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PREFACE

This is the eighth edition of *Global Legal Insights – Corporate Tax*. It represents the views of a group of leading tax practitioners from around the world.

One consistent trend across each jurisdiction is the evolving nature of tax rules which impact cross-border arrangements, and the ongoing uncertainty that this creates. BEPS implementation is now well into the domestic implementation phase and transfer pricing is now a mainstream aspect of tax planning.

We also see renewed effort to reach an international consensus on taxation of the digital economy, with increasing concern that further delay will prompt unilateral domestic action across the OECD. This has prompted reaction from the US government in particular, and it was recently announced that the US would not be taking part in negotiations relating to 'Pillar One' – which broadly proposes changes to traditional nexus rules for allocating taxing rights, enabling a portion of the revenue generated from digital services to be taxed in the jurisdiction in which they are used. The US stated that they were stepping away from talks as the OECD was not making headway on a multilateral deal on digital services taxation. In addition, tax compliance and information reporting are entering a new phase, as DAC 6 will be implemented across the EU.

The impact of COVID-19 will inevitably add to the complex international tax landscape. The long-term impact of the lockdown restrictions and the fiscal measures taken by governments worldwide remains to be seen; however, it is likely that tax policy will play an important role in revitalising the economy.

Authors were invited to offer their own perspective on the tax topics of interest in their own jurisdictions, explaining technical developments as well as any trends in tax policy. The aim is to provide tax directors, advisers and revenue authorities with analysis and comment on the chosen jurisdictions. I would like to thank each of the authors for their excellent contributions.

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Introduction

U.S. corporate tax since the release of last year's edition of *Global Legal Insights – Corporate Tax* can be characterised by two themes. First, in the last half of 2019, the U.S. Treasury Department ("Treasury") and the Internal Revenue Service (the "IRS") released a substantial amount of guidance under legislation commonly known as the Tax Cuts and Jobs Act of 2017 (the "Tax Act"), and 2020 promised much of the same, including long-anticipated regulations governing limitations on business interest deductions under Section 163(j).[1] However, the economic and social upheaval related to the novel coronavirus ("COVID-19") pandemic has shifted focus among corporations and the government alike. Congress signed comprehensive legislation commonly known as the Families First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). As we head into the latter half of 2020, corporations and practitioners alike continue to grapple with how to implement the modifications to the Internal Revenue Code of 1986, as amended (the "Code") as introduced by the Tax Act, the FFCRA and the CARES Act, as well as how to manage fallout from the COVID-19 pandemic.

Legislation

<u>COVID-19: Income tax relief provisions</u>

Net operating losses

The CARES Act temporarily relaxed certain restrictions put in place by the Tax Act on the utilisation of net operating losses ("NOLs") and made a number of technical amendments to the Tax Act's NOL provisions.[2]

Under the Tax Act, a taxpayer's deduction for NOLs arising in taxable years beginning after December 31, 2017 ("NOLs arising post-2017") was limited to no more than 80 per cent of the taxpayer's taxable income (the "80 Per Cent Limitation"). NOLs arising in taxable years beginning on or before December 31, 2017 ("NOLs arising pre-2018") are not subject to limitation under the Tax Act. The CARES Act suspended the 80 Per Cent Limitation for taxable years beginning before January 1, 2021. In addition, the CARES Act modifies the Tax Act's prohibition on NOL carrybacks by permitting a five-year carryback (the "5-Year Carryback") for NOLs arising post-2017 and before January 1, 2021. Nevertheless, the CARES Act prohibits taxpayers from using an NOL carried back under the 5-Year Carryback to offset income under Section 965 (the so-called transition tax), either by deeming taxpayers to have made an election under Section 965(n) to forgo use of the NOL in the Section 965 inclusion year to the extent of the net amount required to be included in income on account of Section 965, or by allowing taxpayers to exclude Section 965 inclusion years from the 5-Year

Carryback. Which option is preferable to a particular taxpayer will depend on a number of factors, including the impact of the deemed Section 965(n) election on the taxpayer's ability to utilise foreign tax credits in the year of the Section 965 inclusion.

