Wednesday, December 2nd

1:30-1:45pm
WELCOME ADDRESS AND PRESENTATION OF THE
NYU SPS PAUL H. FRANKEL AWARD
Co-Chairs: June S. Haas, Esq., *Haas Law, Cheboygan, MI*
J. William McArthur, Esq., *Former VP Planning, TE Connectivity, Berwyn, PA*
Award Recipient: Hollis L. Hyans, Esq., *Partner, Blank Rome, New York, NY*

1:45-2:45pm
SALES TAX UPDATE
This session discusses hot sales/use tax issues and developments including efforts to expand the sales/use tax base, developments in the taxation and sourcing cloud computing and other technologies, uniformity challenges after Wayfair, marketplace facilitator legislative developments and more.
Carolynn S. Kranz, Esq., *Managing Member, Industry Sales Tax Solutions, Washington, DC*
Joshua D. Cohen, CMI, *Principal, Ryan, Dallas, TX*
Susan K. Haffield, CPA, *Partner, PricewaterhouseCoopers, Minneapolis, MN*

2:45-3:55pm
AUDITS AND CONTROVERSY RESOLUTION IN THE TIME OF COVID-19
Social distancing, staff reductions and the dearth of state call centers have made resolving tax audits and other controversies more challenging than ever. State revenue demands, restrictive corporate budgets, and ever-changing tax regimes make SALT audit management increasingly complicated and challenging. This practical session led by multi-state audit veterans with substantial private sector and government experience explores practical procedural and substantive tips to get through to the right people and find creative solutions to audits, hearings and litigation. Whether the matter is resolved prior to assessment, after assessment, or in litigation, this session explores strategies from both the company and practitioner perspectives as well as dynamics at state revenue agencies that must be understood.
David J. Shipley, Esq., *Partner, McCarter & English, Newark, NJ*
John Paek, Esq., *Principal, Deloitte Tax, Atlanta, GA*
Damon N. Chronis, *President, US Operations, Ryan, Dallas, TX*
David W. Machemer, Esq., *Principal, Horwood Marcus & Berk, Chartered, Chicago, IL*

3:55-4:10pm BREAK

4:10-5:00pm

OVERVIEW AND PREVIEW OF FEDERAL CONSTITUTIONAL ISSUES

The most significant constitutional cases in state taxation over the past year, both in the US Supreme Court and in state courts, are surveyed. Our commentators also preview important cases to watch in the coming year.

Jeffrey A. Friedman, Esq., *Partner, Eversheds Sutherland US, Washington, DC*
Richard D. Pomp, Esq., *Professor of Law, University of Connecticut, Hartford, CT*

5:00-5:20pm

DAY ONE Q&A SESSION

Hosted and Moderated by Blank Rome

BLANKROME

Thursday, December 3rd

1:30-2:30pm

PASS-THROUGH ENTITIES—LATEST DEVELOPMENTS AFFECTING STATE TAXATION OF PARTNERSHIPS, LLCS, AND THEIR OWNERS

Even though the Tax Cuts and Jobs Act of 2017 (TCJA) significantly reduced the federal corporate tax rate below the top individual tax rates, IRS statistics continue to show that pass-through entities (PTEs) remain the overwhelming favorite form of business organization in the U.S. States struggle with whether to impose tax at the entity level or at the owner level, and with how to apportion or allocate income for multistate PTEs when their owners are located in one state but the PTEs are doing business in many. In response to the TCJA's annual cap on SALT deductions, more and more states (often at the urging of PTE owners and their advisors) amended their laws to impose tax at the entity level in hopes of allowing their residents to qualify for the perceived continued deduction of SALT by the PTE's individual owners. States likewise have provided guidance to navigate the unique issues facing PTEs and their owners as a result of the pandemic. Lastly, states are enacting major parts of the MTC's Model Uniform Statute for Reporting Adjustments to Federal Taxable Income and Federal Partnership Audit Adjustments, bringing some level of uniformity to an already complicated federal audit regime for PTEs and their owners. This panel provides an update on these developments and the latest key state tax cases and administrative rulings affecting Subchapter K entities and their owners.

Bruce P. Ely, Esq., *Partner, Bradley Arant Boult Cummings, Birmingham, AL*
Todd A. Hyman, CPA, *Partner, Deloitte Tax, Philadelphia, PA*
Kelvin M. Lawrence, Esq., *Partner, Dinsmore & Shohl, Columbus, OH*
Steven N.J. Wlodychak, Esq., *Principal, EY, Washington, DC*

2:30-3:30pm

APPORTIONMENT ISSUES: RECENT DEVELOPMENTS

This panel will focus on market sourcing developments, including determination of ultimate destination of services, base calculations and the different interpretations of similar statutory language, including the interpretation of certain states of cost-of-performance sourcing to really mean marketing sourcing. The panel will also review the recent developments in alternative apportionment.

Hollis L. Hyans, Esq., *Partner, Blank Rome, New York, NY*
Lindsay LaCava, Esq., *Partner, Baker McKenzie, New York, NY*
Lynn A. Gandhi, Esq., *Partner, Foley & Lardner, Detroit, MI*
Jamie C. Yesnowitz, Esq., *Principal, Grant Thornton, Washington, DC*

3:30-3:45pm BREAK

3:45-4:15pm

WHAT'S HAPPENING IN NY, NJ AND LOCAL TAXES

An overview of the latest developments in NY, NJ and city and local taxes around the country.

Richard W. Genetelli, CPA*, Managing Director, Genetelli Consulting Group, New York, NY*

Kyle O. Sollie, Esq.*, Partner, Reed Smith, Philadelphia, PA*

4:15-4:35pm

DAY TWO Q&A SESSION

Hosted and Moderated by EY

EY Building a better working world

4:35-5:35pm

ETHICAL CHALLENGES FOR STATE TAX PROFESSIONALS FROM SOCIAL DISTANCING AND ELECTRONIC COMMUNICATIONS WITH CLIENTS AND COLLEAGUES

The panel reviews the implications of remote work sites, communication using email and internet video conferencing with co-workers and clients to discuss confidential issues and data. A discussion of responsibilities arising from use of electronic data exchange; electronic filing and data transfer methods to courts, governmental authorities, co-workers and clients. A review of the how changing standards and applications to new technologies affect private practitioners, in-house professionals and government employees working in the tax field. The application of governing ABA and AICPA rules are explored and then applied to several scenarios using interactive technology to involve registrants in the session.

Glenn C. McCoy, Jr., CMI, Esq.*, Director, KPMG, New York, NY*

Breen M. Schiller, Esq.*, Partner, Eversheds Sutherland US, Chicago, IL*

Christopher J. Sullivan, Esq.*, Shareholder, Rath, Young and Pignatelli, PC, Concord, NH*

Friday, December 4th

1:30-2:30pm

OECD INITIATIVES AND THE IMPACT OF STATE TAXATION ON THE DIGITAL ECONOMY

This panel explains the OECD tax initiatives to development of global uniform treatment and the changing international rules regarding the taxation of the digital economy. The session focuses on similarities and differences between the OECD Pillar One and Two proposals, TCJA provisions on foreign source income, and evolving state corporate income tax rules. The new OECD proposals could radically reshape the global taxation of corporate income in the digital era. The panelists explore the federal and state tax antecedents of some of the OECD solutions, and the potential convergence of international, federal and state approaches.

