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Association

# TAX LAW CONFERENCE

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## *Eyes on the Horizon: What Will Follow the TCJA?*

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# *Agenda*

- I. International Developments
- II. U.S. Legislative Initiatives
  - A. TCJA Technical Corrections
  - B. Tax Reform 2.0

# ***Learning Objectives***

This panel is intended to—

- ❑ Equip audience members to better evaluate and advise clients about the risks associated with taking tax return positions based on ambiguities in TCJA international provisions that may be the subject of technical corrections;
- ❑ Enable audience members to appropriately evaluate the risks associated with medium- and long-term international tax planning strategies that rely heavily on certain TCJA provisions; and
- ❑ Educate audience members about the potential risks and consequences for their clients of non-U.S. tax developments.

# International Developments

# International Landscape

- ❑ Highly ambitious G20/OECD BEPS Project launched in 2013
  - A response to aggressive tax planning, base erosion and profit-shifting by MNEs
  - Also reflected—and may have strengthened—a broader political shift
    - Historic source countries' market size and clout have grown
    - Increasing demand for a greater allocation of taxing rights to source / market jurisdictions
  - Coincided with rapidly increasing digitalization of the economy
- ❑ BEPS Project produced results but not policy stability
  - Produced myriad new minimum standards and recommendations, culminating in a groundbreaking multilateral treaty amendment process
  - Changed some MNE behavior
  - Increased transparency and disclosure obligations
  - BUT did not dissuade countries from pursuing unilateral base-preserving measures

# OECD/G20 Tax and Digitalization

## *Revisiting the allocation of taxing rights*

- ❑ July 2013 – OECD/G20 BEPS Action Plan
  - Action 1: Address the tax challenges of the digital economy
- ❑ September 2014 – Action 1 Interim Report
- ❑ October 2015 – Action 1 Final Report
- ❑ March 2018 – Interim Report
- ❑ January/February 2019 – Policy Note and Consultation Document
- ❑ March 2019 – Public Consultation
- ❑ Mid-2020 – Final Recommendations Due

# OECD/G20 Tax and Digitalization

## *BEPS Action 1 – An Enormous Task*

Identify the main difficulties that the digital economy poses for the application of existing international tax rules **and develop detailed options to address these difficulties, taking a holistic approach and considering both direct and indirect taxation.**

Issues to be examined include, but are not limited to, the ability of a company to have a significant digital presence in the economy of another country without being liable to taxation due to the lack of nexus under current international rules, the attribution of value created from the generation of marketable location-relevant data through the use of digital products and services, the characterization of income derived from new business models, the application of related source rules, and how to ensure the effective collection of VAT/GST with respect to the cross-border supply of digital goods and services.

Such work will require a thorough analysis of the various business models in this sector.

(OECD, Action Plan on Base Erosion and Profit Shifting, July 2013)

# OECD/G20 Tax and Digitalization

## *Action 1 Final Report*

- ❑ Identified key features of digitalization potentially relevant from a tax perspective
  - Mobility of intangibles, users, and business functions
  - Reliance on data
  - Network effects, with reference to user participation, integration, and synergies
  - Use of multi-sided business models in which sides of the market may be in different jurisdictions
  - Tendency toward monopoly or oligopoly in certain business models relying heavily on network effects
  - Volatility due to low barriers to entry and rapidly evolving technology
- ❑ Concluded that digitalization does not present unique BEPS issues—would be difficult, if not impossible, to “ring-fence” the digital economy
- ❑ Identified broader tax challenges raised by digitalization in relation to nexus, data, and characterization
  - Challenges of digitalization raise questions about how taxing rights on income generated from cross-border activities should be allocated in the digital age
- ❑ Described, without recommending, possible policy responses
  - Countries could pursue any option but must respect their existing international obligations (i.e., treaties)



# OECD/G20 Tax and Digitalization

## *2018 Interim Report*

- ❑ Identified key features of the digitalizing economy:
  - Scale without mass
  - Higher reliance on IP
  - Role of users in value creation
- ❑ Described convergence around three alternative policy positions:
  - No change: Give the other BEPS Actions' outcomes time to work; likely no need for further significant changes.
  - Digital-only: Targeted changes needed to address user contributions to value creation in digital business models; no need for broader changes.
  - No ring-fencing: Digitalization pervades the economy, not just certain business models; rules for allocating taxing rights among jurisdictions should be more broadly reexamined.
- ❑ Announced agreement to work toward a consensus-based, long-term solution