In addition, the CARES Act provided helpful clarification for situations in which both NOLs arising post-2017 and NOLs arising pre-2018 are carried to a taxable year beginning after December 31, 2020. In that case, the taxpayer's taxable income (determined without regard to Section 199A, Section 250 or NOL deductions) would be reduced first by 100 per cent of NOLs arising pre-2018, and NOLs arising post-2017 would be allowed as a deduction up to the amount of 80 per cent of any remainder.

Deductibility of business interest

The CARES Act temporarily relaxed some of the restrictions on the deductibility of business interest enacted by the Tax Act.[3] Under Section 163(j) as enacted by the Tax Act, a taxpayer was generally permitted to deduct business interest paid or accrued only to the extent of business interest income, plus 30 per cent of "adjusted taxable income". The CARES Act increased the limitation from 30 per cent to 50 per cent of adjusted taxable income for taxable years beginning in 2019 or 2020 (except with respect to entities taxed as partnerships, as described below). Taxpayers are entitled to elect out of this change.

The 50 per cent limitation applies to entities taxed as partnerships only for taxable years beginning in 2020. If a partnership has excess business interest (i.e., business interest deductions in excess of the amount allowed under the general limitation) for a taxable year beginning in 2019, half of the excess is treated as business interest paid or accrued by the partner in its first taxable year beginning in 2020 and is not subject to the general limitation on the deductibility of business interest, while the remainder is carried forward and is subject to the normal limitation applicable to excess business interest of a partnership. If a partner is allowed to deduct this amount in a taxable year beginning in 2020, presumably the 50 per cent limitation (instead of the 30 per cent limitation) described above would apply, unless the partner elected otherwise. A partner may elect out of the application of these rules.

The CARES Act also allows a taxpayer to calculate the business interest limitation for a taxable year beginning in 2020 based on its adjusted taxable income for its last taxable year beginning in 2019. The election could benefit a taxpayer that had greater adjusted taxable income in 2019 than in 2020 and wanted to increase its business interest limitation.

Bonus depreciation

The CARES Act assigned qualified improvement property ("QIP") a 15-year recovery period (rather than 39 years).[4] Notably, the Tax Act provided for 100 per cent bonus depreciation under Section 168(k) for property with a recovery period of less than 20 years. This change ensures that QIP is eligible for 100 per cent bonus depreciation, retroactive for property placed in service after 2017.

Acceleration of credit for corporate AMT

The Tax Act repealed the corporate alternative minimum tax ("AMT") and allowed taxpayers a refundable credit in respect of AMT that was already paid (and not previously credited). The credit could be claimed over a four-year period beginning with the corporation's taxable year beginning in 2018. The CARES Act accelerated the refundable credit so the remaining uncredited AMT balance is creditable over a two-year period beginning with the corporation's taxable year beginning in 2018.[5] The CARES Act also allowed a corporate taxpayer to elect to accelerate the entire uncredited AMT balance as a credit for the corporation's taxable year beginning in 2018.

COVID-19: Payroll tax provisions

Sick leave credits

The FFCRA enacted new payroll tax credits for certain businesses with fewer than 500 employees. First, the FFCRA introduced a credit against the tax imposed by Section 3111(a) (commonly referred to as the Social Security tax) for each calendar quarter in an amount equal to 100 per cent of the qualified sick leave wages paid per employed individual per day.[6] The amount of the credit is limited to 10 days per individual and is capped at: (i) $511 per day for an individual who is quarantined or self-quarantined due to COVID-19 or seeking a medical diagnosis for COVID-19 symptoms; and (ii) $200 per day for an individual caring for either a quarantined or self-quarantined individual or for a child due to COVID-19-related school or childcare disruptions, and is increased by the amount of tax imposed by Section 3111(b) (commonly referred to as the Medicare tax) on qualified sick leave wages.

Eligible employers are also allowed a credit against the Social Security tax for each calendar quarter in an amount equal to 100 per cent of the qualified family leave wages paid per employed individual per day.[7] Qualified family leave wages are generally wages payable to an individual caring for a child due to COVID-19-related school or childcare disruptions. The amount of the credit is generally capped at a per individual amount of $200 per day and $10,000 in total for all calendar quarters, increased by the amount of Medicare tax on such wages.

