party service providers
- Talent pipeline

Deloitte.


LICONY 38th Annual
Tax Conference
Thursday,
October 27, 2022
9am - 4pm
Reception:
4:30pm-6:30pm
LICONY
Location:
Guardian Life
Insurance Company
Hudson Yards, NYC

Privilege Challenges to Remote Work: Keeping Up With Legal Ethics

Amy Richardson and Deepika Ravi
HWG LLP
October 27, 2022

Agenda

- Recent Developments in Privilege Challenges
- Language Access and Client Communications Requirements Under ABA Opinion 500
- Cybersecurity and Data Breaches
- Updates on the Ethics of Remote Work, including ABA Opinion 498

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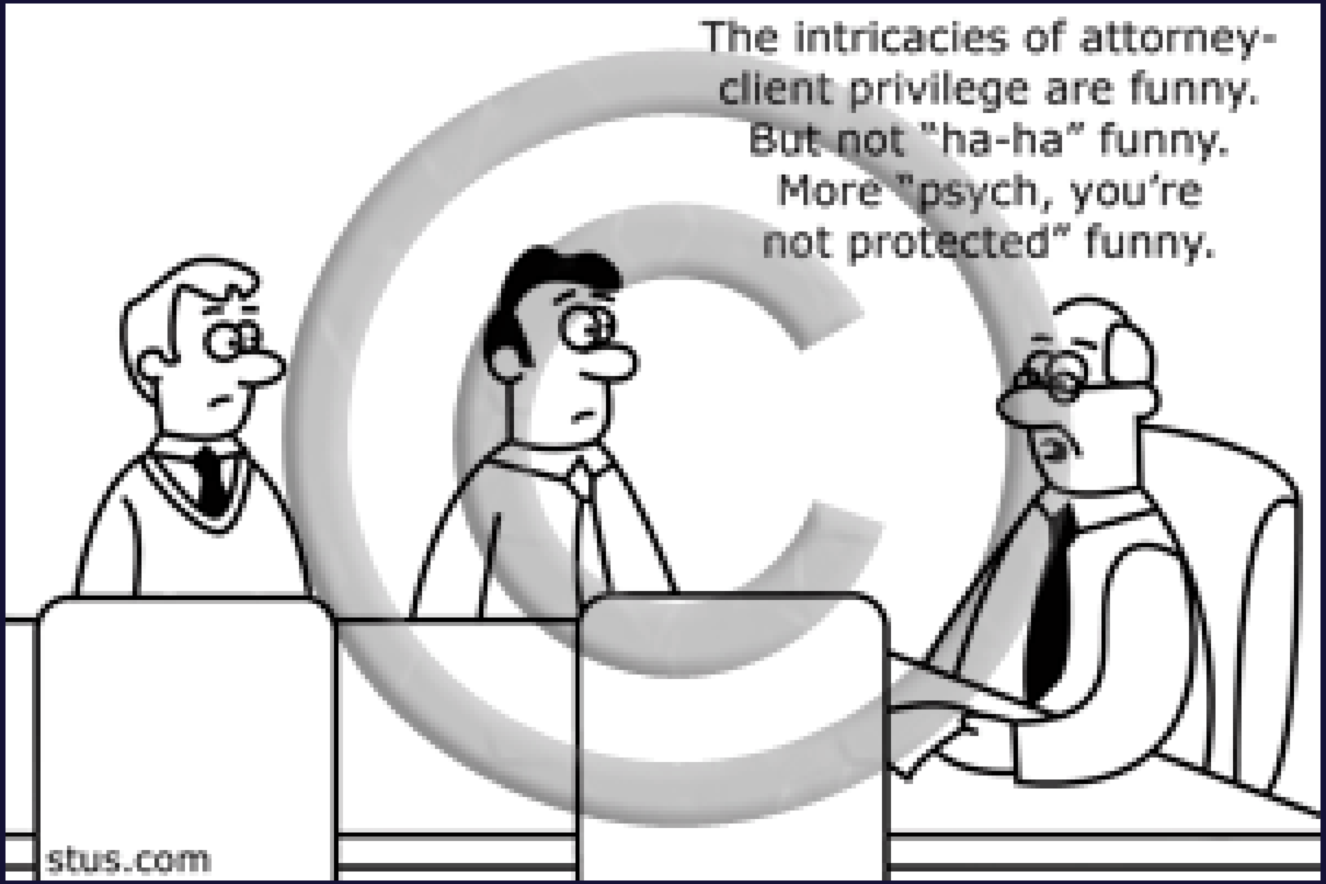
Privilege and Confidentiality Trends

- In recent years there has been a trend of courts narrowly defining claims of privilege over attorney client and work product privileged information.
- The result is that courts and other tribunals are more likely to grant requests to compel some or all the materials that parties have claimed are privileged.
- This is especially true in situations that involve in-house counsel given that in-house counsel often serve in both a legal and a business role. *See, e.g.*, *Pearlstein v. BlackBerry Ltd.*, No. 13-cv-07060-CM-KHP, 2019 WL 1259382 (S.D.N.Y. Mar. 19, 2019); *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16-CV-1301-PAB-GPG, 2018 WL 3055774 (D. Colo. May 23, 2018).


The intricacies of attorney-
client privilege are funny.
But not "ha-ha" funny.
More "psych, you're
not protected" funny.
stus.com

Case Study #1: Privilege Claims for Third Parties

Special Master's First Interim Report and Order, Google, No. 20-CA-252802 (N.L.R.B. Nov. 26, 2021).

- Case alleged that Google interfered with employees' protected concerted and union activities.
- NLRB conducted an *in camera* review of documents responsive to a subpoena request for communications relating to Google's hiring of third-party IRI Consultants.

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Case Study #1: Privilege Claims for Third Parties

- NLRB found communications and materials created by or with IRI Consultants were not privileged because they involved the development of campaign materials regarding antiunion messaging, not providing legal advice.
- The fact that they were funneled through outside counsel and labeled as privileged did not make them privileged.
- Nor did the paragraph in Google's contract with IRI stating it was Google's intent that their communications be privileged.