# OECD/G20 Tax and Digitalization

## *2019 Policy Note and Consultation Document*

- ❑ Relatively concrete proposals are now on the table, all to be explored “without prejudice”
- ❑ Proposals grouped under two pillars:
  - Pillar #1 – Broader challenges of digitalization; allocation of taxing rights
    - Generally, three options under consideration
  - Pillar #2 – Remaining BEPS issues
    - Two, inter-related rules to be developed

# OECD/G20 Tax and Digitalization

## *Pillar #1 – Principles*

- ❑ Allocation of taxing rights
  - Addresses where tax should be paid and in what amount
  - Recognizes that enterprises can now be heavily involved in the economic life of a jurisdiction without any significant physical presence
  - Aims to address the reality of intangibles as value-drivers
- ❑ Revisions to nexus rules
- ❑ Revisions to profit allocation rules
- ❑ Scope of changes not yet clear
  - Digital-only (“ring-fencing”) vs. broadly-applicable

# OECD/G20 Tax and Digitalization

## *Pillar #1 – Guidelines*

- ❑ Revised rules may be implemented through treaty changes and/or withholding taxes; some proposals would entail broader changes to domestic law
  - Model legislation and/or treaty provisions to be developed
- ❑ Revised rules should:
  - Be administrable
    - Recognition that jurisdictions' resources and administrative capacities differ
  - Ensure a level playing field among all jurisdictions
  - Advance tax certainty
- ❑ Revised rules should not:
  - Result in double taxation
  - Result in tax when there is no economic profit

# OECD/G20 Tax and Digitalization

## *Pillar #1 – Three Options*

	User Contribution	Marketing Intangibles	Significant Economic Presence
<b>Would change nexus for taxation (PE) rules</b>	To allow taxation of a company with no physical presence based on its “active and participatory user base” in a jurisdiction	To allow taxation of a company with no physical presence based on the attribution of marketing intangibles a jurisdiction	To recognize a PE where a company is “heavily involved in the economic life of a jurisdiction without a significant physical presence”
<b>Would change profit allocation (TP) rules</b>	To attribute profit based on residents’ provision of data used in a company’s business	To attribute profit to marketing intangibles	To attribute profit to the recognized PE on a formulary basis
<b>Would affect</b>	Only highly digitalized business models	All business models, consumer-facing business models, or user-focused business models	All business models
<b>Favored by</b>	United Kingdom	United States	India

☐ *All options would generally go beyond the arm’s length principle.*

# OECD/G20 Tax and Digitalization

## *Pillar #1 – User Contribution*

- ❑ Would grant taxing rights and attribute profit on the basis of an “active and participatory user base” within a jurisdiction
- ❑ Policy Rationale:
  - Soliciting the sustained engagement and active participation of users is a critical component of value creation
  - Users’ activity and participation contribute to the creation of a brand, the generation of valuable data, and the development of a critical mass of users, which helps to establish market power
  - User contribution is most relevant as a source of value for social media platforms, search engines, and online marketplaces
- ❑ Possible Mechanics:
  - Value created by user activities cannot be determined using traditional transfer pricing methods / by application of the arm’s length principle
  - A portion of worldwide non-routine profit would be attributed to user contributions, and such profit would then be allocated among the jurisdictions in which the group has users
  - Jurisdictions would have a right to tax allocated profit irrespective of whether the group otherwise has a taxable presence

# OECD/G20 Tax and Digitalization

## *Pillar #1 – Marketing Intangibles*

- ❑ Would grant taxing rights and attribute profit to market jurisdiction on the basis of attributed marketing intangibles
- ❑ Policy Rationale:
  - There is an intrinsic functional link between marketing intangibles and the market jurisdiction because such intangibles are reflected in favorable customer attitudes and derived from activities targeted at customers in the jurisdiction.
  - Therefore, marketing intangibles and associated risks should be attributed to market jurisdictions, where they would attract a return.
- ❑ Possible Mechanics:
  - A portion of worldwide non-routine profit would be attributed to marketing intangibles, either using traditional TP methods or a residual profit split involving “more mechanical approximations,” and such profit would then be allocated among the group’s market jurisdictions based on a formula
  - Jurisdictions would have a right to tax allocated profit irrespective of whether the group otherwise has a taxable presence