Employee retention credits

The CARES Act established a new refundable tax credit against the Social Security tax of 50 per cent of "qualifying wages" paid to an employee after March 12, 2020 and before January 1, 2021, capped at $10,000 of qualifying wages per employee (a maximum credit of $5,000 per employee).[8] The credit is available to employers engaged in a trade or business that (i) is subject to closure due to COVID-19 orders, or (ii) experiences a "significant decline" in gross receipts. "Closure" means a full or partial suspension of business activity due to orders from an appropriate governmental authority due to COVID-19. A "significant decline" in gross receipts occurs during the period beginning with the first calendar quarter beginning after December 31, 2019 in which the employer's gross receipts drop to less than 50 per cent of gross receipts for the same quarter in the prior year, and ending with the first quarter in which gross receipts are greater than 80 per cent of gross receipts for the same calendar quarter in the prior year. The IRS released a number of frequently asked questions ("FAQs") that explain certain aspects of the employee retention credit on its website;[9] however, the FAQs are not legal authority and are not binding.

Small employers (with 100 or fewer employees) are eligible for the credit for any wages paid during a closure or a period of significant decline in gross receipts. Larger employers (with more than 100 employees) are eligible for the credit only for wages paid with respect to employees who are not providing services due to closure or a significant decline in gross receipts. The credit is not available to employers who receive a Payroll Protection Program ("PPP") Loan under the CARES Act.

Payroll tax deferral

Employers may defer deposit and payment of the 6.2 per cent Social Security payroll tax from March 27, 2020 through the end of 2020 beginning with the date of enactment of the CARES Act.[10] Fifty per cent of the tax deposits may be deferred until December 31, 2021, and the remaining 50 per cent may be deferred until December 31, 2022. The deferral does not apply to the employee portion of payroll taxes or the Medicare tax imposed on employers.

New regulations and guidance

PFIC Regulations

On July 10, 2020, Treasury and the IRS issued long-awaited proposed regulations (the "Proposed PFIC Regulations") that address certain rules relating to passive foreign investment companies ("PFICs") under Sections 1291, 1297 and 1298, including rules addressing the insurance exception and for determining ownership of a PFIC and calculating passive assets and income.[11] The Tax Act modified Section 1297 to provide that passive income does not include investment income derived in the active conduct of an insurance business by a qualifying insurance corporation ("QIC"). The Proposed PFIC Regulations provided guidance on the application of this exception, including rules defining a QIC and insurance business and rules that govern the treatment of income and assets of domestic insurance companies owned by a QIC.

The Proposed PFIC Regulations also clarified that for purposes of determining whether a U.S. person owns stock of a PFIC under the applicable attribution rules, a partner in a partnership is deemed to own 50 per cent or more of the stock of any foreign corporations that are not a PFICs (which is the threshold for purposes of attributing any PFIC stock owned by such corporations to their shareholders) only if the partner owns 50 per cent or more of the partnership, i.e., by applying what the Proposed PFIC Regulations refer to as a "top-down" approach.

Finally, the Proposed PFIC Regulations addressed certain aspects of the income and asset tests. The regulations clarify the application of the look-through rules under Section 1297(c), and offered guidance regarding the elimination of certain intercompany assets and income for purposes of the PFIC asset and income tests. The regulations also clarify which exceptions applicable to the determination of "foreign personal holding company income" apply for purposes of the PFIC income test – notably, the regulations provide that the Section 954(h) active banking or finance business exception does apply, while the Section 954(i) insurance business exception does not apply. In addition, the regulations provide that the asset test is determined using the quotient of the average of the values at the end of each quarter, rather than the average of the quotients of the values. The Proposed PFIC Regulations are generally applicable to tax years beginning on or after the date the final regulations are published, but taxpayers may apply the Proposed PFIC Regulations to open tax years if applied consistently.