Case Study #1: Privilege Claims Involving Third Parties

- NLRB also rejected Google's argument that IRI Consultants were experts retained by a lawyer to conduct studies and analyses required to give legal advice because Google did not identify any legal advice one can reasonably conclude would necessitate first obtaining antiunion messaging and training from IRI, and the document recommending Google engage IRI made no mention of legal advice.

Case Study #2: Over-Sharing Information

United States v. Coburn, 439 F. Supp. 3d 361 (D.N.J. 2022).

- Defendants—accused of violating the Foreign Corrupt Practices Act while employed as Cognizant's Chief Legal Officer and President—argued that Cognizant had waived privilege over its internal investigation after Cognizant disclosed a summary of the investigation to DOJ.
- While under threat of prosecution, Cognizant disclosed to DOJ detailed accounts of interviews with employees, including the defendants.
- The court found that by handing these materials to a potential adversary, Cognizant destroyed any confidentiality the materials may have had, undermining both attorney-client and work product privileges.

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Case Study #2: Over-Sharing Information

Concerning the breadth of the waiver, the court held that:

(1) to the extent summaries of interviews were conveyed to DOJ, the privilege was waived as to all memoranda, notes, summaries, or other records of the interviews;

(2) to the extent summaries conveyed contents of documents or communications, those underlying documents or communications were within the scope of waiver; and

(3) the waiver extends to documents and communications that formed any basis of the presentation to DOJ.

Case Study #3: Privilege Training for Employees

United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. 2020).

- DOJ filed a case against Google claiming antitrust (monopolization) violations related to its search advertising.
- DOJ alleged that Google has been instructing its employees to label any written communications involving the contracts targeted in the case as privileged and to ask an in-house attorney for pre-textual, general advice even when legal advice was unneeded. DOJ asked for sanctions.
    - DOJ argued that Google gave its employees a training called "Communicate with Care," and that for many of the email chains involved, the in-house attorney never responded. The District Court Judge called these "silent attorney emails."
    - The court, based on the Government's claims, asked Google to submit a random sample of 210 of the emails that it withheld on privilege grounds.

Case Study #3: Privilege Training for Employees

- Google has fought back against the DOJ’s claims, arguing that there was nothing nefarious about its training and that the training material represents nothing more than “legitimate guidance” for how workers should speak with in-house counsel.
  - Google said the training material actually cautions that simply labeling an email as privileged does not make it so and that privilege does not safeguard all communications.
- The court held an in-person hearing and later issued a minute order.
  - During the hearing, the Court noted that it was skeptical that it could sanction Google because even if there was a violation, it was pre-litigation conduct.
  - The May 12, 2022 Minute Order cited that reasoning but ordered Google to make sure all the emails in question "have been re-reviewed to the same extent" as the sample submitted to the Court.

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ABA Formal Op. 500

In some cases, *“. . . a client’s ability to receive information from or convey information to a lawyer is impeded because the lawyer and the client do not share a common language, or owing to a client’s non-cognitive physical condition . . . .”*

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 1 (2021).

ABA Formal Op. 500

- Lawyers are increasingly engaged in the representation of clients who may not speak the same language as the lawyer.
- Lawyers must be acutely aware of their duty and ability to effectively communicate with clients, as well as any impediments to doing so.
- Opinion 500 addresses these situations and recommends that lawyers take additional steps to resolve communication issues in order to meet their ethical duties under ABA Model Rules 1.1 and 1.4.

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ABA Formal Op. 500

When “reasonably necessary,”—i.e. when a lawyer and client “cannot communicate with **reasonable efficacy**”—lawyers must “arrange for communications to take place through an **impartial** interpreter or translator capable of comprehending and accurately explaining the **legal concepts** involved, and who will assent to and abide by the lawyer’s duty of **confidentiality**.”

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 2, 10 (2021) (emphasis added).

The Duty of Communication

Model Rule 1.4(a) requires a lawyer to:

(1) “promptly inform the client” about any decision or occurrence for which the client’s informed consent is required;

(2) “reasonably consult with the client about” the representation;

(3) “keep the client reasonably informed about the status of a matter;”

(4) “promptly” respond to “reasonable requests for information;” and

(5) “consult with” the client on relevant limitations on the lawyer’s ability to provide legal assistance.

MODEL RULES OF PRO. CONDUCT r. 1.4(a) (AM. BAR ASS’N 2020).

The Duty of Communication

- Model Rule 1.4 also requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."
  - MODEL RULES OF PRO. CONDUCT r. 1.4(b) & cmt. 5 (AM. BAR ASS'N 2020).
- In order to do so, a lawyer must provide information such that a "comprehending and responsible adult" can make informed decisions about her legal matter.
  - MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 6 (AM. BAR ASS'N 2020).

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The Duty of Competence

- A lawyer's duty to **effectively** communicate with her client is intrinsically tied to a lawyer's duty of competence pursuant to Model Rule 1.1.

- ABA Formal Op. 500: "If a lawyer does not communicate with a client in a mutually understood language, it is doubtful that the lawyer is exercising the thoroughness and preparation necessary to provide the client with competent representation."

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The Duty of Competence

- A lawyer must ensure that the lawyer and her client can understand one another.
- If the client cannot understand the lawyer or vice versa, it is incumbent **on the lawyer** to "establish a reasonably effective mode of communication" which "[o]rdinarily . . . require[s] [the] engagement of a qualified impartial interpreter or translator" and/or, in some situations, the employment of "an appropriate assistive or language-translation device."

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 5 (2021).

Hiring Trained Professionals

"[A]n individual engaged to facilitate communication between a lawyer and a client must be:

[1] **qualified** to serve as an interpreter or translator in the language or mode required,

[2] familiar with and able to explain the law and **legal concepts** in that language or mode, and

[3] free of any personal or other potentially conflicting interest that would create a risk of bias or prevent the individual from providing **detached and impartial** interpretive or translation services."

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 6–7 (2021) (emphasis added).

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Hiring Trained Professionals

In “most situations,” a lawyer can adequately verify that a prospective interpreter or translator has the requisite skill and capacity to convey legal concepts by hiring **a professional translator or interpreter**.