# OECD/G20 Tax and Digitalization

## *Pillar #1 – Significant Economic Presence*

- ❑ Would recognize a new category of permanent establishment based on the generation of substantial revenue from a jurisdiction and one or more other factors—
  - Existence of a user base and associated data input
  - Volume of digital content derived from the jurisdiction
  - Billing and collection in local currency or with a local form of payment
  - Maintenance of a website in a local language
  - Responsibility for the final delivery of goods to customers or the provision of other support services
  - Sustained marketing and sales promotion activities, online or otherwise, to attract customers
- ❑ Policy Rationale:
  - Digitalization and other technological advances have enabled business enterprises to be heavily involved in the economic life of a jurisdiction without a significant physical presence.
  - These changes have rendered the existing nexus and profit allocation rules ineffective in certain circumstances.
- ❑ Possible Mechanics:
  - Fractional apportionment – e.g., based on sales, assets, and employees



# OECD/G20 Tax and Digitalization

## *Pillar #2*

### ☐ Objective:

- Strengthen the ability of jurisdictions to tax profits where the other jurisdiction with taxing rights applies a low effective rate of tax to those profits

### ☐ Proposal:

- Income Inclusion Rule – would include such profits as income in the hands of a related party investor
- Tax on Base Eroding Payments – would allow the source country to deny a deduction (or impose withholding tax) on payments subject to very low or no tax in the hands of the payee
- Coordination rule to mitigate double-tax risk

# OECD/G20 Tax and Digitalization

## *Pillar #2*

### ❑ Income Inclusion Rule:

- Applied on a jurisdiction-by-jurisdiction basis, with jurisdiction-specific FTC calculations
- Design features to be considered:
  - Types of entities covered
  - Minimum ownership threshold
  - ETR determination
  - Thresholds / safe harbors
  - Choice of minimum rate
  - Whether included income should be taxed at a reduced rate
  - Mechanisms for avoiding double-taxation

# OECD/G20 Tax and Digitalization

## *Pillar #2*

### ❑ Tax on Base Eroding Payments:

- Undertaxed Payments Rule – would deny a deduction for a related party payment if the payment is not subject to tax at a minimum rate in the payee’s jurisdiction
  - Should cover “conduit” or “imported” arrangements
  - Design features to be considered: scope of covered payments, threshold for related party status, mechanics of ETR test (item-by-item? entity-by-entity?), absolute or graduated deduction disallowance
- Subject to Tax Rule – would deny treaty benefits where a payment or other income/profit is subject to very low or no tax in the hands of the payee/taxpayer
  - Could apply to business profits, dividends, interest, royalties, capital gains, and/or other income, as well as other related party payments
  - Design features to be considered: impact on participation exemptions for dividends, means of demonstrating benefit eligibility, impact on non-business taxpayers (individuals, pension funds, charitable organizations)

# OECD/G20 Tax and Digitalization

## *Assessments / Predictions*

- ❑ Will the Inclusive Framework reach consensus around one or more proposals before the mid-2020 deadline?
  - Which proposal(s) are likely to prevail?
  - Will the U.S. Senate ratify any agreed treaty changes?
  - Will the U.S. Congress enact any model legislation?
- ❑ Will unilateral measures be withdrawn?
  - Will the BEAT be modified (or repealed)?

# U.S. Legislative Initiatives

# TCJA Technical Corrections

*Which international provisions could be changed—and how?*

- ❑ Joint Committee on Taxation Bluebook (JCS-1-18, General Explanation of Public Law 115-97) flags numerous international provisions as potentially needing technical corrections
  - “A technical correction may be necessary to reflect this intent.”
- ❑ Proposed regulations largely proceed as if technical corrections will be made or are not, in fact, required to accurately reflect legislative intent
- ❑ No bill yet introduced in the new Congress
  - Democratic Ways & Means Committee members / aides quoted as suggesting technical corrections should be paired with a broader TCJA rewrite and/or new domestic-focused tax measures
- ❑ Only proposal on the table is House Ways & Means Committee Chairman’s Discussion Draft (January 2, 2019)
  - Released by Rep. Kevin Brady (R) at the end of the 115<sup>th</sup> Congress
  - Generally implements technical corrections as identified in the JCT Bluebook and other corrections

