Introduction

The staff of the Joint Committee on Taxation (JCT) on December 20, 2018, issued the General Explanation of Public Law 115-97—the “Bluebook.” This report provides initial impressions regarding certain international provisions in the Bluebook (JCS-1-18).

The Bluebook—prepared in consultation with the staffs of the House Committee on Ways and Means, the Senate Committee on Finance, and the Treasury Department’s Office of Tax Policy—provides an explanation of the federal tax provisions enacted in December 2017 as Pub. L. No. 115–97 (the law that is often referred to as the “Tax Cuts and Jobs Act” or the “Act”).

The Bluebook contains an explanation of each provision in the Act—including the reason for change to existing law—and thus may provide insight regarding congressional intent underlying those provisions. Note that the Bluebook is technically not considered “legislative history” with regard to the Act. See FPC v. Memphis Light, Gas & Water Div., 411 U.S. 458, 472 (1973). The courts have applied varying degrees of deference to prior versions of Bluebooks issued with regard to prior legislation.

The Act contains many provisions directly applicable to the taxation of multinational entities. This report provides preliminary observations about the Bluebook description of certain of those provisions. These observations include comments concerning:

- Section 245A providing a dividends received deduction
- Section 965 relating to mandatory repatriation of certain foreign earnings
- Section 951A implementing the global intangible low taxed income regime “GILTI”
- Section 250 describing the foreign-derived intangible income deduction “FDII”
- Section 59A concerning the base erosion and anti-abuse tax “BEAT”
- Other relevant international tax provisions

Bluebook description of international provisions

Section 245A

The Bluebook indicates that dividends eligible for a dividends received deduction (DRD) under section 245A “may result in an inclusion” under subpart F or GILTI when section 951(a)(2)(B) would otherwise reduce the total amount of subpart F or GILTI inclusions, and states that a technical correction may be necessary to reflect this intent.

This interaction was not discussed in the legislative history of the Act, nor has it been discussed in any IRS or Treasury guidance issued to date. Further, it is unclear whether the inclusion envisioned by the Bluebook would be to the recipient of the distribution or to the U.S. shareholders on the last day of the controlled foreign corporation’s (CFC’s) tax year.
Mandatory repatriation - section 965

The Bluebook clarifies that Congress intended that foreign income taxes attributable to a hovering deficit may be deemed paid by a U.S. shareholder (USSH) of a specified foreign corporation (SFC) pursuant to a section 965 inclusion from such entity to the extent that the hovering deficit is absorbed by earnings of the SFC in the repatriation year, and even if such earnings are not within the same basket as the hovering deficit. The section 965 proposed regulations (REG-104226-18) had specifically stated in the preamble that hovering deficits were not taken into account for purposes of calculating the amount of taxes deemed paid by the USSH.

The earnings and profits (E&P) of an E&P deficit foreign corporation are increased by the amount of such corporation's specified deficit that offsets the deferred foreign income of other SFCs. Like the section 965 proposed regulations, the Bluebook provides that such increase in E&P is not taken into account for purposes of determining the post-1986 undistributed earnings of the SFC in its repatriation year although the Bluebook notes that a technical correction may be required to effect this rule.

Congress intended for individual USSH's of a deferred foreign income corporation that do not make a section 962 election to be allowed a section 965(c) deduction and that such deduction would not be treated as an itemized deduction for any purposes. The Bluebook notes that a technical correction could be required to reflect this intent; however, IRS guidance does currently reflect this intent.

Congress did not intend that foreign taxes associated with deferred foreign income not included by a USSH as a result of the use of specified deficits could be deducted or credited by the USSH.

Congress intended that the section 965(n) election would exclude the section 965(a) inclusion, 965(c) deduction, and taxes deemed paid with respect to the section 965(a) inclusion for purposes of determining both the USSH's net operating loss incurred in the current year and the amount of net operating losses that carry into the repatriation year. This is consistent with the section 965 proposed regulations but may require a technical correction to reflect this intent.

Congress intended for the term “regular tax liability” as used by section 965(h)(6) to mean the taxpayer’s regular tax liability described in section 26, which is without regard to the alternative minimum tax or BEAT additions to tax. The Bluebook clarifies that such taxes are not eligible to be paid over the eight-year installment period. A technical correction may be required.

The extended limitation on assessments to six years from the date of filing a return reporting the section 965 inclusion was intended to also apply to partnership returns. A technical correction may be required.