Alysse McLoughlin, Esq.*, Partner, McDermott Will & Emery, New York, NY*

Barbara M. Angus, Esq.*, Global Tax Policy Leader, EY, Washington, DC*

Karl A. Frieden, Esq.*, Vice President and General Counsel, Council On State Taxation, Washington, DC*

2:30-3:30pm

FEDERAL TAX REFORM'S IMPACT ON STATE TAXATION

Now that federal tax reform has been implemented, this panel identifies remaining reform issues that impact state taxation of businesses and the state-specific responses to federal tax reform. Issues addressed include state work-around to the limitation on the deductibility of interest expense, the changes on usage of net operating losses, the expensing provisions, the 199A deduction for partnerships, the limitation on the deductibility of FDIC fees, and the changed rules concerning capital contributions.

Mitchell A. Newmark, Esq., *Partner, Blank Rome, New York, NY*
Deborah Harrison, MS, *Director, US Income Tax Audits, Accenture, Walnut Creek, CA*
Alexis Morrison-Howe, Esq., *Tax Principal, Deloitte Tax, Boston, MA*

3:30-3:45pm BREAK

3:45-4:45pm

COVID-19 IMPACTS ON STATE TAXATION AND IMPLICATIONS OF THE REMOTE WORKFORCE

This panel looks at claw backs of business incentives based on investment or employment levels unable to be met during state quarantines and regulatory or legislative solutions. The national workforce has been limited to work from home, wherever that is. . . Employees and employers must now figure out how to pay the tax man. States (and localities) levy a welter of complicated and inconsistent standards for when employees are required to file personal income tax returns and when employers are required to withhold for their employees. Additionally, this panel explores the new tax policies and positions developed to deal with the impact of Covid-19 on state budgets and staffing. This session explores the issues, controversies, and potential solutions to the state and local tax issues facing our quarantined workforce.

Brian J. Kirkell, Esq., *Principal, Washington National Tax, RSM US, Washington, DC*
Ulrich Schmidt, MS, *Principal, KPMG, Philadelphia, PA*
Robert Ozmun, CPA, *Partner, PricewaterhouseCoopers, Boston, MA*

4:45-5:05pm

DAY THREE Q&A SESSION

Hosted and Moderated by PWC

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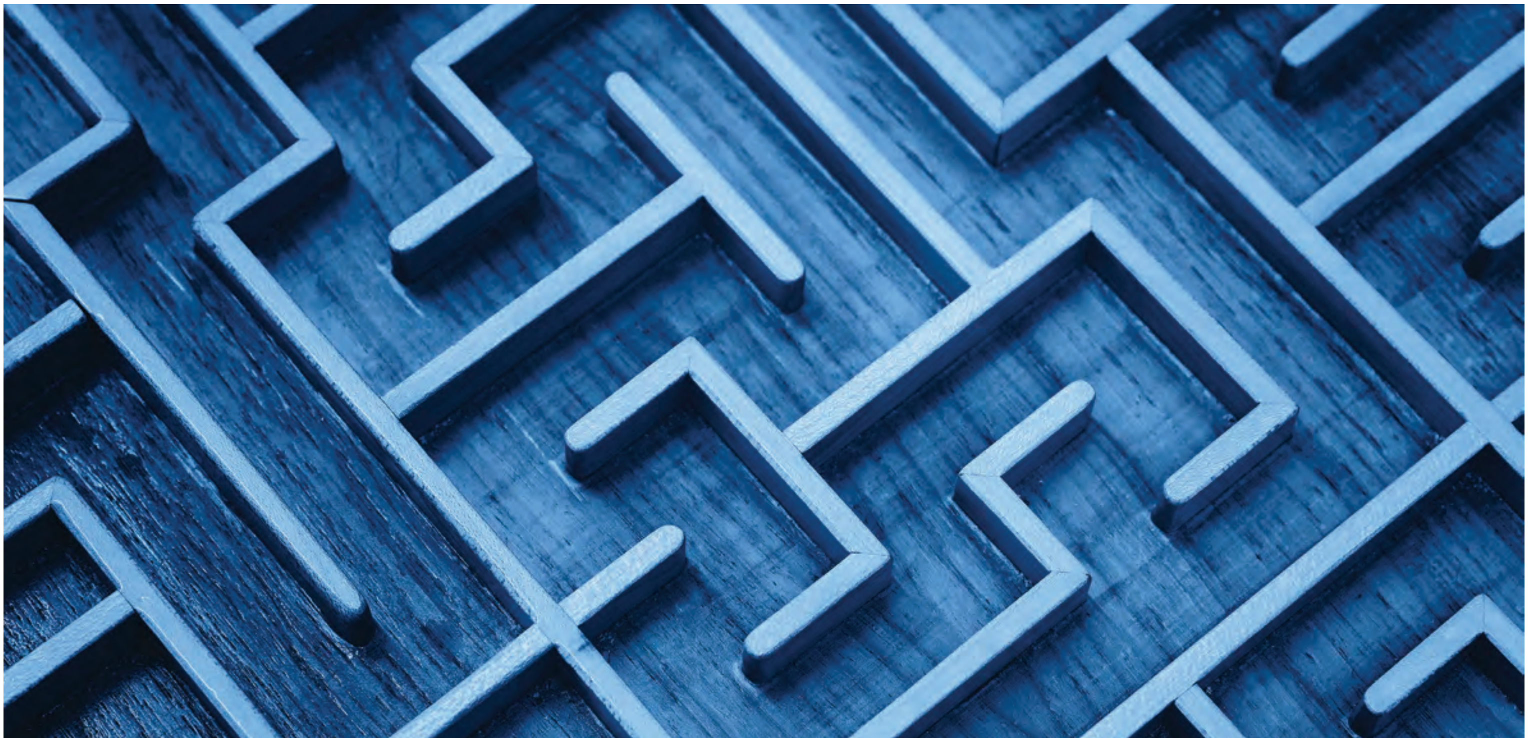

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For more information about how we can help your business, please contact:

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For more information about how Eversheds Sutherland's Tax Practice can help your business, please contact:

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PERSPECTIVE

NYU: 39th Institute on State and Local Taxation
December 4, 2020

OECD INITIATIVES AND THE IMPACT ON STATE TAXATION ON THE DIGITAL ECONOMY

Barbara Angus, EY
Karl Frieden, COST
Alysse McLoughlin, McDermott Will & Emory

Agenda

- **OECD BEPS 1.0 and BEPS 2.0**
- **OECD Pillar One**
  - Key Elements of the Blueprint
  - U.S. State Tax Roots
  - Key issues
- **OECD Pillar Two**
  - Key Elements of the Blueprint
  - U.S. Federal Tax Roots
  - Key issues
- **Future Direction of State Taxation of the Digital Economy and Foreign Source Income**
- **Appendix**