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 7 (2021).

The Duty to Supervise

"A lawyer should be able to verify a prospective translator's or interpreter's professional qualifications in the same manner used when engaging the services of an expert, i.e., by evaluating the individual's training, experience, certifications, and professional standing."

ABA Comm. on Ethics & Pro. Resp., Formal Op. 500 at 7 n.28 (2021).

The Duty to Supervise

The Bottom Line:

- Select well-qualified experts;
- Look out for red flags (e.g., your client spoke for three minutes, but the interpreter provided a one-sentence translation);
- Make sure you, the interpreter, and the client understand the interpreter’s role and responsibilities;
- Ask questions and keep the lines of communication open; and
- Allow the experts to do their jobs.

Cybersecurity and Ethics

"[T]he profusion of digital technologies has added cybersecurity to every client's primary interests, whether or not the client knows it, thereby drawing cybersecurity into the field of view that counsel must watch over if it is to provide competent representation of a client."

–Jill D. Rhodes & Robert S. Litt, *ABA Cybersecurity Handbook*

According to insurance companies providing cybersecurity insurance, during the pandemic, the number of cyberattacks on law firms **increased 75%.**

"The question is not if, but when."

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Cybersecurity and Confidentiality

"The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure."

–MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 18 (AM. BAR ASS'N 2020).

Reasonable efforts change as technology and cyber-crime evolve and change.

Cybersecurity and Client Communication

"A lawyer shall . . . keep the client reasonably informed about the status of the matter . . . [and] explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

–MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020).

This includes events such as cybersecurity attacks, especially if confidential client information is involved.

Cybersecurity and Retention Agreements

- Ethical duties are the bare minimum, and many clients ask for more
- Corporation-specific security requirements

Pitfalls

- Over-promising
- Agreeing to requirements that impair representation
- Not reviewing/negotiating
- Not involving IT

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The Ethics of Remote Work

- During COVID-19 and the changing workplace, many lawyers are working remotely every day.
- Many attorneys are familiar with the requirements of confidentiality and communication required when working remotely.
- State bars and the ABA have continued to provide guidance and update their rules and policies regarding the unauthorized practice of law (UPL).

ABA Opinion 498

- On March 10, 2021, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association released Formal Opinion 498.
- The Opinion defines and addresses virtual practice, including competency, diligence, confidentiality, and supervision requirements associated with virtual practice.
- Concerning competence and diligence, the Opinion notes "a lawyer should keep abreast of changes in the law and practice, *including the benefits and risks associated with relevant technology* . . ." ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 at 2 (2021).

ABA Opinion 498 - Confidentiality

ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 at 3 (2021) (emphasis added):

"At all times, **but especially when practicing virtually**, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information."

Confidentiality

Practical Tips

- Ensure confidential communications cannot be overheard by others in your household.
- Implement a “clear screen / clean desk” policy.
- Disable listening capability of “smart devices.”
- Only disclose client identity and contact information to the extent reasonably necessary.
- Ensure you are taking steps to safeguard client information, such as:
  - Use a secure Wi-Fi connection;
  - Consider using a Virtual Private Network (VPN) or another secure internet portal;
  - Use unique and complex passwords, and change them periodically;
  - Stay on top of security and software updates.

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ABA Opinion 498 - Supervision

ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 at 3 (2021) (emphasis added);

“Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct. **Practicing virtually does not change or diminish this obligation.**”

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Supervision

Practical Tips

- Instruct lawyers and nonlawyer assistants (including vendors) of their ethical obligations, including the obligation to maintain client confidences.
- Engage in “sufficiently frequent” contact between supervising and supervised lawyers and nonlawyers. N.Y. Cnty. Lawyers Ass’n Comm. on Pro. Ethics, Formal Op. 754-2020 at 4 (2020).
- Ensure outside vendors and support staff have practices in place to satisfy confidentiality and other obligations.
- Establish a Bring-Your-Own-Device (BYOD) policy.

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Unauthorized Practice of Law

- Model Rule 5.5(c): Not UPL if services are provided on a **temporary** basis **and**:
  - Are undertaken in association with a lawyer barred in this jurisdiction who actively participates in the matter (**co-counsel**);
  - Reasonably related to a proceeding where the lawyer is authorized to appear or reasonably expects to be authorized (**pro hac**);
  - Reasonably related to arbitration/mediation/ADR if services are reasonably related to lawyer's practice in barred jurisdiction and do not require pro hac admission (**ADR**); or
  - Are otherwise **reasonably related** to lawyer's practice in barred jurisdiction.

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Unauthorized Practice of Law

- On December 16, 2020, the ABA's Standing Committee on Ethics and Professional Responsibility published ABA Opinion 495, which holds that a lawyer can be physically outside the jurisdiction in which she is licensed to practice provided she follows "specific parameters." ABA Comm. on Ethics & Pro. Resp., Formal Op. 495 at 2 (2020)

- A lawyer can live in State A, while practicing consistent with her State B license, so long as she does not establish a "local office" or a "systematic and continuous presence" in State A or "hold out" a presence or availability to perform legal services in State A. *Id.*

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Unauthorized Practice of Law

Many states issued remote work / UPL ethics opinions before, and following, ABA Op. 495:

• Maine Pro. Ethics Comm'n, Op. 189	Nov. 2005*
• Utah State Bar, Op. 19-03	May 2019*
• D.C. Bar, Legal Ethics Op. 24-20	Mar. 2020*
• Pennsylvania Bar Ass'n, Op. 2020-300	April 2020*
• New York Cnty. Lawyers Ass'n, Formal Op. 754-2020	Aug. 2020*

*Issued before ABA Op. 495

Unauthorized Practice of Law

Many states issued remote work / UPL ethics opinions before, and following, ABA Op. 495:

• Wisconsin State Bar, Formal Op. EF-21-02	Jan. 2021
• Pennsylvania Bar Ass'n, Joint Formal Op. 2021-100	Mar. 2021
• Florida State Bar, Advisory Op. FAO #2019-4	May 2021
• Delaware State Bar, Formal Op. 2021-1	July 2021
• California State Bar, Formal Op. Interim No. 20-0004	Aug. 2021
• New Jersey Advisory Comm. on Pro. Ethics, Op. 742	Oct. 2021
• Virginia State Bar, LEO 1896	Jan. 2022

Unauthorized Practice of Law

Practical Tips

- Review the rules and ethics opinions of the jurisdiction(s) where you are barred and the jurisdiction where you are living/working remotely.
- Avoid holding yourself out as a lawyer in a jurisdiction where you are not barred.
- Do not offer to provide legal services in the jurisdiction from which you are working but where you are not barred.