Cloud computing and digital transactions

On August 9, 2019, Treasury and the IRS released proposed regulations intended to provide a framework for classifying cloud computing transactions either as a lease of property or a provision of services for purposes of many international U.S. federal income tax provisions, as well as guidance applicable to transfers of digital content (the "Proposed Cloud Computing Regulations").[12] The Proposed Cloud Computing Regulations define a cloud transaction as a transaction through which a person obtains non-*de minimis*, on-demand network access to computer hardware, digital content or other similar computing resources, and provide that a cloud transaction is classified solely as a lease of property or provision of services based on all relevant factors. Factors that tend to demonstrate that a cloud transaction should be treated as a provision of services include: whether the provider has the right to determine the specific property used in the cloud transaction and replace such property with comparable property; whether the property is a component of an integrated operation in which the provider has other responsibilities, including ensuring the property is maintained and updated; and whether the provider's fee is primarily based on a measure of work performed or the level of the customer's use rather than the mere passage of time.

The Proposed Cloud Computing Regulations also expand the application of current Treasury Regulation Section 1.861-18, which classifies transactions relating to computer programs for purposes of many international U.S. federal income tax provisions, to transactions relating to "digital content", which is defined to include all content in digital format that is either protected by copyright law or is no longer protected by copyright law solely due to the passage of time, including books, movies, and music in digital format in addition to computer programs. The regulations also provided for an exception to the provisions of Treasury Regulation Section 1.861-18 regarding "copyright rights" for the transfer of the right to publicly perform or display digital content for the purpose of advertising the sale of the digital content.

Finally, the Proposed Cloud Computing Regulations provided that income from the sale of electronically transferred digital content subject to copyright is sourced to the location where such content is downloaded or installed onto the end-user's device that is used to access such content or, in the absence of such information, to the location of the customer according to the provider's recorded sales data for business or financial reporting purposes. Under existing law, such income is sourced by considering a variety of factors, including the location where legal title passes. The proposed changes represent a departure from existing law and practice, especially for non-U.S. taxpayers selling digital content into the United States for whom such income would generally be non-U.S. source under current law and U.S. source under the proposed regulations.

<u>Calculation of NOL limitations</u>

Section 382 generally limits the amount of taxable income that can be offset annually by NOLs after an ownership change; however, if the corporation has net unrealised built-in gain ("NUBIG") immediately before the ownership change, gain recognised within five years of the ownership change that is attributable to a pre-change asset is considered recognised built-in gain ("RBIG") and increases the Section 382 limitation for the relevant year. Under Notice 2003-65, taxpayers were permitted to use one of two alternative approaches to calculating NUBIG (and its corollary, NUBIL): (1) an accrual-based "Section 1374" approach, which provides that RBIG (and its corollary, RBIL) only includes gain or loss a corporation actually recognises following the ownership change from the sale of an asset; and (2) a "Section 338" approach, which generally identifies items of RBIG and RBIL by comparing the corporation's actual items of income, gain, deduction, and loss with those that would have resulted if the corporation had made a hypothetical Section 338 election on the ownership change date. The Section 338 approach has been particularly beneficial to taxpayers with substantial goodwill or self-created intangibles that have a low-tax basis (and thus low or no actual cost recovery deductions) but significant built-in gain.

On September 9, 2020, Treasury and the IRS issued proposed regulations ("Proposed NOL Regulations") that require taxpayers to use the Section 1374 approach, thereby eliminating the alternative, generally taxpayer-favourable, Section 338 approach.[13] The Proposed NOL Regulations also made various other amendments intended to coordinate the calculation of built-in items with the changes enacted by the Tax Act, including clarifying that interaction of the business interest carryforwards under Section 163(j) and the Section 382 limitation, and clarifying when certain cancellation of debt income recognised by a corporation following an ownership change is included in the computation of NUBIG or net unrealised built-in loss. If adopted, the Proposed NOL Regulations would be effective for ownership changes occurring after the date the rules are finalised. On January 10, 2020, Treasury released updated regulations that provided that the Proposed NOL Regulations will not apply until 30 days following the date on which the rules are finalised (the "Delayed Applicability Date") and will not apply to companies that experience an ownership change after such date if the ownership change is publicly announced or triggered pursuant to a binding agreement in effect on or before the Delayed Applicability Date (or if certain other conditions are met).[14]

Downward attribution

One significant change introduced by the Tax Act was to repeal Section 958(b)(4) in determining whether a non-U.S. corporation is a controlled foreign corporation ("CFC"). Prior to repeal, Section 958(b)(4) provided that for purposes of applying the attribution rules of Section 318 to determine CFC status stock owned by a non-U.S. person would not be attributed to a U.S. entity owned by such non-U.S. person (such attribution, "downward attribution"). With the repeal of Section 958(b)(4), the number of CFCs rose significantly.