# TCJA Technical Corrections

*Which international provisions could be changed—and how?*

□ Following slides compare---

- Technical corrections potentially needed as per the JCT Bluebook
- Proposed Treasury Regulations that align with the identified corrections
- Technical corrections proposed in the Brady Discussion Draft

Section 965	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
The increase in earnings and profits of an E&P deficit foreign corporation that are taken into account by a U.S. shareholder by the amount of the specified E&P deficit of such corporation that was used, does not apply for purposes of determining post-1986 undistributed earnings under section 902.	✓	✓	✓
The section 965(c) deduction is not treated as an itemized deduction for any purpose.	✓	✓	✓
No deduction or credit is allowed for taxes associated with earnings and profits that, by reason of section 965(b), are not included in income.	✓		✓
Deductions, whether for current year expenses or for a net operating loss carryover, taken into account in the year in which a section 965(n) election is made may not exceed gross income determined without regard to the transition inclusion and related section 78 gross-up.	✓	✓	✓
Neither the AMT nor the BEAT is considered in determining the portion of a taxpayer's tax liability that is eligible to be paid over eight installments.	✓		
If a REIT timely elects to defer its section 965 inclusion, neither the REIT nor its investors may invoke the installment payment election.	✓	✓	✓
The provision extending the limitations period on assessment of the transition tax also extends the period for making adjustments to a return filed by a domestic partnership.	✓		✓
Taxpayers that elect to pay the transition tax in installments may be allowed refunds and credits.			✓



# TCJA Technical Corrections

## *Section 965 and the GILTI Gap*

- ❑ Brady Discussion Draft would add (new) section 965(o)
  - Relevant for fiscal year CFCs of domestic corporate U.S. shareholders
  - Focuses on the period between the later section 965 measurement date (12/31/17) and the first day on which GILTI applies (e.g., 12/1/18) – the “GILTI Gap”
  - Generally applies the provisions of section 965 to CFC E&P accrued during the GILTI Gap and attributable to non-ordinary-course asset dispositions to related parties

Section 245A	JCT Bluebook	Proposed Regulations	Brady Discussion Draft *
A corporate shareholder of a CFC receiving a dividend from a 10-percent owned foreign corporation shall be allowed a DRD with respect to the subpart F inclusion attributable to such dividend in the same manner as a dividend would be allowed under section 245A.	✓		✓
Dividends that qualify for the DRD may result in an inclusion under section 951(a) or section 951A in cases in which any such inclusion is reduced under section 951(a)(2)(B) by reason of a dividend or in certain cases in which the CFC ceases to have a U.S. shareholder with section 958(a) ownership.	✓		
The rule disallowing the DRD for tiered hybrid dividends applies to an amount treated as a dividend in the hands of the recipient CFC, and for which the distributing CFC received a deduction or other tax benefit.	✓	✓	
Section 245A applies to distributions made after (and for purpose of determining a taxpayer's foreign tax credit limitation under section 904, deductions with respect to taxable years ending after) December 31, 2017.	✓		
For purposes of the corporate AMT as applicable to certain fiscal-year taxpayers for their 2017 taxable year, clarifies that the DRD is not a noncash deduction that would result in an adjusted current earnings adjustment for corporate AMT purposes.			✓
A hybrid dividend is any dividend received from a CFC for which the CFC received a deduction or other tax benefit			✓

\* Would also modify the pro rata share rules with respect to stock a U.S. shareholder does not hold as of the last day, in the foreign corporation's taxable year, on which the foreign corporation is a CFC, to the extent such U.S. shareholder received a distribution of current E&P that would give rise to a deduction under section 245A(a), or in the case of a dividend paid directly or indirectly to a CFC with respect to stock owned within the meaning of section 958(a)(2), that would not result in subpart F income to the CFC by reason of section 954(b)(4), (c)(3), or (c)(6).