THANK YOU!

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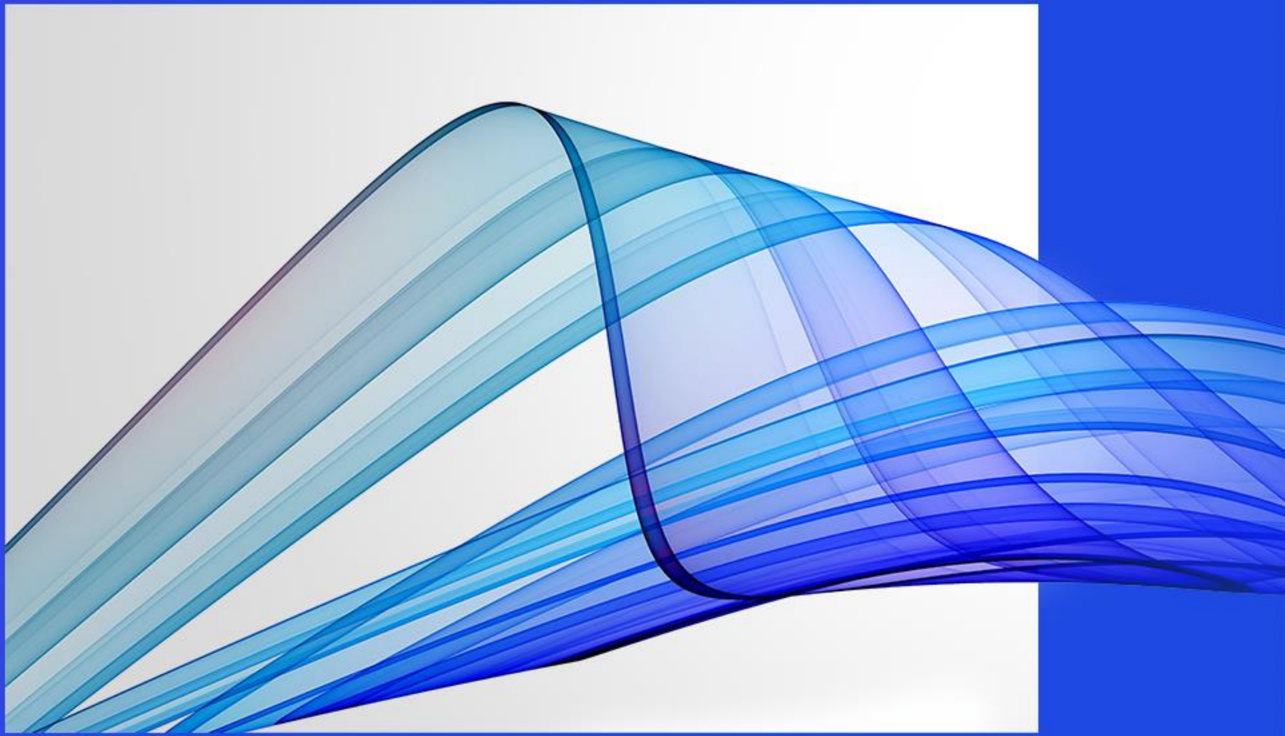
IRS Examination Priorities Affecting Life Insurance Companies

- ONY 38th Annual Tax Conference
- October 27, 2022



Administration

Disclaimer

The views presented are those of the panelists and do not necessarily represent the views of the organizations they represent.

Attendee questions

Please ask questions throughout our presentation. We will answer as many questions as we can. If we are unable to answer your question during the panel session, please follow up with us after the panel.

Your feedback

We welcome feedback. Feel free to complete the survey, as your comments are valuable to us.

Today’s presenters

Sarah Sheldon
VP Tax Legal
Lincoln Financial Group

Barbara T. Kaplan
Co-Chair, Global Tax Practice
Greenberg Traurig, LLP

Tom Greenaway
Principal
KPMG LLP

• 01

IRS Examination: Future State

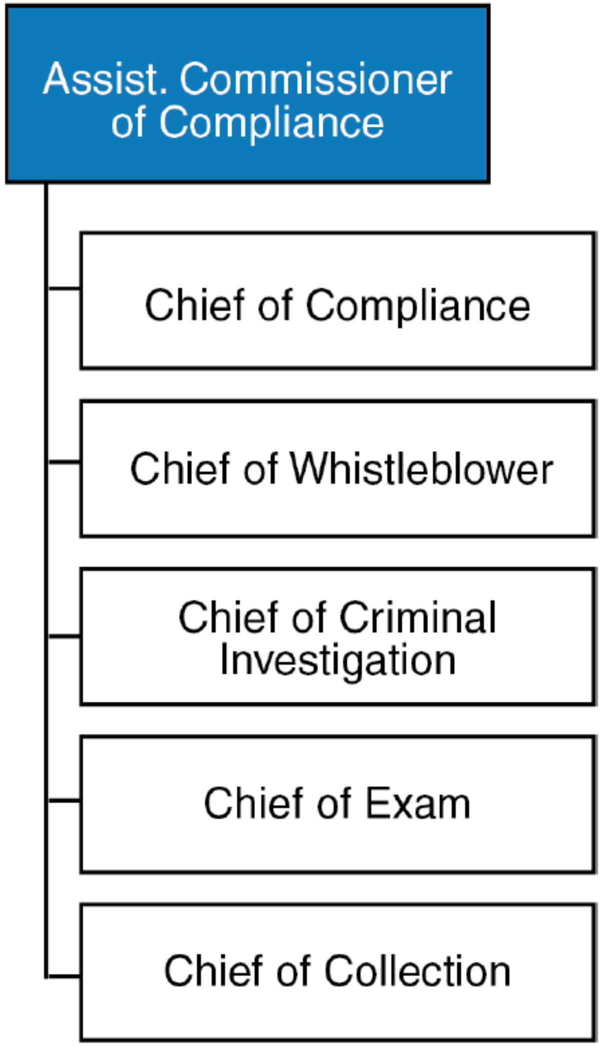
The future of IRS compliance

"Our future structure would establish a unified Compliance Division, creating a centralized compliance function geared towards ensuring more efficient operations and providing consistent outcomes for resolving taxpayer compliance issues…