OECD BEPS 1.0 and BEPS 2.0

Polling Question # 1

The Historical Time Line of BEPS 1.0 and BEPS 2.0

- The Organisation for Co-operation and Development (OECD) Inclusive Framework on BEPS includes not just the 37 countries in the OECD, but nearly 140 total participating countries.
- The OECD Pillar One and Two project began only three years after the publication of the OECD BEPS 1.0 reports in an effort to develop a international consensus on how to tax multinational corporations in a fast-expanding **digital and globalized economy.**
- The Inclusive Framework is committed to reaching a consensus solution by the **middle of 2021 (**already delayed from late 2020) driven in large part by the pressure to deter other alternatives:
  - Individual country and potential European Union Digital Services Taxes
  - Stand alone Pillar Two adoption
  - Other unilateral actions by individual countries
- **Will the OECD reach consensus on one or both Pillars?**
- **What position will the Biden administration take?**
- **Is there a historical precedent for the BEPS projects in international taxation?**

Polling Question # 2

OECD Pillar One

Pillar One: Key Elements of the Blueprint

- Aim is to allocate more taxing rights to **market or user jurisdictions**
  - **Amount A**: expands taxing rights on 1/ automated digital services and 2/ consumer-facing businesses with economic presence in the taxing jurisdiction
    - Applies only to non-routine profits
    - Applies only to very large corporations (750 million euros or more)
- Supplements permanent establishment rules with new economic presence standard
- Supplements current CIT income allocation rules with new formulaic allocation to market jurisdictions
- Co-exists with, but goes beyond, arm's length principle (ALP)
- Focuses on tax rules relating to "inbound" companies (and primarily aimed at US multinationals)
- **One key goal: Coordinated withdrawal of DST statutes and proposals**

Polling Question # 3

Pillar One: State Tax Roots and Implications

- **Economic Nexus**
  - International impact of the Wayfair decision
  - The vast majority of states already apply some type of economic nexus standard by statute, regulation or unofficial guidance to corporate income taxes.
- **State Apportionment Formulas/ Market Sourcing**
  - About two-thirds of the states utilize single sales factor/market sourcing
  - Pillar One framework is now considering market sourcing rules very similar to state market sourcing rules.
- **Pillar One is only a modest, partial version of the state CIT framework** for taxing digital and consumer-facing businesses.

Pillar One: Issues

- Digital businesses only v. broader scope?
- Allocation of more taxing rights to market jurisdictions: what jurisdictions are required to give up taxing rights?
- How far will global revisions to PE/nexus rules extend?
- Will the focus on very large multinational corporations hold?
- What portion of profits will be subject to the new rules?
- What is the future of ALP?
- Will countries withdraw DST statutes as part of a Pillar One consensus?
- Is it possible that Pillar Two will be agreed upon separate from any consensus on Pillar One?

OECD Pillar Two

OECD Pillar Two: Key Elements of the Inclusive Framework

- **Aim is to strengthen the ability of jurisdictions to tax profits where the other jurisdiction with taxing rights applies a low effective rate of tax to those profits.**
- Three Key Components:
  - **Income inclusion rule**
    - Parent company jurisdiction has right to impose minimum tax
  - **Tax on base eroding payments** – "Undertaxed payment rule"
    - Payor company jurisdiction has right to impose minimum tax
  - **Subject to tax rule**
    - Denial of treaty based reductions in withholding tax rate
- Applies only to very large multinationals (750 million euros or more)
- Differences from and similarities with the US GILTI concept

OECD Pillar Two: Federal/State Tax Roots

- **Pillar Two generally has its roots in the U.S. Tax Cuts and Jobs Act (TCJA**)
  - TCJA enacted in 2017, included both the GILTI and BEAT provisions for the first time.
- Currently, states with over 80 percent of the U.S. population have decoupled from all or 95 percent of GILTI; no states have adopted BEAT.
  - If the OECD countries adopt all or parts of Pillar Two, that could have an impact on future state-level debate in the U.S. on the taxation of foreign source income
- There is currently no international movement toward full formulary apportionment or worldwide combined reporting.

Polling Question # 4

OECD Pillar Two: Key Issues

- What minimum tax rate to use?
- To what extent will GILTI be grandfathered in for the U.S.?
- Use of financial accounting income in computing Effective Tax Rate?
- Treatment of timing differences and losses?
- Ordering of application of new rules to avoid multiple impositions of minimum tax?
- How much net tax revenue will Pillar One and Pillar Two bring in?
- Will the widespread adoption of Pillar Two result in any significant changes in the state taxation of foreign source income (e.g. GILTI, worldwide combined reporting)?

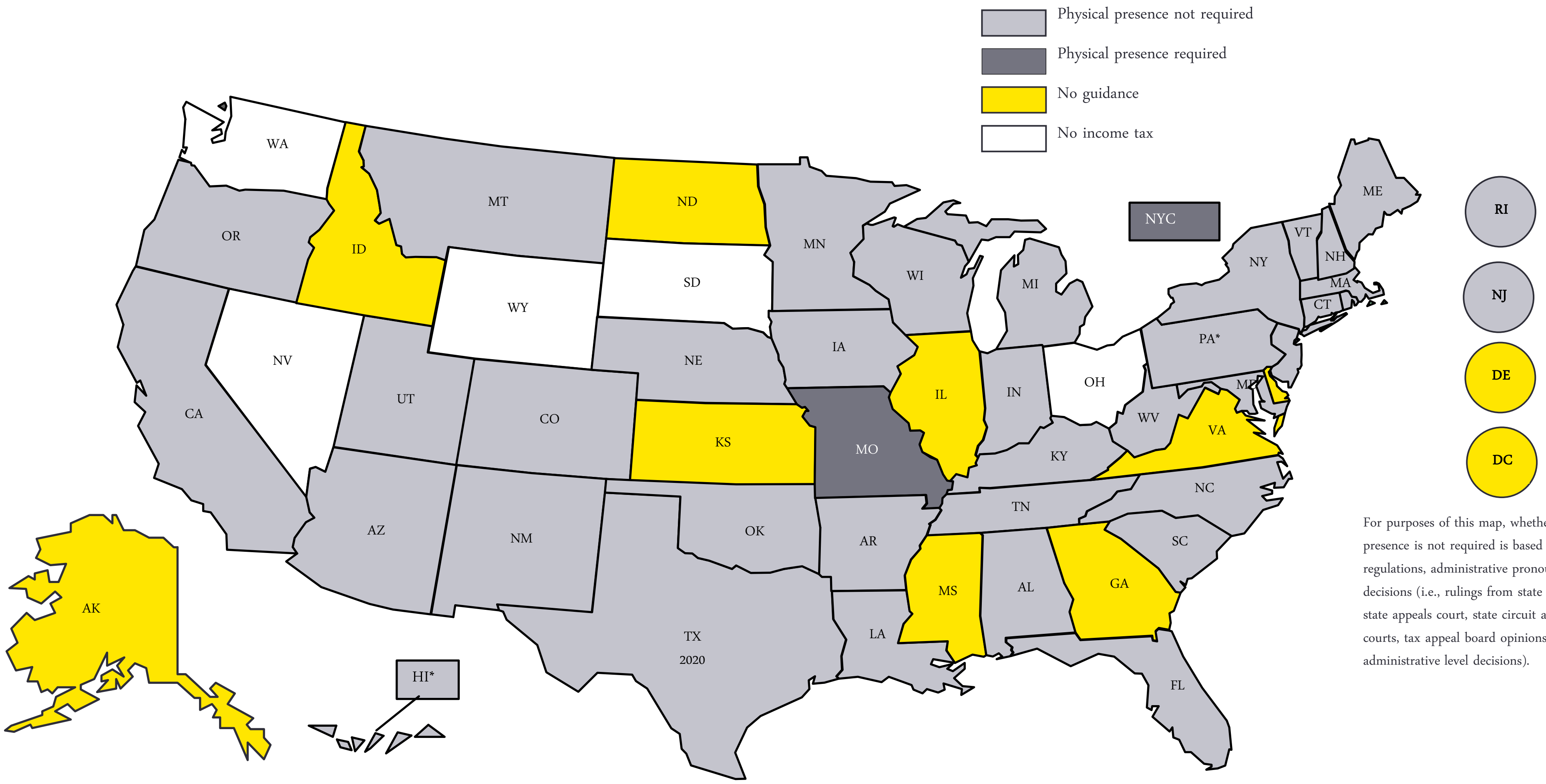
Future Direction of State Taxation of the Digital Economy and Foreign Source Income?