Section 964	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
An amount treated as a dividend because of a CFC's sale or exchange of stock in another foreign corporation held for a year or more, the foreign-source portion of which is includible by a U.S. shareholder with respect to the selling CFC as subpart F income, shall be treated as a dividend from a specified 10-percent owned foreign corporation in the hands of the U.S. shareholder for purposes of applying section 245A.	✓		✓
To the extent a dividend arising under section 964(e)(1) is a hybrid dividend, the tiered hybrid dividend rules of section 245A(e)(2), rather than the rules of section 964(e)(4)(A)), apply to the dividend.	✓	✓	✓

Section 250	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
Deduction eligible income does not include income that is of a kind that would be foreign personal holding company income as defined in section 954(c) or any amount included in gross income of the corporation under section 1293.	✓		✓
If property is sold by the taxpayer to a person who is not a U.S. person, but the Federal government facilitates the transaction purely as an intermediary (e.g., for certain foreign military sales), income derived from the sale of such property may be treated as foreign-derived deduction eligible income if the other requirements are met.	✓		
If the sum of a domestic corporation's FDII, GILTI, and GILTI-attributable section 78 gross-up amounts exceeds its taxable income determined without regard to this provision, then the amount of FDII, GILTI, and GILTI-attributable section 78 gross-up for which a deduction is allowed is reduced (but not below zero) by an amount determined by such excess.	✓		✓
The following items of income are excluded in determining deduction eligible income: any income received or accrued that is of a kind that would be foreign personal holding company income (as defined in section 954(c)); any amount included under section 1293; and any amount included in the gross income of a corporation with respect to any transaction if any amount could be excluded from the gross income of the corporation as a result of the benefit for extraterritorial income.			✓
The taxable income limitation under section 613A(d) is calculated without regard to any deduction allowable under section 250.			✓

Section 951A	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
Tangible property used in the production of both gross tested income and gross income that is not gross tested income (i.e., dual-use property) is treated as specified tangible property in the same proportion that the amount of gross tested income produced with respect to the property bears to the total amount of gross income produced with respect to the property.	✓	✓	✓
The grant of regulatory authority in section 951(A)(d)(4) is not limited to section 951A(d).			✓
Section 1248	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
Section 1248(a)(2) should require ownership of at least 10 percent of the value or voting stock of the CFC during periods in which the expanded definition of U.S. shareholder under section 951(b) applies.	✓		✓
Section 958	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
Section 958(a) applies for purposes of section 960 when applying the new expanded U.S. shareholder definition under section 951(b).			✓

# TCJA Technical Corrections

## *Rethinking Section 958(b)(4) Repeal*

- ❑ JCT Bluebook explains that Congress intended to render ineffective certain transactions among related persons that are used as a means of avoiding the subpart F provisions—e.g., “de-control” transactions
- ❑ Brady Discussion Draft would reinstate section 958(b)(4), subject to an exception:
  - IF downward attribution would cause a U.S. person to directly or indirectly own more than 50 percent of a foreign corporation,
  - THEN the U.S. person is taxable on the subpart F income of the foreign corporation as if such corporation were a CFC, and the foreign corporation is treated as a CFC of which the U.S. person is a U.S. shareholder

Sections 960, 961	JCT Bluebook	Proposed Regulations	Brady Discussion Draft
A credit is allowed under section 901 only for 80 percent of the foreign income taxes imposed with respect to previously taxed earnings and profits attributable to GILTI, and no credit is allowed for any taxes paid or accrued (or treated as paid or accrued) with respect to distributions of previously taxed amounts described in section 965(b)(4)(A).	✓	✓	✓
No credit is allowed for taxes that are not attributable to actual distributions of previously taxed earnings and profits, such as taxes not allowed as a deemed paid credit for taxes properly attributable to tested income by reason of the inclusion percentage or 80 percent multiplicand in section 960(d)(1).	✓		✓
The rules in section 960(c) that allow taxpayers to increase their foreign tax credit limitation when making distributions out of previously taxed earnings and profits apply to distributions out of earnings and profits that were previously taxed as GILTI.			✓
Gain may be recognized by reason of sections 961(b) and (c) upon a distribution of previously taxed earnings and profits by a lower-tier CFC to an upper-tier CFC where the amount of the distribution exceeds the upper-tier CFC's basis in the stock of the lower-tier CFC.			✓
A taxpayer is allowed a section 960 deemed-paid credit with respect to income includible under section 953 in cases where the definition of CFC has been expanded.			✓

# TCJA Technical Corrections

## *Clarifying the Scope of Section 961(c)*

- ❑ Brady Discussion Draft provides that—
  - Section 961(c) applies in determining the basis of stock and certain property and the recognition of gain for all purposes of the Code
  - Section 961(c) may require gain recognition when a lower-tier CFC distributes previously taxed earnings in an amount that exceeds the recipient upper-tier CFC's basis in the lower-tier CFC's stock
- ❑ JCT Explanation describes these provisions in the context of GILTI-related clarifications
  - Are they truly technical corrections?