"[T]he **Chief Compliance Officer** would identify and track evolving taxpayer behaviors across all taxpayer segments in order to implement innovative compliance solutions…

"The **Exam Office** will consolidate exam operations and processes that currently span across multiple business units. This office will be responsible for all examination processes across all taxpayer segments but would maintain some degree of specialization to address unique taxpayer needs."

- IRS Taxpayer First Act Report, January 2021



Inflation Reduction Act – Almost $79B in multiyear funding

The Act specifically designates a 10-year increase in IRS appropriations to be used as follows:

• **$45.6 billion** for tax enforcement activities, including determining and collecting taxes, providing legal and litigation support, conducting criminal investigations, providing digital asset monitoring and compliance activities, enforcing criminal statutes for violations of internal revenue laws and other financial crimes;

• **$3.2 billion** for taxpayer services, including pre-filing assistance and education, filing and account services, and taxpayer advocacy services;

• **$25.3 billion** for necessary expenses to support taxpayer service and enforcement programs, including facilities services; headquarters and other IRS-wide administration activities; telecommunications; and information technology development, enhancement, operations, maintenance, and security; and

• **$4.75 billion** in additional funding would provide for business systems modernization, including development of callback technology and other technology to provide a more personalized customer service (but not including the operation and maintenance of legacy systems).

Inflation Reduction Act - other funding items

- The law designates $15 million of IRS funding to designing an IRS-run free "Direct E-file" tax return system.

- In addition to IRS funding:
  - $403 million to Treasury Inspector General for Tax Administration (TIGTA)
  - $104.5 million to Treasury Office of Tax Policy
  - $153 million to U.S. Tax Court
  - $50 million to other departments within Treasury for purposes of overseeing/helping IRS as it implements the Act

- Key differences from BBBA (version that passed House in November 2021):
  - The Act does not require IRS to produce an initial report (or quarterly updates) on how IRS intends to implement additional funding
  - The Act does not include provision allowing for direct hire and critical pay authority

Inflation Reduction Act – implementation

What have the IRS and Treasury said about their future plans and effects of enhanced funding? What should taxpayers and practitioners anticipate?

IRS has committed to provide a plan to Treasury within six months of enactment, so any IRS comments on multi-year funding would be premature at this point.

Nevertheless, multiyear committed funding potentially allows for:

- Enhanced audit focus on:
  - High-income individuals
  - Partnerships and
  - Large multi-national corporations
- Transformational changes to IRS technology systems
- Improved taxpayer services

Inflation Reduction Act - implementation

- August 10th letter from Secretary Yellen to IRS Commissioner Rettig
  - Directs that additional enforcement resources focus on "high-end noncompliance"
  - The funding will be critical to the IRS's ability "*to make investments needed to pursue a robust attack on the tax gap by targeting crucial challenges, like large corporations, high-net-worth individuals, and complex pass-throughs …"*

- August 17th memorandum from Secretary Yellen to IRS Commissioner Rettig
  - Directs that an operational plan be delivered within 6 months, detailing how the funding will be deployed over 10 years

- August 22nd letter from Secretary Yellen to IRS Commissioner Rettig
  - Reiterating commitment to enforce "*the tax laws against those high-earners, large corporations, and complex partnerships who today do not pay what they owe*"
  - Directing that any additional resources shall not be used to increase audits of small businesses or households below the $400,000 threshold

• 02

IRS Examination: Current State

LB&I Division– current state

Large Business & International

- All 1120 and 1120-S corporations and 1065 partnerships with assets of $10 million or more
- Responsible for Global High Wealth and International Individual Compliance programs
- Approximately 210,000 customers

How IRS examination develops strategic plans and goals

Large Business & International

a) Campaigns
b) Large partnerships*
c) Largest corporations (assets greater than $250 million)*
d) Compliance Assurance Program
e) Global High Wealth Program

Joint LB&I and SB/SE Projects

a) High Income Individuals (more than $10M in Total Positive Income)*
b) Conservation easements & microcaptives

*New Treasury performance indicators in FY2021

Insurance-Related IRS Campaigns

- TCJA Reserves Transition Campaign
- - The goal is to understand how companies are implementing section 13517 of the TCJA
- - Section 13517(c)(3) provides a transition spread rule for the TCJA reserve change to be recognized ratably over eight years

- Section 807(d)(4) Campaign
- - Prior law section 807(d)(4) allowed an election to reset the Applicable Federal Interest Rate every five years "[i]n computing the amount of the reserve with respect to *any* contract to which an election under this clause applies for periods during *any* recomputation period." (Emphasis added).
- - The election was applicable "to all contracts issued during the calendar year for which the election was made or during any subsequent calendar year."
-

Insurance-Adjacent IRS Campaigns

- FS Entities Engaged in a U.S. Trade or Business (Offshore Lending) Campaign
- - This campaign addresses whether foreign investors are subject to tax on effectively connected income from lending transactions engaged in through a U.S. trade or business.

- Form 1042 / 1042-S Compliance Campaign
- - "This campaign addresses Withholding Agents who make [FDAP] payments "but do not meet all their compliance duties."

- Form 1120-F Interest Expense/Home Office Expense
- -This campaign includes the identification of aggressive positions, including apportionment factors that may not attribute the proper amount of expenses to the calculation of ECI.