Future Direction of State Taxation of the Digital Economy and Foreign Source Income

- Will the OECD Pillar One and Two proposals impact state taxation?
- Will states find other ways to "ring-fence" the digital economy?
- Will more/fewer states tax GILTI?
- Will any states follow the lead of France and other countries and impose a digital services tax?
- Will states expand transfer pricing capabilities?
- Will the difficulty of administering corporate income taxes in a global digital economy result in a shift to more consumption taxes?

Appendix

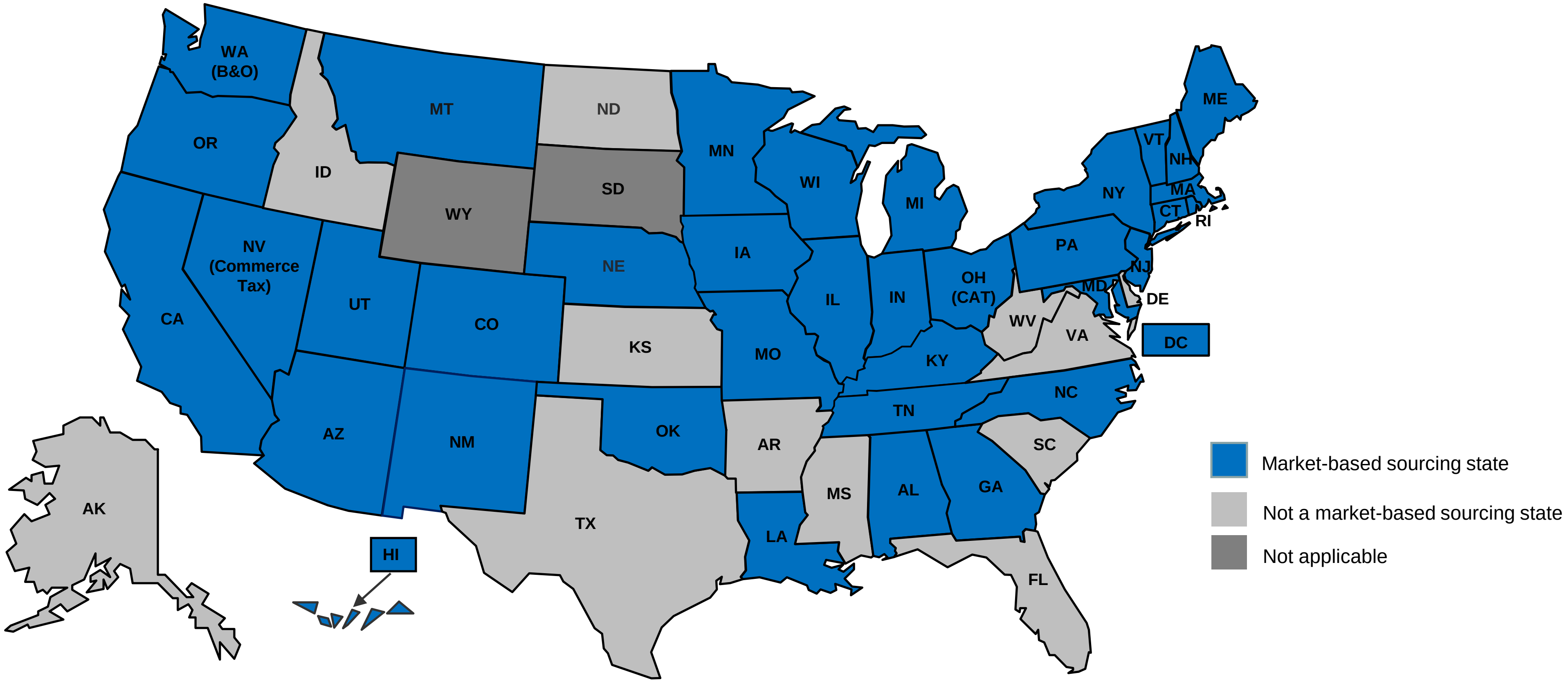
Income Tax Bright-line Economic/Geoffrey Nexus



For purposes of this map, whether physical presence is not required is based on statutes, regulations, administrative pronouncements, and decisions (i.e., rulings from state supreme courts, state appeals court, state circuit and district level courts, tax appeal board opinions and administrative level decisions).