On October 2, 2019, Treasury and the IRS released proposed regulations regarding the repeal of Section 958(b)(4) (the "Proposed Downward Attribution Regulations").[15] The Proposed Downward Attribution Regulations revert to pre-Tax Act law (i.e., repeal downward attribution) solely for purposes of applying Sections 267, 332, 367, 672, 706, 863, 904, 1297, and 6049. For example, under Section 1297(e), CFCs that are not publicly traded (as specially defined) are generally required to use adjusted tax basis, rather than fair market value, for purposes of determining whether they satisfy the asset test to qualify as a passive foreign investment company. The Proposed Downward Attribution Regulations provide that solely for purposes of determining whether a corporation is a PFIC, whether the corporation is a CFC is determined without regard to downward attribution. In addition, non-U.S. corporations which are CFCs solely as a result of the application of downward attribution are not subject to the increased reporting requirements under Section 6049. The Proposed Downward Attribution Regulations are generally applicable on or after October 1, 2019, but may generally be relied on for a taxpayer's last taxable year beginning before January 1, 2018 and taxable years thereafter.

The IRS concurrently released Rev. Proc. 2019-40, which provides a safe harbour for U.S. shareholders to determine whether a non-U.S. corporation is a CFC. The safe harbour provides that if a U.S. shareholder does not have actual knowledge, statements received or publicly available information that a non-U.S. corporation is a CFC, and the U.S. shareholder requests certain specified information from its directly held non-U.S. corporation, the IRS will accept the shareholder's determination regarding CFC status. Rev. Proc. 2019-40 also provides a safe harbour, permitting U.S. shareholders to rely on certain information provided by a CFC or a specified foreign corporation, including earnings and profits.

Base Erosion and Anti-abuse Tax ("BEAT")

On December 6, 2019, Treasury and the IRS released final regulations under Section 59A, providing guidance on base erosion payments made by corporations to non-U.S. related parties (the "BEAT Regulations").[16] The BEAT Regulations retain the same approach and structure as prior proposed regulations, with a few exceptions. One exception is that the BEAT Regulations expressly provide that amounts transferred subject to a nonrecognition provision such as Sections 332 or 368 are not subject to BEAT, although the regulations also add anti-abuse provisions to target transactions in which a basis step-up is obtained prior to the nonrecognition transaction. The BEAT Regulations also include new provisions addressing mechanics of calculating the amount of BEAT, rules that simplify the calculation of interest on excess effectively connected liabilities and rules for determining the applicable taxpayer. Finally, the BEAT Regulations added several taxpayer-favourable provisions relating to financial transactions and added more details on the treatment of transactions involving partnerships.

On the same day, Treasury and the IRS released proposed regulations providing additional guidance under BEAT (the "Proposed BEAT Regulations").[17] The Proposed BEAT Regulations proposed mechanical rules for determining a taxpayer's aggregate group and additional details on the treatment of transactions involving partnerships. In addition, the Proposed BEAT Regulations provided an election for taxpayers to waive allowable deductions, subject to a general anti-abuse rule.

Foreign tax credits

Treasury and the IRS released final regulations that provide guidance on the determination of foreign tax credit to implement changes made by the Tax Act (the "Final FTC Regulations").[18] The Final FTC Regulations adopted proposed regulations from December 2018 (the "Prior FTC Regulations")[19] and finalised certain prior proposed regulations relating to overall foreign losses and notification requirements.[20] The Final FTC Regulations largely follow the basic approach and structure of the Prior FTC Regulations, which are beyond the scope of this chapter.

