

MAYER • BROWN

Government & Global Trade Post Inauguration Webinar Series

Impact of the Stimulus and Proposed Budget on Tax Legislation

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Mayer Brown is a global legal services organization comprising legal practices that are separate entities ("Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia.

The Stimulus Legislation and the Administration's Budget Proposals

Robert E. Glennon

Obama Campaign Promises

- Reduce taxes for everyone making less than \$250,000
- Raise high earner taxes to pre-Bush levels
- “Reforming deferral to end the incentive for companies to ship jobs overseas”
- Enact economic substance doctrine
- Eliminate special tax breaks for oil and gas
- Tax carried interest as ordinary income
- “Cracking down on international tax havens”
- Raise capital gain and dividend rates to 20%

Recently Enacted Stimulus Bill Highlights

- Individual tax relief (\$155 B)
- First time homebuyer credit (\$6.6 B)
- AMT “patch” (\$70 B)
- Energy incentives (production and efficiency) (\$17 B)
- Depreciation relief (\$7 B)
- Small business 5 year carryback of NOLS (\$15 million gross receipts) (\$1 B)
- Debt restructuring relief (\$5 B)
- Repeal of bank §382 ruling \$7 B

Administration's Budget Proposals

- Individual tax cuts (\$770 B)
- Raise upper income taxes \$637 B
- Eliminate cap gains for small business (\$7.7 B)
- Make R&E credit permanent (\$74 B)
- Reinstate superfund taxes \$17 B
- Carried interest \$24 B
- Economic substance \$5 B
- Repeal LIFO \$61 B
- Tax oil & gas companies \$31 B
- “Implement international enforcements, reform deferral, and other tax reform policies” \$210 B
- Expand Stimulus’ NOL carryback provision (\$9 B)
- “Loophole task force”

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The Stop Tax Haven Abuse Act

Rafic H. Barrage

Stop Tax Haven Abuse Act

- Key provisions of the bill would
 - Treat certain foreign corporations as domestic corporations for US federal income tax purposes
 - Establish certain legal presumptions against the validity of transactions involving specified “offshore secrecy jurisdictions”
 - Grant the IRS additional time to review tax returns involving offshore secrecy jurisdictions
 - Codify the economic substance doctrine, and
 - Expand US withholding tax on dividends to include dividend equivalents and substitute dividend payments

Stop Tax Haven Abuse Act – Treatment of Certain Foreign Corporations as Domestic Corporations

- The provision applies to
 - A publicly traded foreign corporation, and
 - A foreign corporation with aggregate gross assets (including assets under management for investors, whether held directly or indirectly) of \$50m at any time during the current taxable year or any preceding taxable year
 - “Controlled foreign corporation” (CFC) exception
- But only if “the management and control of [such] corporation occurs, directly or indirectly, primarily within the United States”
- This is a significant departure from the traditional place of incorporation test that is used to determine whether a corporation is domestic or foreign
- Effective date: Taxable years beginning on or after 2 years after the date of enactment

Stop Tax Haven Abuse Act – Treatment of Certain Foreign Corporations as Domestic Corporations

- Treasury is granted the authority to promulgate regulations for purposes of determining whether the management and control of a corporation is treated as occurring primarily within the US, including
 - If substantially all of the executive officers and senior management of the corporation who exercise day-to-day responsibility for making decisions involving strategic, financial, and operational policies of the corporation are located primarily in the US, and

Stop Tax Haven Abuse Act – Treatment of Certain Foreign Corporations as Domestic Corporations (cont'd)

- Individuals who are not executive officers and senior management of the corporation (including individuals who are officers or employees of other corporations in the same chain of corporations as the corporation) are treated as executive officers and senior management if such individuals exercise day-to-day responsibilities over the tested corporation
- If the assets of the tested corporation (directly or indirectly) consist primarily of assets being managed on behalf of investors, and decisions about how to invest are made in the US

Stop Tax Haven Abuse Act – Treatment of Certain Foreign Corporations as Domestic Corporations

- The accompanying statement issued by Senator Levin explains that the provision is intended to apply, “in particular,” to hedge funds and investment management businesses that are incorporated in a tax haven jurisdiction but whose “key decision-makers” are based in the US
- However, the provision is worded so broadly that it has the potential to apply to many other foreign multinational corporations with US operations, including those that have traditionally enjoyed an exemption from US tax (e.g., certain international airline and shipping companies)

Stop Tax Haven Abuse Act – Treatment of Certain Foreign Corporations as Domestic Corporations

- The provision could hinder foreign investment in the United States at a time when US markets are already in turmoil
 - Overrides the securities trading safe harbor (I.R.C. § 864(b)(2)(A))
- In addition, it is not clear how the provision would apply to foreign multinationals with US operating subsidiaries
- Some or all of a foreign multinational's subsidiaries could become US CFCs

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