Source: Ernst & Young LLP analysis of state laws as of August 28, 2020

Market-Based Sourcing Adoption



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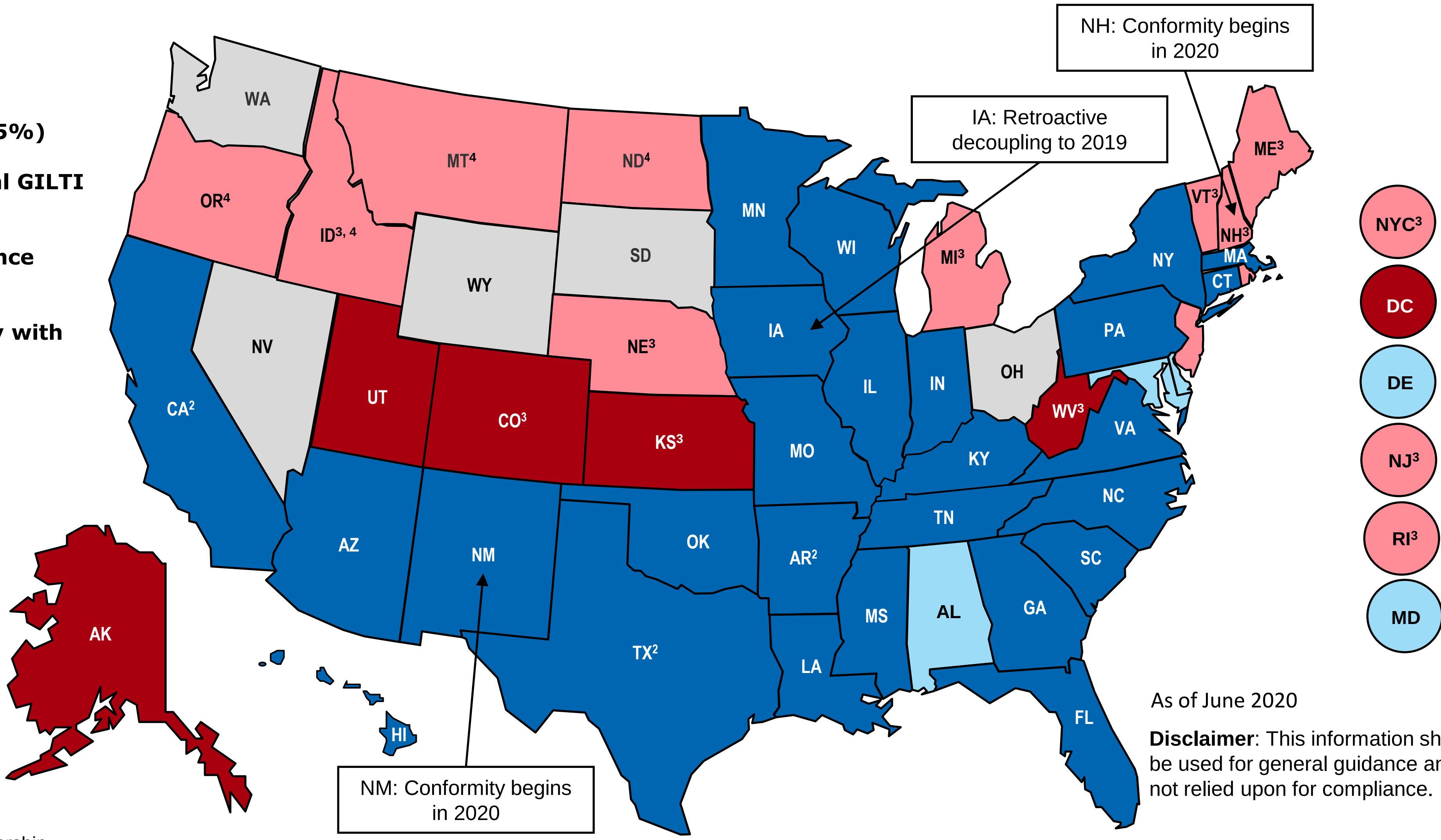
Disclaimer: This information should be used for general guidance and not relied upon for compliance. Sales sourcing regimes above were as of September 2020.

GILTI: State Corporate Income Tax Conformity[1]

- No Corporate Income Tax
- Decoupled from GILTI (or Excludes 95%)
- Separate Reporting State with General GILTI Conformity[5]
- General GILTI Conformity with Guidance
- General or Potential GILTI Conformity with No Guidance



As of June 2020

Disclaimer: This information should be used for general guidance and not relied upon for compliance.

Source: Council On State Taxation

1 Generally based on 80% or more direct corporate ownership.

2 Has not addressed IRC conformity and/or GILTI coupling specifically. Neither GILTI nor the § 250(a) deduction currently applies

3 Less § 250(a) deduction or state deduction in accordance with § 250(a).

4 State dividends received deduction (DRD) applies – GILTI amounts are eligible for Oregon’s 80% DRD, Montana’s 80% DRD, Idaho’s 80% or 85% DRD, and North Dakota’s 70% DRD.

5 GILTI inclusion may be constitutionally prohibited in separate reporting states. Note New Jersey was a separate reporting state for 2018. Additional state administrative guidance may have been provided.

State Taxation of Foreign Source Income In Historical Perspective

- GILTI is one of a number of historic approaches to taxing foreign source income at the state level.
- Other state-level approaches include:
  - Mandatory worldwide combination
  - Tax haven legislation
  - Taxation of foreign dividends
  - Add back statutes
  - Transfer pricing

The French Digital Services Tax

- Enacted in July 2019 and effective for 2019, but payment due dates for 2020 deferred until December 2020 based on agreement with the US.
- The digital services tax is imposed at a rate of 3% on the gross revenues derived from digital activities of which French “users” are deemed to play a major role in value creation.
  - Online advertising
  - The sale of data for advertising purposes
  - Fees derived from linking users to online sales platforms
- The tax is only imposed on corporations with over 750 million euros (about $818 billion) in global digital sales - **primarily US multinationals.**
- **Will the shift to greater reliance on digital commerce in the COVID-19 emergency tilt more countries/states toward digital services taxes?**

U.S. and State Tax Implications of Digital Services Taxes

- **U.S. Opposition to digital services taxes**
  - The U.S. federal government has sharply criticized the French and other foreign government digital services taxes and taken steps toward a tariff-based response.
- **State special tax rules for digital services**
  - To date, only Maryland has enacted to gross receipts tax on digital advertising, but that legislation was vetoed by the State’s governor. A vote on a legislative override of the veto is expected in January.
  - Other states such as Nebraska and New York have considered similar proposals.

Corporate Income Taxation at the Subnational Level

Source: "Survey of Subnational Corporate Income Taxes in Major World Economies: Treatment of Foreign Source Income", study prepared for COST/STRI by PwC, November 2019

Type of Income	United States	48 Other G20/OECD Nations
Subnational Corporate Income Tax	Yes in about 45 states	Only in 8 of 48 Countries
Include Foreign Source income In Base	Some States tax a portion of GILTI or foreign dividends	Only in 1 of 48 Countries
Include Tax Haven Country Income in Base	6 States	No
Utilize Mandatory Worldwide Combined Reporting for Apportionment	Elective in some states	No

New York University – Institute on State and Local Taxation

Federal Tax Reform's Impact on State Taxation

December 4, 2020

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Agenda

State Conformity to the Internal Revenue Code

Section 163(j)