- Section 965 Transition Tax Campaign
-

Alternatives to examination

1. Pre-filing Agreements

2. Industry Issue Resolution Program

3. Advance Pricing Agreement Program

4. Soft letters

5. Voluntary disclosures

6. Rev. Proc. 94-69 & Form 15307

• 03

IRS Examination: Hot Topics

- Partnerships
- Transfer pricing
- Research & development
- CAP
- Economic substance

Partnerships

1. Schedules K-2 & K-3

2. Practitioner feedback on the Administrative Adjustment Request process
   a) Calculating imputed underpayments (Forms 8985 & 8986)
   b) Solving the “stranded overpayment” problem
   c) AARs and Alternative Minimum Tax

2. BBA partnership examinations well underway

Transfer pricing

1. Case selection, development, and recent results
   a) *Coca-Cola, Medtronic, Eaton, Western Digital*

2. Transfer Pricing Examination Process

3. Competent authority
   a) Advance Pricing Agreements
   b) Mutual Agreement Procedures

Research & development (1)

1. Changes to the claims process. *See* CCA 20214101F (September 17, 2021)
   a) IRS wants to see documentation of the four-part test up front
   b) Transition period with 45-day perfection window now closes January 10, 2024
   c) Experience from the front lines

2. Experience with the Revised ASC 730 Directive (September 10, 2020)

3. Recent Tax Court cases: *Kellet*, T.C. Memo. 2022-62; *J.G. Boswell Co. & Subs.*, Docket No. 2408-19 (July 12, 2022), *Perficient, Inc.*, Docket No. 7600-18 (May 11, 2022).

4. Section 174, the 2022 extenders bill (?), and accounting method changes
   - For now, the only way to change accounting method to comply with "new" section 174 is through a non-automatic method change on Form 3115.

Research & development (2)

Potential Changes to Form 6765, *Credit for Increasing Research Activities,* for 2023 Filing Season

- Total number of business components
- Whether taxpayer is a member of controlled group and identifying information for the other members of the controlled group that contribute to the group credit
- Total wages reported on Form 1125-E (officer compensation) that are included in QREs
- Whether there was an acquisition or a disposition in the tax year
- Whether the credit involves any new categories of activities
- Whether the taxpayer is following the ASC 730 Directive
- Identify each business component and provide a brief description of qualified research performed
- QREs by business component (wage, supplies, contractor costs)

Compliance Assurance Program (CAP)

1. 2023 CAP year application window now open until November 15, 2022

2. Highlights & updates
   a) Applicants must have only one filed return and one unfiled return
   b) No more than three tax years open for exam, and exam team must conclude that these open years will close within 12 months
   c) Tax Control Framework Questionnaire required
   d) US GAAP audited financial statements required

3. Research credit & transfer pricing in CAP

4. Bridge phase taxpayers are not under examination but are expected to maintain CAP-like controls

Economic substance doctrine (1) – updated guidance

1. Recent guidance removed "executive level" approval previously required for examiners to assert the economic substance doctrine. LB&I-04-0422-0014.
2. Coordination with IRS Counsel is still generally required, and IRS Counsel must review notices of deficiency asserting the economic substance doctrine and associated penalties.
3. Most of the factors tending to show that the application of the economic substance doctrine is appropriate are carried over from prior administrative guidance. (LB&I-04-0711-015.)
   a) Updated guidance drops one factor: "[t]ransaction is promoted/developed/ administered by tax department or outside advisors."
   b) Updated guidance also drops all factors tending to show that economic substance doctrine is not appropriate.
4. "Notwithstanding existence of the [factors], the economic substance doctrine may not be appropriate if the transaction that generates targeted tax incentives is, in form and substance, consistent with Congressional intent in providing the incentives."

Economic substance doctrine (2) – current IRS factors

- Transaction is promoted/developed/administered by tax department or outside advisors
- Transaction is highly structured
- Transaction includes unnecessary steps
- Transaction is not at arm's length with unrelated third parties
- Transaction creates no meaningful economic change on a present value basis (pre-tax)
- Taxpayer's potential for gain or loss is artificially limited
- Transaction accelerates a loss or duplicates a deduction
- Transaction generates a deduction that is not matched by an equivalent economic loss or expense (including artificial creation or increase in basis of an asset)
- Taxpayer holds offsetting positions that largely reduce or eliminate the economic risk of the transaction
- Transaction involves a tax-indifferent counter-party that recognizes substantial income
- Transaction is outside the taxpayer's ordinary business operations.
- Transaction has no credible business purpose apart from federal tax benefits
- Transaction has no meaningful potential for profit apart from tax benefits
- Transaction has no significant risk of loss
- Tax benefit is artificially generated by the transaction
- Transaction is pre-packaged
- Transaction results in separation of income recognition from a related deduction either between different taxpayers or between the same taxpayer in different tax years

Question s?

Wrap-up & Thank You

LICONY 38th Annual
Tax Conference
Thursday,
October 27, 2022
9am - 4pm
Reception:
4:30pm-6:30pm
LICONY
Location:
Guardian Life
Insurance Company
Hudson Yards, NYC

LICONY

38th Annual Tax Conference
October 27, 2022

Product Tax Update

Moderator: Mark Griffin, Davis & Harman LLP

Panelists: Tamara Saverine, Prudential

Landis Atkinson, TIAA

Topics

- New Post-Death RMD Rules
- “SEPP” Guidance
- SECURE 2.0
- New Withholding Rules

NEW POST-DEATH RMD RULES

Background

Prior Law	SECURE Act Changes
• RMDs must commence by the required beginning date (RBD), which is April 1 of the year after the year the IRA owner turns age 70½ • An individual beneficiary may "stretch" the inherited benefits over their life expectancy	• RBD is 72 for owners born after June 30, 1949 • Only an "eligible designated beneficiary" (EDB) may stretch their benefits. • Otherwise, distributions are generally required within 10 years of the year of the owner's death • Proposed regs. issued in Feb. 2022

Distributions During the 10-year period?

NO if … Owner dies ***before*** their RBD and individual beneficiary does not “stretch”

YES if … Owner or EDB dies ***after*** RMDs start

- *Owner dies on / after RBD*
- *EDB dies after stretching, or*
- *Minor EDB reaches age of majority after stretching*

IRS Notice 2022-53 provides relief for failures to make required payments during the 10-year period in 2021 and 2022.