<b>Section 78</b>	<b>JCT Bluebook</b>	<b>Proposed Regulations</b>	<b>Brady Discussion Draft</b>
Fiscal year taxpayers are not eligible to claim the benefit of the participation exemption for section 78 gross-ups made in taxable years beginning before December 31, 2017.	✓	✓	✓
Previously-taxed income from lower-tier CFCs that gives rise to deemed paid credits under section 960(b) may be distributed without additional U.S. taxation.	✓		✓
<b>Section 904</b>	<b>JCT Bluebook</b>	<b>Proposed Regulations</b>	<b>Brady Discussion Draft</b>
The section 78 gross-up amount attributable to a GILTI inclusion is considered GILTI for foreign tax credit limitation purposes.	✓	✓	✓
Financial services income, including financial services income attributable to a QBU, shall not be treated as passive category income for foreign tax credit limitation purposes.	✓	✓	✓
<b>Section 907</b>	<b>JCT Bluebook</b>	<b>Proposed Regulations</b>	<b>Brady Discussion Draft</b>
The carryback and carryover rules for foreign oil and gas taxes under section 907(f)(1) do not apply to taxes paid or accrued with respect to GILTI.	✓		✓

# TCJA Technical Corrections

## *Financial Services Income of a QBU*

- ☐ General Basket
- ☐ Foreign Branch Basket
- ☐ Passive Basket

# TCJA Technical Corrections

## *Financial Services Income of a QBU*

### § 904 Limitation on credit.

#### (d) Separate application of section with respect to certain categories of income.

##### (2) Definitions and special rules.

For purposes of this subsection -

##### (C) Treatment of financial services income and companies.

(i) **In general.** Financial services income shall be treated as general category income in the case of-

(I) a member of a financial services group, and

(II) any other person if such person is predominantly engaged in the active conduct of a banking, insurance, financing, or similar business.

(ii) **Financial services group.** The term "financial services group" means any affiliated group (as defined in section 1504(a) without regard to paragraphs (2) and (3) of section 1504(b)) which is predominantly engaged in the active conduct of a banking, insurance, financing, or similar business. In determining whether such a group is so engaged, there shall be taken into account only the income of members of the group that are-

(I) United States corporations, or

(II) controlled foreign corporations in which such United States corporations own, directly or indirectly, at least 80 percent of the total voting power and value of the stock.

##### (J) Foreign branch income.

(i) **In general.** The term "foreign branch income" means the business profits of such United States person which are attributable to 1 or more qualified business units (as defined in section 989(a)) in 1 or more foreign countries. For purposes of the preceding sentence, the amount of business profits attributable to a qualified business unit shall be determined under rules established by the Secretary.

(ii) **Exception.** Such term shall not include any income which is passive category income.

# TCJA Technical Corrections

## *Financial Services Income of a QBU*

### ☐ JCT Bluebook

- Financial services income, including financial services income attributable to a QBU, shall not be treated as passive category income for foreign tax credit limitation purposes. (JCS-1-18 at 395)

### ☐ Prop. Reg. § 1.904-4(e)(1)(i)

- Financial services income that meets the definition of foreign branch category income is treated as income in that category.
- Financial services income of controlled foreign corporation that is included in gross income of a United States shareholder under section 951A(a) is treated as section 951A category income in the hands of the United States shareholder.
- Financial services income that is neither treated as foreign branch category income nor treated as section 951A category income is treated as general category income.

### ☐ Prop. Reg. § 1.904-4(f)(1)(ii)

- [I]ncome that would be passive category income but for the application of section . . . 904(d)(2)(C) (financial services income) and the regulations under those sections and also meets the definition of foreign branch category income is foreign branch category income.