Net Operating Losses

Section 245A and Previously Taxed E&P

GILTI

Section 245A

State Conformity to the Internal Revenue Code

State Tax Conformity to the Internal Revenue Code

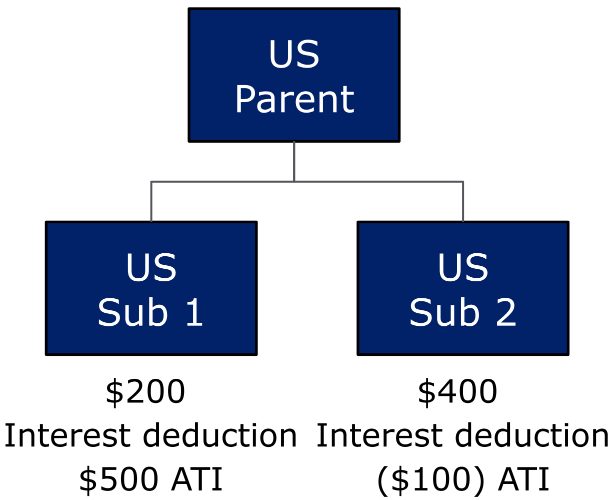
Type of State	IRC Conformity	Conformity to TCJA/CARES
Rolling Conformity	State adopts the version of the IRC currently in effect for the tax year.	State adopts tax reform provisions unless they <u>decouple</u> by legislation
Fixed Conformity	State adopts a version of the IRC as of a fixed date (e.g., December 31, 2016)	If conformity date is prior to 12/31/17, state does not adopt tax reform provisions unless they <u>opt in</u> by legislation
Selective Conformity	State only adopts specific sections of the IRC	If state has not adopted a particular section, state does not conform unless they <u>opt in</u> by legislation

Section 163(j)

Section 163(j)
Consolidated Return Rules

Proposed Treas. Reg. § 1.163(j)-4

Limitation is computed based on ATI of the consolidated group, applied against total interest deductions of the consolidated group.



<u>NO Consolidated Return</u>

Sub 1: Limitation = 30% x $500 = $150
Sub 2: Limitation = 30% x ($100) = $0
(cannot be less than zero)

Total Disallowed Interest = $50 + $400 = $450

<u>Consolidated Return</u>

Total Group Limitation = 30% x $400 = $120

Total Disallowed Interest = $480

*****Separate company limitation may be better or worse than consolidated limitation depending on facts*****

*assumes no interest income

Section 163(j)
State Tax Issues Related to section 163(j)

- **Conformity**
  - Does the state adopt new Section 163(j)?
    - If they have older conformity, may still follow old Section 163(j), a limitation paid on certain intercompany interest
    - If they decoupled from the entire section, may not have any limitation on interest
  - Will the state require separate entity Section 163(j) calculation or consolidated GILTI calculation?
    - Separate company states should use separate entity limitation
    - Consolidated states (e.g. OR, FL with election, etc.) should use consolidated limitation.
    - Combined states that do not follow consolidated return rules may impose separate company limitations (e.g., Massachusetts, Kentucky, Michigan, etc.)

Section 163(j)

State Tax Issues Related to section 163(j)

- **Conformity (cont'd)**
  - State limitation is not necessarily 30% of state taxable income
    - Definition of ATI is a federal definition, states should likely follow subject to any adjustments for conformity to IRC
- **Partnership Issues**
  - Limitation on interest deduction is done at the partnership level, but carryforward of disallowed interest is done at the partner level
  - If partnership pays entity level tax, does nonresident withholding, or partners elect composite, there is potentially no benefit to the disallowed interest carryover.

Polling Question #1

CARES ACT Section 163(j) Amendments
Use of 50% of ATI in Limitation; Election to Use 2019 ATI in 2020

- States with fixed conformity may use 30% for limitation in 2019 and/or not allow for ATI election in 2020 without legislative action
  - Would require different state by state calculations of deductible income and could affect carryforwards
  - State is likely bound by federal election, absent conformity to a pre-CARES Act IRC
- States may update conformity over 2020 to adopt CARES Act changes
  - Some states may still choose decouple from Section 163(j) change and continue to use 30% (e.g. New York, Colorado)

Section 163(j)
Compliance Complexity

- Section 163(j) may need to be computed to account for a number of complexities:
  - Separate company
  - Combined state group that varies from federal consolidated group
  - States with 30% ATI limitation
  - Combined states which require separate member calculations that allow ATI and/or carryover sharing (e.g., MA)
  - Combined states which require separate member calculations that don't allow ATI and/or carryover sharing (e.g., MI)
  - States with differing treatment of partnership limitations (e.g., New Jersey) or that tax at the partnership level

…

Section 163(j)
Intercompany Addback Rules

State interest addback rules would generally apply after determination of deductible interest amount pursuant to Section 163(j)

- Issues to be Resolved by States
  - If the entity has both intercompany and third-party interest expense, what portion of the post-limitation deduction is subject to addback?
- Example

– Third party interest expense	$100,000
– Related party interest expense	$100,000
– Total	$200,000
– Federal 163(j) limit (assumed)	$150,000
– Carry forward:	$50,000

- How much of the $150,000 current deduction is related party?
  - New Jersey would say $75K ($100k of related party interest = 50% of total interest x $150k allowed deduction).

Section 163(j)

Interaction of section 163(j) and state intercompany addback rules

Is interest limited under Section 163(j)?

Yes

- Section 163(j) limitation calculation
- Proper calculation level

No

Is any deductible interest paid to a related party in a state with an addback requirement?

Yes

- Amount of post limitation deduction that is intercompany vs 3rd party

No

addback exception

Yes

No

- If applicable, was the interest "paid in the taxable year"?

Deduct federal interest

Deduct partially allowed interest or no interest

Section 163(j)

Intercompany Debt in a Combined Return

Michigan Department of Treasury, *Notice: Corporate Income Tax Treatment of the IRC 163(j) Business Interest Limitation* (June 8, 2020)

- Requires that each entity in a unitary group calculate a separate company section 163(j) limitation based on their own ATI
- For purposes of the calculation, intercompany interest and expense are not eliminated until *after* the limitation is applied

Result = If there is a mix of third party and intercompany expense, Section 163(j) limitation is used against interest expense that can never be deducted and generates a carryforward that can never be used

Section 163(j)

Michigan 163(j) Limitation

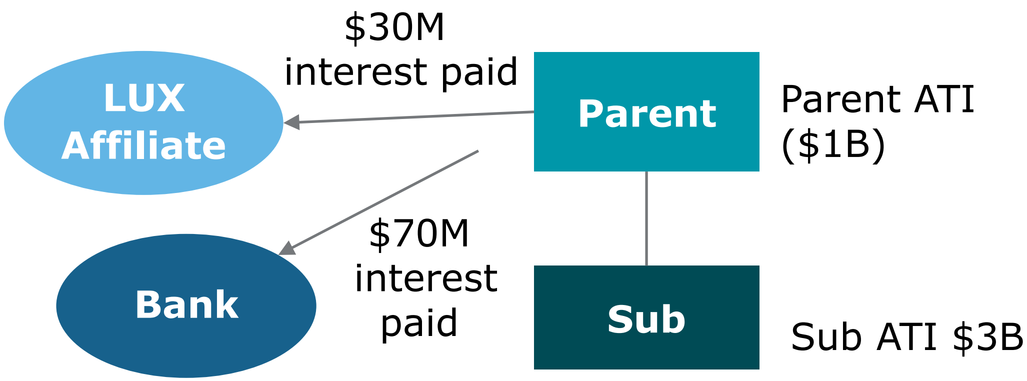
	Corp A
Total Interest Expense	**75,000,000**
Total ATI	**100,000,000**
ATI After Limitation (50%)	**50,000,000**
Business Interest Income	**2,000,000**
Section 163(j) Limitation	**52,000,000**
Total Allowable Interest Before Elims	**52,000,000**
Member Section 163(j) Modification (Form 4897)	**23,000,000**
Intercompany Interest % of Total Interest	**25%**
Total Deductible Intercompany Interest Expense	**13,000,000**
Total Deductible Intercompany Interest After Elims	**-**
Total section 163j Carryforward	**17,250,000**
Lost C/F due to MI I/C Rule	**5,750,000**
Total Deduction w/o MI I/C Rule	**52,000,000**