GILTI

The Bluebook indicates that technical corrections to the new law may be necessary to reflect Congress’s intent for the following:

- Property that produces both tested income and income that is not tested income (dual-use property) is treated as QBAI based on the amount of gross tested income produced with respect to the property, compared to the total gross income produced with respect to the property. This is consistent with a rule in the proposed regulations under section 951A (REG-104390-18).
- The section 78 gross-up related to the GILTI inclusion is assigned to the section 904(c) “basket” to which the taxes relate. This is consistent with a rule in the proposed regulations under section 904 (REG-105600-18).
• Only 80% of foreign taxes paid with respect to GILTI previously taxed income (“PTI”) is creditable under section 901, and that the amount not creditable is not deductible.
• Financial services income is not treated as passive category income for foreign tax credit "basketing" purposes.
• Carryback and carryover rules for foreign oil and gas taxes under section 907(f)(1) do not apply with respect to taxes paid or accrued with respect to GILTI.

Section 250 - FDII

The Bluebook indicates that the section 250 deduction is computed after applying the section 163(j) deduction. This is consistent with provisions in the proposed section 163(j) regulations (REG-106089-18).

The Bluebook indicates that the Secretary is expected to provide regulations or other guidance similar to section 965 with respect to determining gain or loss under section 986(c), due to the reduction in the effective U.S. tax rate resulting from the deduction for FDII and GILTI.

The Bluebook indicates that technical corrections to the new law may be necessary to reflect Congress’s intent for the following:

- Income of a kind that is foreign personal holding company income is excluded from deduction eligible income (DEI).
- QEF inclusions excluded from DEI.
- The dual-use property QBAI rule, as modified for FDII purposes, which applies as a result of a cross-reference in section 250 to section 951A(d).
- If property is sold to a foreign person, but the federal government facilitates the transaction purely as an intermediary (e.g., for certain military sales), income derived from the sale of the property may be treated as foreign derived deduction eligible income (FDDEI).
- The section 250 taxable income limitation rule is determined with respect to the section 78 gross-up (in addition to GILTI and FDII), and the section 78 gross-up (as well as GILTI and FDII) is reduced when the taxable income limitation applies.

The Bluebook indicates that a clerical correction may be necessary to reflect the intent of the related party services rule, which contains a cross-reference to “subparagraph (A)(ii) when the cross-reference apparently should be to “subparagraph (B)(ii).”

Section 958(b)(4)

The Bluebook indicates that a technical correction to the new law may be necessary to reflect Congress’s intent for the repeal of section 958(b)(4) to attribute stock of a foreign corporation owned by foreign person to a related U.S. person for purposes of determining whether the related U.S. person would be a USSH of a CFC.

Section 951(b) USSH definition

The Bluebook indicates that a technical correction to the new law may be necessary to reflect Congress’s intent to expand the 10% ownership test in section 1248(a)(2) to apply based on ownership of value or voting stock.
Prevention of base erosion

- **Section 163(j):** The Bluebook discussion of section 163(j) did not address international aspects of the provision.

- **Hybrids:** The Bluebook particularly emphasizes the broad regulatory authority granted to Treasury under section 267A to issue regulations or other guidance to not only implement the statute but to also “carry out the purposes” of the provision. Specifically, the Bluebook states that Treasury has the authority to address the “overly broad or under-inclusive application of this provision” and provides examples of such over-breadth and under-inclusiveness. Examples provided in the Bluebook as potentially not being caught by the legislative text are branches (to which they devote a lengthy footnote but are otherwise not mentioned in the statute itself) and reverse hybrids, which (as discussed in more detail below) appear to have been inadvertently omitted from the definition of hybrid entities in the statute. An example of an overly broad application of the statute is a type of hybrid instrument that is primarily targeted and sold to tax-exempt domestic entities but may also be acquired by persons who benefit from the hybridity in their respective jurisdictions.

Foreign tax credits

The Bluebook clarifies that Congress did not intend for a section 78 gross-up to qualify for the section 245A DRD. A technical correction to the effective date of section 78 (as revised by the Act) may be necessary to reflect this intent.

The Bluebook clarifies that Congress intended that the section 78 gross-up with respect to a GILTI inclusion is considered foreign source income in the GILTI basket for foreign tax credit purposes. A technical correction may be necessary to reflect this intent.

BEAT

The Bluebook’s description of the services cost method (SCM) exception in section 59A(d)(5) mirrors the statutory language. The Bluebook does not include the statement from the conference report to H.R. 1 (the Act) that payments are eligible for the SCM exception “only if the payments are made for services that have no markup component.” The removal of this statement is consistent with the provisions of the proposed BEAT regulations.

The Bluebook explains that modified taxable income is computed under an “add back” approach by starting with a taxpayer’s taxable income for the tax year and adding back any base erosion tax benefits and the base erosion percentage of any net operating loss (NOL) deduction allowed for the year. This description of modified taxable income is consistent with the provisions of the proposed BEAT regulations.
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