On the same day, Treasury and the IRS released proposed regulations that provide a number of additional changes to the existing guidance regarding determination of foreign tax credits (the "Proposed FTC Regulations").[21] The Proposed FTC Regulations provided a framework to allocate a number of specified expenses, including rules for research and experimentation ("R&E") expenditures, stewardship expenses, expenses in connection with litigation or settlements, and interest expense. Of note, the Proposed FTC Regulations generally required R&E expenditures to be apportioned based on relative gross receipts from sales. The existing rule that apportions 50 per cent to the geographic location of research and development remains in place, but only for purposes of determining foreign tax credit limitation and not for other purposes. In addition, the Proposed FTC Regulations generally treat all R&E expenditures of a U.S. taxpayer as allocated to "gross intangible income", which generally includes all gross income attributable to intangible property but not dividends or amounts included in income under Sections 951, 951A or 1293. Accordingly, a U.S. taxpayer's R&E expenditures deductions are not apportioned to the global intangible low tax income ("GILTI") basket.

The Proposed FTC Regulations provided guidance on a number of other matters, including detailed rules on assigning foreign taxes to various Section 904 baskets and groupings, rules allocating income from disregarded entities and other foreign branches, and guidance that whether an entity is predominantly engaged in an active financing business, and whether income is financial services income, is determined under the same standard as the active financing exception of Section 954(h)(2)(B). The Proposed FTC Regulations are generally applicable for tax years ending on or after December 16, 2019, with certain exceptions.

Sourcing

On December 23, 2019, Treasury released proposed regulations intended to address changes made by the Tax Act to Section 863(b) and modify the rules to source sales of inventory produced within and without the United States (the "Proposed Sourcing Regulations").[22] Section 863(b), as modified by the Tax Act, provides that for tax years beginning after December 31, 2017, sales of inventory produced by a taxpayer is sourced on the basis of the production activities of such taxpayers. Prior to amendment, Treasury Regulations under Section 863 provided that income would be sourced by one of three methods: the 50/50 method; the independent factory price method; or the books and records methods. Consistent with the revisions to the statute, the Proposed Sourcing Regulations source income from sales of inventory solely based on production activities and not from sales activities.

In addition, the Proposed Sourcing Regulations clarify the interaction between Section 863 and Section 865(e)(2). Section 865(e)(2) provides that income from sales of inventory and other personal property made by non-U.S. taxpayers through an office or other fixed place of business in the United States is U.S. source, and the Proposed Sourcing Regulations clarify that this rule not impacted by the Tax Act changes to Section 863. The Proposed Sourcing Regulations are intended to be effective for taxable years ending on or after December 23, 2019, if finalised in their current form. However, taxpayers may rely on the Proposed Sourcing Regulations in their entirety for taxable years beginning after December 31, 2017.

Hybrid regulations

On April 7, 2020, Treasury and the IRS released final and proposed regulations regarding hybrid dividends under Section 245A(e) and certain amounts paid or accrued under Section 267A relating to hybrid arrangements (i.e., arrangements or entities that are characterised differently for U.S. and non-U.S. tax purposes) (respectively, the "Final Hybrid Regulations" and the "Proposed Hybrid Regulations").[23] The Final Hybrid Regulations generally retain the framework set forth by proposed regulations issued in December 2018 (which is beyond the scope of this chapter), with a few exceptions. Of note, the Final Hybrid Regulations include certain transitional rules to delay the application of the hybrid provisions. For example, the regulations generally retain the applicability of the hybrid deduction rules to include a deduction with respect to equity, including notional interest deductions ("NIDs"), but delay the effectiveness of the rules to NIDs for taxable years beginning on or after December 20, 2018. The regulations also include a general anti-duplication rule to address deductions or other tax benefits that are duplicated in multiple tiers of CFCs and clarify that the "hybrid deduction account" with respect to acquired stock is eliminated if an election is made under Section 338(g) with respect to a CFC target.

The Proposed Hybrid Regulations provide guidance on calculating hybrid deduction accounts under Section 245A(e), in particular by reducing the amount by Subpart F income, GILTI and Section 965 inclusions (though not necessarily dollar for dollar). In addition, the Proposed Hybrid Regulations expand the conduit financing rules under Treasury Regulations Section 1.881-3 to treat certain instruments characterised as equity for U.S. tax purposes but debt for non-U.S. tax purposes as a financing transaction that can result in a conduit financing arrangement.