Section 163(j)

Overview Calculation Example

Assumptions

- No business interest income
- Consolidated groups will calculate limitation on a consolidated basis
- Prior debt/equity safe harbor does not apply



	State A	State B	State C	State D
Combined/Consolidated/ Separate	Combined	Combined	Consolidated	Separate (Sub only)
Conformity to 2018 IRC	No	Yes	Yes	Yes
§163(j) applies?	Only to $30M I/C interest	Yes	Yes	Yes
Limitation at group or separate entity level	Group	Separate	Group	Separate
§163(j) limitation	50% x $2B = $1B	30% x ($1B) = ($300M)–cannot be less than zero	30% x $2B = $600M	N/A
Disallowed Deduction	$0	$100M	$0	N/A

Polling Question #2

Net Operating Losses

Net Operating Losses

TCJA and CARES Act

Original Rules under Tax Cuts and Jobs Act

- For tax years beginning after 1/1/2018, pre-2018 net operating losses are limited to 80% of taxable income
- Pre-2018 net operating losses are not limited

Amendments Under the CARES Act

- For tax years 2019 and 2020, 80% limitation is waived on post-2018 net operating losses
- Tax year 2018 – 2020 NOLs are allowed to be carried back 5 years instead of 2 years

20

Net Operating Losses

80% Limitation Waived; 5 Year Carryback

- Many states have their own statutory NOLs that do not refer to Section 172 - 80% limitation on NOLs would not apply generally.

- For states that do refer to Section 172 and have a corresponding 80% limit:
  - Rolling conformity states <u>would</u> adopt the limitation waiver unless they opt <u>out</u>
  - Fixed date conformity states <u>would not</u> adopt the limitation waiver unless they opt <u>in</u>

- Only three states (Alaska, Maryland, and Oklahoma) automatically conform to extended federal NOL Carryback period. Others may follow if they update conformity.

21

Section 245A and Previously Taxed E&P

Previously Taxed E&P

Section 959

Income of a CFC included in federal gross income of US shareholder, like Section 965 inclusion, is treated as "previously taxed E&P" (PTEP) or "previously taxed income" (PTI) and **excluded** from gross income when actually repatriated

Section 961

US shareholder's basis in CFC is increased by amount PTEP and PTI recognized, and decreased to the extent the income is actually repatriated

If state included in gross income but then allowed a deduction, likely is PTEP/PTI and results in basis increase

If income was never included in gross income because state had fixed conformity or decoupled from IRC section, may be no PTEP/PTI or basis increase

Section 245A

Non-Conformity to Section 245A

- Section 245A allows a DRD for most dividends from a 10% or more owned foreign subsidiary for tax years 2018 and after
  - Section 245A is a "special deduction" – only available in states that start with federal taxable income after special deductions
  - States that do not follow Section 245A may impose a less than 100% DRD (e.g. California).
- Need to consider whenever there are actual or deemed distributions to the US

Distributions made from foreign entities that may not be dividends for federal purposes or eligible for a DRD may be taxable in states

State Tax Treatment of Foreign Distributions

State Non-Conformity to Section 245A

Non-conforming states that allow less than 100% DRD by state statute

States that require a disallowance of expenses related to a DRD

State Tax Treatment of Foreign Distributions

California

Dividend Received Deduction ("DRD")

- IRC section 965 and GILTI not recognized (Cal. Rev. & Tax. Code §§ 23051.5(a); 17024.5(a)(1)(P))
  - Distributions from 965 and GILTI are not considered PTEP
  - Amounts included in CFC partial inclusion (Subpart F)
- 75% DRD available for dividends from CFCs owned at least 50% (Cal. Rev. & Tax. Code § 24411(a))
  - Requires Foreign Interest Offset calculation

Apportionment treatment of Dividends

- Net dividends included in sales factor denominator (Cal. Rev. & Tax. Code § 25120(f)(2))

80/20 Company Rules

- California does not have 80/20 exclusion rules (Cal. Rev. & Tax. Code § 25110)

State Tax Treatment of Foreign Distributions

New Hampshire

Dividend Received Deduction

- IRC section 965 not recognized and GILTI not recognized before tax year 2020 (N.H. Rev. Stat. Ann. § 77-A:1.XX(o))
  - Distributions from 965 and GILTI are not considered PTEP
- No DRD available for foreign distributions (N.H. Rev. Stat. Ann. §§ 77-A:1; 77-A:4.)

Apportionment treatment of Dividends

- A portion of the property, payroll, and sales <u>of the foreign payor</u> included in the denominator of each factor. (N.H. Rev. Stat. Ann. §§ 77-A:3.II.(b)(1), (2), (5); N.H. Admin. Code Rev. 304.04(b)(2))

80/20 Company Rules

- As state does not follow the check the box rules, requires a foreign entity to be a true foreign branch in order to be included as an 80/20 company (N. H. Rev. Stat. Ann. § 77-A:1(XX)(a))
  - The foreign branch needs to have an average of property and payroll of 80% located outside the U.S. (N. H. Rev. Stat. Ann. § 77-A:1(XV))

State Tax Treatment of Foreign Distributions
Wisconsin

Dividend Received Deduction

- State does not adopt IRC section 965 or GILTI (Wis. Stat. § 71.22(4)(L)2)
  - Distributions from 965 and GILTI are not considered PTEP
- 100% DRD for dividends from at least 70% owned corporations if the owner holds such stock for the <u>owner's entire taxable year</u>. (Wis. Stat. § 71.26(3)(j))
- Dividends must be paid on "common stock" – but Circuit Court recently applied DRD to foreign entities taxed as corporations

- **Apportionment treatment of Dividends**
  - Excluded from the sales factor if deducted in determining net income (Wis. Stat. § 71.25(9)(f))
- **80/20 Company Rules**
  - Water's Edge filing excludes 80/20 companies, which are companies with 80% of their income derived from "active foreign business income" (Wis. Stat. § 71.255(1)(d); Wis. Rule 2.61(4))
    - May potentially include dividends from foreign subsidiaries

