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Clarifications On Tax Reform Will Come, Officials Say

By **Natalie Olivo**

Law360, New York (January 25, 2018, 8:59 PM EST) -- The recently enacted U.S. tax legislation has created new baskets of foreign income that don't always match up with the mechanics of the current tax system, and government officials hinted Thursday at upcoming corrections and clarifications for the law.

The Tax Cuts and Jobs Act, P.L. 115-97, moves the U.S. to a largely territorial tax system, exempting from taxation most of the income earned outside the country's borders. However, it also contains a slew of provisions to discourage U.S. companies from moving intangible assets offshore or stripping earnings out of the U.S.

These provisions include new categories of profit to tax, such as global intangible low-taxed income, or GILTI, which captures income earned through offshore subsidiaries beyond 10 percent of their tangible depreciable assets. That income is immediately pulled in for U.S. taxation, although it receives a deduction that ultimately sets its tax rate at 10.5 percent, compared to the 21 percent corporate income tax rate.

As Covington & Burling LLP partner Michael J. Caballero put it, the tax law's creation of reasonably low-tax foreign income that's now returned means that "we've got partially exempt and partially taxed income that we now have to take and push through the existing mechanics" of the current tax system. Caballero spoke Thursday at a Washington, D.C, tax conference sponsored by the D.C. Bar and Jones Day .

Aaron Junge, tax counsel for the U.S. House Committee on Ways and Means, said during the conference that he and his colleagues are interested in feedback in areas where people think the bill has statutory language that differs from statutory intent, and when a technical correction would be appropriate.

"We're also interested in feedback on areas where it wouldn't be a technical correction but a policy change," Junge said, adding that he can't speak as to when Congress may or may not take up a technical corrections bill, but that "we're definitely interested in hearing about it."

The U.S. Department of Treasury and the Internal Revenue Service already have issued some guidance for taxpayers. Shortly after the tax overhaul was passed, the IRS on Dec. 29 issued a notice regarding the newly enacted Internal Revenue Code § 965, which covers repatriation rates of 15.5 percent for cash and 8 percent for noncash income under the new law.

On Jan. 19, the IRS released additional 965 guidance clarifying how some types of debt would be considered.

However, questions remain regarding § 965 and other provisions, such as GILTI. Douglas L. Poms, international tax counsel at the Treasury, acknowledged there is uncertainty about possible consolidated return treatment when it came to GILTI computation for a controlled foreign corporation, which is done at the U.S. shareholder level.

“In the case of GILTI, we’ve been so focused on putting out guidance under 965,” Poms said. “We haven’t come to clear view on some of these issues for GILTI, but that’s definitely an issue we’ve been hearing a lot of questions about and that we will address.”

Dana L. Trier, a deputy assistant secretary of tax policy at the Treasury, spoke in a panel later during the conference about the department's overall approach to the tax law in its entirety, saying that one priority for guidance is IRC § 163, which covers how interest expense deductions are applied and limited at the partnership level.

When it came to the question of what approach the Treasury and IRS will take to ensure taxpayers have notice, direction or an ability to rely on reasonable methods in light of potential upcoming regulations, Trier said, “I wake up in the morning thinking about these questions, and I go to bed at night thinking about these questions.”

He added that he goes around with about 150 to 200 authority issues in his head, which he said are very discrete, but that it would be tricky to say what the overall characterization would be.

“I think the answer is there’s going to be a whole lot of regulations and guidance occurring, and it’s going to be relatively expansive, and it’s going to try to fix the disparity and these issues as much as we can,” Trier said.

--Additional reporting by Alex M. Parker. Editing by Tim Ruel.