Eligible Designated Beneficiary ("EDB")

- A designated beneficiary who is –
  - Employee's surviving spouse
  - Employee's minor child (under age 21)
  - Disabled
  - Chronically ill
  - Not more than 10 years younger than the employee
  - Designated beneficiary of an employee who died prior to the effective date (generally Jan. 1, 2020)
- Status determined generally at the time of the employee's death

Death Before RBD

Beneficiary	Rule
Individual but not an EDB	10-year rule, no distributions required until the end of the year containing the 10th anniversary of the ***employee's*** death
EDB but not a minor	10-year rule, no distributions required until the end of the year containing the 10th anniversary of the ***employee's*** death **<u>or</u>** Stretch over the EDB's life or life expectancy, starting by the end of the year following the year of the ***employee's*** death and continuing over the EDB's remaining life expectancy after the EDB's death, **<u>but</u>** all amounts must be fully distributed by the end of the year containing the 10th anniversary of the ***EDB's*** death
EDB minor	10-year rule, no distributions required until the end of the year containing the 10th anniversary of the ***employee's*** death **<u>or</u>** Stretch over the EDB's life or life expectancy, starting by the end of the year following the year of the ***employee's*** death and continuing over the EDB's remaining life expectancy after the EDB's death, **<u>but</u>** all amounts must be fully distributed by the ***earlier*** of (1) the end of the year the ***EDB*** attains age 31 or (2) the end of the year containing the 10th anniversary of the ***EDB's*** death
Non-individual	5-year rule, no distributions required until the end of the year containing the 5th anniversary of the ***employee's*** death

Death On or After RBD

Beneficiary	Rule
Individual but not an EDB	Distributions must continue over the ***longer*** of the employee's remaining life expectancy and the beneficiary's life expectancy and must continue over that remaining life expectancy after the beneficiary's death, **but** all amounts must be fully distributed by the end of the year containing the 10th anniversary of the ***employee's*** death
EDB but not a minor	Distributions must continue over the ***longer*** of the employee's remaining life expectancy and the EDB's remaining life expectancy and must continue over that remaining life expectancy after the EDB's death, **but** all amounts must be fully distributed by the ***earlier*** of (1) the end of the year containing the 10th anniversary of the ***EDB's*** death or (2) *if the EDB is older than the employee, the end of the year in which the EDB's life expectancy would be equal to or less than 1 if their life expectancy (instead of the employee's) had been used to determine the distribution period*
EDB minor	Distributions must continue over the ***longer*** of the employee's remaining life expectancy and the EDB's remaining life expectancy and must continue over that remaining life expectancy after the EDB's death, **but** all amounts must be fully distributed by the ***earlier*** of (1) the end of the year the EDB attains age 31 or (2) the end of the year containing the 10th anniversary of the ***EDB's*** death
Non-individual	Distributions must continue over the employee's remaining life expectancy, ***with no other cap on the distribution period***

Spousal Continuation and Rollovers (prop. regs.)

Prior Law	A surviving spouse who is the sole beneficiary of a decedent's IRA may elect ***at any time*** to treat the IRA as the spouse's own.
New Deadline	The spouse must make the election by the later of (1) the end of the calendar year in which they attain age 72, and (2) the end of the calendar year following the calendar year of the IRA owner's death.
New Limit	If spouse misses the deadline and is subject to the 10-year rule that applies to death before the RBD, spouse can roll over a distribution from the decedent's IRA to their own IRA before the end of the 10-year period. ***A portion of the distribution is treated as an RMD and can't be rolled over.*** The RMD portion is the sum of the ***"hypothetical RMDs"*** that the spouse would have had to take if the stretch rule had applied instead of the 10-year rule, calculated using certain rules in the proposed regulations.

Rules for Trust Beneficiaries

- Largely the same, but …
  - More detailed, more flexible, more complicated
  - Still no separate accounting (except for certain special needs individuals)
  - Reflect new rules for multiple beneficiaries
  - New rules for “applicable multi-beneficiary trusts”
- Documentation requirements retained
  - Copy of the trust instrument, or
  - Certify list of beneficiaries with “description of the conditions on their entitlement sufficient to establish who are the beneficiaries”

Annuity payments – in general

- Max period certain still set at commencement using Uniform Lifetime Table
- Joint life still allowed with non-spouses, non-EDBs (subject to MDIB rule)
- Death always deemed to occur on/after "required beginning date"
  - "At least as rapidly rule" always applies
  - Generally means annuity payments must continue as scheduled
- EDB status generally is determined on date of employee's death
  - Status could change between annuity commencement and death
- Period certain, joint life payments may need to be accelerated after employee's death
  - If EDB, the cap is 10 years after EDB's death
  - If non-EDB, the cap is 10 years after employee's death
  - If non-individual, there is no cap (can continue under the max period permitted on the start date)

Increasing annuity payments

- No more “minimum income threshold test” for:
  - Lump sum return of premium death benefits
  - Short-term payment advances
  - Accelerations needed to comply with the 10-year rule

- Other changes to the “MITT”:
  - Determined on date the contract is “annuitized” (rather than date payments commence or “date of determination”)
  - Determined using mortality rates in the RMD regulations (rather than the life expectancy tables)
  - ***Reflect future increases? Reflect period certain?***

And more …

- Age of majority is 21
- Default RMD rules updated
- Plans can specify which RMD rules apply or allow elections, but “must” specify which rule applies in the absence of a beneficiary election
- Updated rules for treatment of multiple beneficiaries
- Documentation of disability and chronic illness required
- SECURE Act effective dates for beneficiaries
- Implications for annuity payments

Updating Plan Documents

- SECURE Act requires qualified plans and IRAs to amend their governing documents generally by December 31, 2022 (with exceptions), “or such later date as the Secretary of the Treasury may prescribe.”
- Deadline extended generally to December 31, 2025 (IRS Notices 2022-33 & 2022-45)
- Special considerations for IRAs
  - IRA prototype approval program suspended (IRS Ann. 2022-6)
  - Can continue to use previously- approved forms
  - Extensions do not apply to disclosure statements

“SEPP” GUIDANCE

Background – The Statute

- Code sections 72(t) and (q) each impose a 10% additional tax on “early” distributions from qualified plans, IRAs, and non-qualified annuities (i.e., distributions made before age 59 ½).
  - Each provides an exception for “substantially equal periodic payments” for life or life expectancy or for joint life or joint life expectancy (SEPP Exception).
  - If SEPPs commence and are subsequently modified (other than by reason of death or disability) before the employee (or IRA owner) turns 59 ½ or within five years of the first payment, then the 10% additional tax that was previously avoided under the SEPP Exception is imposed, or “recaptured”, plus interest for the deferral period, in the year of the modification.

