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American Jobs Plan & Made in America Tax Plan—Summary of Certain Key Tax Components

*****These legal developments are still in progress. We will update this Alert as the Acts makes their way through the legislative process.*****

On Wednesday March 31, 2021, President Joseph R. Biden announced the American Jobs Plan and Made in America Tax Plan, designed to provide dramatic improvements to U.S. infrastructure writ large. The American Jobs Plan will focus on physical infrastructure, climate change, domestic manufacturing, research and development (R&D), and home health care services. The White House fact sheet outlining the plans can be found here but the proposed statutory language for the plans have not yet been released. The plan proposes funding the initiatives from measures including (i) increasing the corporate tax rate from 21% to 28%, (ii) creating a 15% minimum tax on global book income, (iii) increasing the minimum effective tax rate on GILTI from 10.5% to 21%, (iv) moving towards a global minimum tax and preventing profit-stripping from U.S., (v) modifying deductions to incentivize on-shoring, (vi) eliminating subsidies for fossil fuels, and (vii) increasing tax enforcement. These proposals are summarized below.

The total estimated cost of the American Jobs Plan is approximately $2 trillion spent over eight years but funded over 15 years by increases in corporate taxes, the elimination of subsidies, and increased enforcement addressing tax evasion by corporations and high-income taxpayers.

Republicans have consistently voiced opposition to increases in corporate taxes. Additionally, some Democrats have voiced opposition to any tax increases without a restoration of the state and local tax (SALT) deduction. With unified Democratic support, Congress may advance portions of the proposal through a budget reconciliation bill, which only needs a simple majority vote in the Senate to pass. However, there are limits as to what may be included in a budget reconciliation bill, and there is also a limit of one budget reconciliation bill per fiscal year, which starts in October. And as a reminder, a budget reconciliation bill has already been passed for the fiscal year starting October 2020—the $1.9 trillion American Rescue Plan Act (ARPA) COVID relief bill, signed into law in March 2021.

The American Jobs Plan and the Made in America Tax Plan are reportedly the first part of a two-part plan, with a second part—the American Family Plan—estimated to cost between $1 trillion and $2 trillion, to be funded by increases in individual taxes. The Made in America Tax Plan does not include any provisions with respect to increasing individual taxation, other than promising increased enforcement to address tax evasion by high-income taxpayers.

American Jobs Plan—Cost of the Plan

The projected cost of the American Jobs Plan is approximately $2 trillion, with spending to be spread over eight years.

- $621 billion for transportation infrastructure;

- $300 billion to strengthen manufacturing;
- $213 billion for affordable housing;
- $380 billion for research and development;
- $400 billion to expand access to home and community-based health care services.

The Made in America Tax Plan (MATP)—Highlight of Key Components

1. The MATP would increase the corporate tax rate from 21% to 28%.
2. The MATP would create a 15% minimum tax on global book income.
    - It would create a 15% minimum tax on corporations with global book income of at least $100 million. The minimum tax would be structured as an alternative minimum tax—corporations would pay the greater of (i) their regular corporate income tax or (ii) the 15% minimum tax. Prior Biden statements related to taxing book income had contemplated still allowing net operating losses (NOLs) and foreign tax credits; these details are not, however, included in the American Jobs Plan and Made in America Tax Plan fact sheet.
        - Global book income refers to financial accounting income, used to report profits to investors. This is distinguishable from taxable income.
        - A criticism is that using book income (rather than taxable income) as a tax base for a minimum income tax would raise the effective tax rate on companies while introducing complexity into the tax preparation process. Companies would have to calculate their tax liability under different tax bases to determine if they owe minimum tax.
3. The MATP would increase the minimum effective tax rate on global intangible low-taxed income (GILTI) (a tax levied on multinational corporations) from 10.5% to 21% and would remove the exemption from GILTI for 10% return on qualified business asset investments (or QBAI) .
    - <u>TCJA History</u>: The 2017 Tax Cuts and Jobs Act (TCJA) created a tax on GILTI, which generally taxes income from controlled foreign corporations above a deemed 10% return on QBAI. Although GILTI is includible in gross income at the corporate rate of 21%, domestic corporations are allowed a 50% deduction with respect to taxes on GILTI, making the effective tax rate 10.5%, subject to further foreign tax credits.
    - It would raise the minimum effective tax rate on GILTI from 10.5% to 21%.

        - Currently, taxes on GILTI are offset by deductions from Section 250 of the Internal Revenue Code of 1986 (the Code): 50% of payments can currently be deducted, a number set to drop to 37.5% beginning in 2026. This deduction reduces the effective tax rate on covered taxpayers from 21% to 10.5%.

        - Although the plan is silent regarding the method for increasing the effective rate from 10.5% to 21%, the rate suggests that the administration intends to eliminate or reduce the Section 250 deduction.

    - It would require corporations to pay tax on GILTI on a country-by-country basis, having the effect of increasing overall tax liability. Although the plan is silent as to how this country-by-country calculation would be implemented, we expect to proposal to limit the use of foreign tax credits from high tax jurisdictions to offset tax due on income from lower tax jurisdictions. Currently, taxpayers can enjoy tax credits for taxes paid to foreign governments on GILTI income (subject to a 20% haircut). Tax credits are capped at the U.S. tax liability on foreign source income, calculated across the various jurisdictions in which a corporation operates.

    - It would eliminate the TCJA GILTI framework provision allowing companies to enjoy a 10% return on tangible investments (i.e., QBAI) tax free.

4. The MATP would support a global minimum tax, including by encouraging other countries to adopt strong minimum corporate tax policies.

    - It would deny deductions to foreign corporations based in countries that do not adopt a strong minimum tax.

    - It would replace a TCJA provision (not named in the plan but likely the base erosion and anti-abuse tax (BEAT)) characterized as being ineffective in preventing profits from being stripped from the U.S.

5. The MATP would modify deductions to create incentives to bring business to American shores.

    - Modify Anti-Inversion Rules: it would modify rules to make it more difficult for U.S. companies to reduce their U.S. tax by becoming a foreign corporation or changing their tax residence to a foreign jurisdiction.

    - Eliminate Expense Deduction for Offshore Jobs: it would eliminate the deductibility of foreign employment expenses and create a tax credit to support U.S. jobs.

    - Repeal FDII: it would repeal the foreign derived intangible income (FDII) deduction. The TCJA created the FDII deduction. Biden views this deduction as a “tax break for shifting assets abroad,” which “is ineffective at encouraging corporations to invest in R&D.”

6. The MATP would eliminate subsidies for fossil fuel companies.

- It would eliminate loopholes, and special foreign tax credits for the fossil fuel industry, as part of the President's commitment to put the U.S. on a path to net-zero emissions by 2050.

7. The MATP will increase IRS enforcement against corporations and high-income Americans, and would provide the IRS with additional resources to support such an effort.

   - While it is not clear yet how much funding would be provided to the IRS, the President indicated in his speech Wednesday that he expects the increased funding to allow the IRS to recover "hundreds of billions of dollars." The IRS Commissioner has previously stated that the IRS brings in five to seven dollars for every dollar spent on enforcement.