Limitations on the deductibility of executive compensation

On December 20, 2019, Treasury and the IRS released proposed regulations under Section 162(m), providing guidance on certain aspects of Section 162(m) that had been significantly modified by the Tax Act, as well as building in certain new provisions.[24] Section 162(m) generally limits the deduction available to public companies on compensation paid to covered employees to $1 million per covered employee per taxable year.

The Tax Act, among other changes, removed the exception from the deductibility limitations for qualifying performance-based compensation and expanded the definitions of "publicly held corporation" and "covered employee", although it did provide limited grandfathering under the prior rules. The proposed regulations, in turn, build on these concepts by:

- further expanding the definition of publicly held corporation to generally include publicly traded partnerships taxed as corporations, foreign private issuers and S-corporations that have publicly traded debt, as well as by modifying the rules related to affiliated groups and disregarded entities;

- applying Section 162(m) to "Up-C" and similar structures by subjecting the distributive share of a partnership's deduction for compensation paid to covered employees that is allocated to a publicly held corporation to the deductibility limits;
- providing that a company's publicly traded status is determined on the last day of the company's taxable year;
- specifying that covered employees of an acquired corporation remain covered employees if the acquiror is publicly held;
- clarifying that an employee must be an executive officer (as defined in Securities and Exchange Commission rules under 17 CFR 240.3b–7) to be a covered employee, but need not be included in the company's summary compensation table; and
- providing guidance regarding the application of the grandfathering provisions, including noting that accelerated vesting is generally not a material modification that would remove compensation from grandfathered status.

In general, the proposed regulations will be effective for taxable years beginning on or after the date the final regulations are published in the Federal Register, although certain provisions have alternate, earlier effective dates.

Other updates

<u>California budget</u>

On June 15, 2020, the California State Senate approved amendments to A.B. 85, which were concurred with by the California State Assembly. A.B. 85 includes a number of changes pertinent to businesses subject to California income tax. A.B. 85 suspends the use of NOLs to offset California business income in taxable years beginning on or after January 1, 2020 and before January 1, 2023 for taxpayers with net business income or modified adjusted gross income in California of $1 million or more. A.B. 85 also limits the use of business incentive credits to offset a maximum of $5 million of tax. The expiration date of the NOLs and credits subject to these limitations is extended. As of the date of this chapter, A.B. 85 has been sent to Governor Gavin Newsom for signature.

* * *

Endnotes

1. All Section references are to the Internal Revenue Code of 1986, as amended.
2. Section 2203 of the CARES Act.
3. Section 2206 of the CARES Act.
4. Section 2207 of the CARES Act.
5. Section 2205 of the CARES Act.
6. Section 7001 of the FFCRA.
7. Section 7002 of the FFCRA.
8. Section 2301 of the CARES Act.
9. https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act.
10. Section 2302 of the CARES Act.
11. 84 Fed. Reg. 33120 (July 11, 2019).
12. 84 Fed. Reg. 40317 (Aug 14, 2019).
13. 84 Fed. Reg. 47455 (September 10, 2019).
14. 85 Fed. Reg. 2061 (January 14, 2020).
15. 84 Fed. Reg. 52398 (October 2, 2019).

16. 84 Fed. Reg. 66968 (December 6, 2019), as corrected by 85 Fed. Reg. 11841 (February 28, 2020).
17. 84 Fed. Reg. 67046 (December 6, 2019).
18. 84 Fed. Reg. 69022 (December 17, 2019), as modified by 85 Fed. Reg. 29323 (May 15, 2020).
19. 83 Fed. Reg. 63200 (December 7, 2018).
20. 77 Fed. Reg. 37837 (June 12, 2012) and 72 Fed. Reg. 62805 (November 7, 2007).
21. 84 Fed. Reg. 69124 (December 17, 2019).
22. 84 Fed. Reg. 71836 (December 30, 2020).
23. 85 Fed. Reg. 19802 (April 8, 2020) and 85 Fed. Reg. 19858 (April 8, 2020).
24. 84 Fed. Reg. 70356 (December 20, 2019).

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