Background – Q&A-12 of IRS Notice 89-25

- Payments were considered to fall under the Code section 72(t) SEPP exception if they were calculated in accordance with one of three safe harbor methods:
  - **RMD method**—Payments treated as SEPPs if the annual payment was determined "using a method that would be acceptable for purposes of calculating the minimum distribution required under section 401(a)(9)." Distributions were calculated each year by dividing an "account balance" for that year by a life expectancy factor for that year. The payment may be determined based on the life expectancy of the employee or the joint life and last survivor expectancy of the employee and beneficiary.
  - **Fixed amortization method**—Payments treated as SEPPs if the amount to be distributed annually was determined by amortizing the taxpayer's account balance over a number of years based on a life expectancy factor and an assumed interest rate.
  - **Fixed annuitization method**—Payments treated as SEPPs if the amount to be distributed annually was determined by dividing the taxpayer's account balance by an annuity factor based on a specified mortality table and an assumed interest rate.

Background – Rev. Rul. 2002-62

- Retained the three safe harbor methods for calculating SEPPs for qualified plans & IRAs
- Applies for a series of payments commencing in 2003 (optional for 2002)
- Guidance on various assumptions:
  - Life expectancy table – All three methods use life expectancy tables or mortality rates in the RMD regulations
  - Interest rate - Interest rate that is not more than 120 percent of the federal mid-term rate
  - Account balance - Determined "in a reasonable manner based on the facts and circumstances."

Background

- IRS Notice 2004-15
  - Extended same guidance to nonqualified annuity contracts
  - IRS has interpreted as applying only to non-annuitized payments
- RMD Life Expectancy Tables
  - In November 2020, the Treasury Department and the IRS released final regulations under Code section 401(a)(9) updating the RMD life expectancy tables with respect to "distribution calendar years" beginning on or after Jan. 1, 2022. *See* T.D. 9930, 85 Fed. Reg. 72472 (Nov. 12, 2020).

IRS Notice 2022-6

- Application – Replaces the Rev. Rul. 2002-62 and Notice 2004-15 for any series of payments commencing in or after 2023 (optional for 2022)
- Generally permits the same three safe harbor methods of calculating SEPPs
- Life Expectancy Tables – For the RMD and fixed amortization methods, can use:
  - For the RMD and fixed amortization methods, can use the Uniform Lifetime Table, Single Life Table, and Joint and Last Survivor Table set forth in the RMD regulations
  - Can use Joint and Last Survivor Table even if the designated beneficiary is not the spouse
  - If SEPPs started before 2023 using RMD method and old tables, a switch to the new tables will not be a "modification" that triggers a recapture tax
  - For the fixed annuitization method, can use the annuity factors on which the RMD tables are based
- Interest Rate— Any interest rate that is not more than the greater of (1) 5%, or (2) 120% of the federal mid-term rate determined in a particular manner.
- Account Balance
  - Determined for the fixed amortization and fixed annuitization methods "in a reasonable manner based on the facts and circumstances" (satisfied if determined "on any date within the period that begins on December 31 of the year prior to the date of the first distribution and ends on the date of the first distribution.")
  - Determined for the RMD method under Treas. Reg. section 1.401(a)(9)-5
- Still nothing on annuity payments!

SECURE “2.0”

Notable Provisions

- Extend SECURE 1.0 amendment deadlines
- Increase RMD age to 75 (from 72)
- Index IRA catch-up contribution limit for inflation
- New age 60+ catch-up contribution (indexed)
- Exempt small balances from RMD rules
- Expand EPCRS, including for IRAs
- Reduce RMD excise tax
- RMD rules for annuities and QLACs
- Allow SIMPLE, SEP, and matching contributions to be made on a Roth basis
- Require employer plan catch-up contributions to be made on a Roth basis
- SEPP guidance for annuity payments
- Much more!

SECURE “2.0” – Annuity-specific proposals

MITT RMD Fix	• Exempt certain benefits from the test, e.g., annual increases < 5% • Parity with non-annuitized accounts • Use company mortality rather than IRS mortality • Prospective only
QLAC Reform	• Repeal 25% premium limit, solving rollover problems • Increase dollar limit on contributions to $200,000 • Clarify rules for joint life annuity if divorce occurs • Clarify treatment of free look periods
Variable ETF	• Amend diversification rules for NQ variable annuities • Facilitate new type of “insurance-dedicated” ETFs

NEW WITHHOLDING RULES

New Forms W-4P and W-4R

- Currently Form W-4P is the withholding certificate for periodic payments and nonperiodic distributions from plans, IRAs, and commercial annuities
- Default withholding rate for periodic payments if no withholding certificate
  - Pre-TCJA: Married claiming 3 withholding exemptions
  - TCJA: Determined under rules prescribed by the Secretary (sunsets 2026)

New Forms W-4P and W-4R

- New forms
  - Form W-4R – Only for nonperiodic distributions
    - Can elect 0 – 100% withholding
  - Form W-4P – Only for periodic payments
    - Requires payees & payors to account for other income
  - Substitute forms – IRS Pubs. 15-A and 15-T
    - Electronic - Must "exactly replicate" the paper form (limited exceptions)
    - Telephonic – Further guidance coming
    - Paper – Generally same as for electronic substitutes

New Forms W-4P and W-4R

- Application
  - Originally applicable beginning 2022
  - Delayed until January 1, 2023
  - Possibility of an additional delay?
  - Prior elections generally can continue until a new form is submitted

Questions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