# TCJA Technical Corrections

## *Assessments / Predictions*

- ❑ Are technical corrections truly needed with respect to points already clarified by Treasury/IRS in proposed regulations?
  - Will such regulations (when finalized) be vulnerable to challenge in the absence of legislative action?
- ❑ What's next for the Brady discussion draft?
  - Politically challenging road ahead
  - Can taxpayers rely on the draft? [JCT has weighed in]
  - Which provisions could be enacted?
- ❑ What is the legislative outlook for technical corrections in general?
  - Post-TCJA political hurdles
  - Position of Congressional Democrats
- ❑ Assuming a compromise is reachable, when can technical corrections be enacted?
  - In search of a viable legislative vehicle
  - Can the stars align in March 2019? [need for policy pressure]
  - Open question whether all technical would be considered, or only a subset

# Tax Reform 2.0

*What issues / proposals will the new Congress address?*

- ❑ International tax bills not yet introduced in this new Congress
- ❑ High-profile Democratic proposals have domestic focus
  - Sen. Elizabeth Warren (D-MA) – annual inter vivos wealth tax with progressive rates
  - Sen. Bernie Sanders (D-VT) – higher and progressive estate tax rates
  - Rep. Alexandra Ocasio-Cortez (D-NY) – 70% tax rate for income above \$10 million
  - Sen. Kamala Harris (D-CA) – elimination of TCJA tax cuts that benefit high-income households; tax proposal forthcoming
- ❑ Polling indicates these proposals may have public support
  - What does that mean for the legislative outlook?

# Tax Reform 2.0

## *What issues / proposals will the new Congress address?*

- ❑ Corporate Tax Rate is a key issue that will receive Congressional attention
  - Ballooning deficit + bipartisan populist tendencies + progressive spending priorities = ?
  - House Democratic budget proposal: 28% corporate rate (?)
  - President Trump's position on increasing the corporate rate to pay for additional middle-class tax cuts?
  - Relationship between corporate rate and the TCJA's international provisions?
    - Will an increased corporate tax rate make the United States less competitive globally?
    - Will an increased corporate rate make the TCJA's international reforms less effective?
    - Will an increased corporate rate be coupled with adjustments to those reforms?
    - Is there a balance?

# Tax Reform 2.0

## *What issues / proposals will the new Congress address?*

- ❑ Past legislative proposals to monitor (from the 115th Congress):
  - *No Tax Breaks for Outsourcing Act* (H.R. 5108/S.2459)
    - Introduced by Rep. Lloyd Doggett (D-TX) and Sen. Sheldon Whitehouse (D-RI), key members on the tax-writing committees
    - Includes further international tax reforms, including changes to FDII and GILTI and additional anti-inversion measures
    - Received significant support in Congress
  - Reps. Rosa DeLauro (D-CT) and Peter DeFazio (D-OR) also introduced legislation proposing international tax reforms



# Tax Reform 2.0

*What issues / proposals will the new Congress address?*

## ❑ Other potential proposals

- Elimination or reduction of the deemed tangible return exemption from GILTI
  - Encourages tangible asset investment (and job creation) outside the United States
  - Exceeds a routine return on assets; 10% multiplier is too high
- Reduction of the section 250 deduction / increased rate on GILTI and FDII
- Further haircut on GILTI FTCs
- Application of GILTI on a per-country basis
- Transformation of GILTI to a true minimum tax (e.g., no expense apportionment)
- Application of BEAT to COGS payments

# Tax Reform 2.0

## *What issues / proposals will the new Congress address?*

- ❑ Congressional attention (response?) to EU digital tax developments
  - House and Senate tax-writing committees are monitoring
    - Recent letter by Sens. Chuck Grassley (R-IA) and Ron Wyden (D-OR)
  - Potential legislative action?
- ❑ Key issues to watch for 2019
  - House Ways and Means Committee hearings on the TCJA's international provisions anticipated
    - Could legislative proposals result?
  - Increased oversight in the House of Representatives, particularly as Treasury and the IRS continue implementing the TCJA provisions
  - What will the political landscape be in 2019?
    - 2020 Presidential elections; proposals by leading Democratic candidates (and White House reactions)
    - What type of business activity will we see this year? [Congress tends to be reactive]
    - Political issues and external activity will likely drive the 2019 legislative agenda