State Tax Treatment of Foreign Distributions

New Jersey

Dividend Received Deduction

- State did not decouple from section 965
  - Regulation provides for a subtraction for PTEP that is “included in entire net income” if it was previously recognized by an entity filing in NJ which paid > minimum tax
- State allows a 95% DRD for dividends from greater than 50% owned corporations
  - Form CBT-100 for the 2019 tax year had required separate company apportionment of the dividend received *deduction*
  - NJ Legislature acted to reverse this shortly before due date for calendar filers – full 95% DRD must be available

GILTI

Module 1: Global Intangible Low Taxed Income
Components of GILTI

GILTI inclusion (Section 951A)	**CFC Tested Income or Loss =** - Expenses attributable to CFC income under Section 954(b)(5) - Exclusions (ECI, Subpart F, related party dividends, foreign oil and gas extraction income)– 10% x Qualified Asset Base (“QBAI”)
GILTI deduction (Section 250)	**2018–2026:** 50% x (GILTI + Section 78 Gross Up) **2026 and after:** 37.5% x (GILTI + Section 78 Gross Up)
Foreign Tax credits	80% of Foreign Tax Credits in GILTI basket allowed

Module 1: Global Intangible Low Taxed Income

State Taxation of GILTI

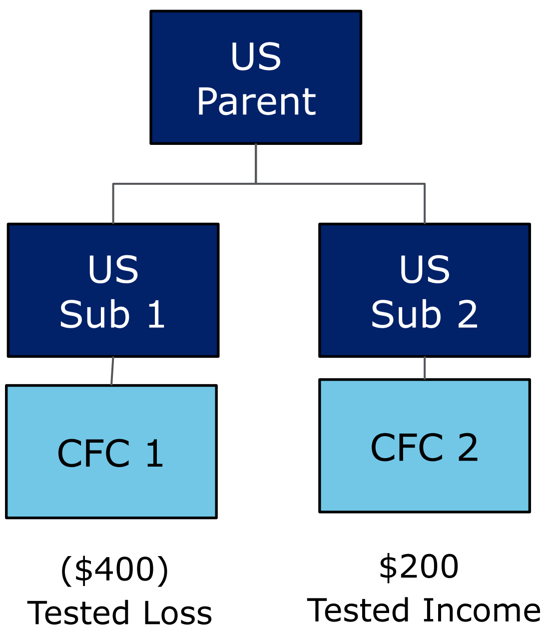
- **Conformity**
  - Does the state adopt new Section 951A and/or Section 250?
  - Does the state require separate entity GILTI calculation or consolidated GILTI calculation?
- **Availibility of Subtraction for GILTI**
  - Many states allow a DRD/subtraction for foreign dividends or Subpart F
    - GILTI is not a dividend per IRC Section 316
    - GILTI is codified in Section 951A within Subpart F of the IRC (i.e., Sections 951–965), but is separate and distinct from "Subpart F Income," which is defined by Section 952.
  - Three types of states where subtraction is permitted:
    - States where DRD is already broad enough (e.g., IL and MI allow a DRD for deemed dividends recognized under Sections 951-965 of the IRC
    - States that have chosen to amend their statutes to allow a subtraction/foreign dividend treatment (e.g., MA, GA, etc.)
    - States that have issued administrative guidance (e.g., KY)

Polling Question #3

Module 1: Global Intangible Low Taxed Income
Consolidated Return Rules

Proposed Treas. Reg. § 1.1502-51

GILTI is computed as if all members of a federal consolidated return were a single shareholder. Losses and income can be offset.



<u>NO Consolidated Return</u>

Sub 1 = $0 GILTI Income from CFC 1
(cannot be less than zero)
Sub 2 = $200 GILTI Income from CFC 2

Total US Taxable Income = $200

<u>Consolidated Return</u>

Total Group Tested Income/(Loss) = ($200)

Total US Taxable Income = $0

GILTI High Tax Exception

Retroactive Election Allowed for Certain Tested Income Subject to Foreign Tax

High Tax Exception

- Regulations finalized on July 23, 2020 allow taxpayers to elect out of GILTI for tested income on which at least a 18.9% tax has been paid in a foreign jurisdiction.
- The election can be made by back to the 2018 tax year by amending the taxpayer's return.

State Conformity

- In states that conform to section 951A, the federal election may generally apply such that GILTI would need to be recomputed for state tax purposes, unless they choose to decouple.
  - States like TX, IN, KY with fixed conformity to the Treasury Regulations may not tax GILTI
- This may affect section the 163(j) limitation, section 250 deduction, expense disallowance amounts, apportionment, and other items in these states.

Global Intangible Low Taxed Income
Taxpayer challenges and litigation

- **Potential Taxpayer Challenges to GILTI**
  - GILTI should be considered a “dividend” similar to Subpart F under state statutes
  - Taxing GILTI discriminates against interstate commerce and/or foreign commerce clause
  - GILTI cannot be taxed without proper apportionment factor representation

- **Dormant Commerce Clause**
  - Commerce clause gives Congress, and only Congress, the right to regulate commerce between the states.
    - “Dormant” commerce clause has been determined by the courts to mean the inverse – states cannot use their powers in ways that discriminates against interstate commerce.
    - States cannot impose tax differently on in-state versus out-of-state taxpayers without a compelling state interest

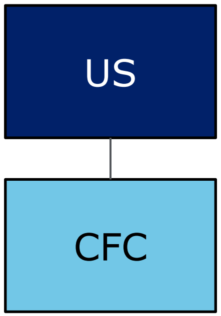
Global Intangible Low Taxed Income
Apportionment

Types of state treatment of GILTI for apportionment purposes:

1. Exclude GILTI from the sales factor
2. Include the GILTI amount net of the 50% deduction pursuant to IRC Section 250 (in states that allow)
3. Include the Gross 951A amount in the sales factor
4. Include the factors of the CFCs attributable to generating the GILTI income ("Detroit Formula")
   - If GILTI income = 80% of CFC's income, then 80% of the CFC's property, payroll, and sales would be included in the apportionment factor of the US shareholder.
   - Similar to CFC inclusion rules in California that allow the factors of CFC to be included proportionally to Subpart F income

- Generally states are excluding GILTI from the numerator, but there are exceptions like Maryland

Module 1: Global Intangible Low Taxed Income
Apportionment - Example



GILTI Income - $1B
CFC Gross Receipts - $10B, CFC Total Income $1.2B

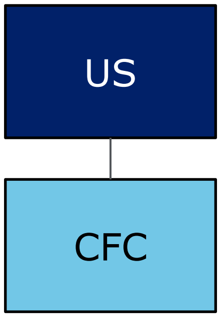
US State A Gross Receipts - $500M
US State A Everywhere - $5B

State A uses Single Sales Factor and a 8% tax rate

Apportionment Treatment	State A Apportionment	Tax Liability on GILTI
No GILTI Inclusion	10% ($500M/$5B)	$8M ($1B x 10% x 8%)
50% GILTI Inclusion	9% ($500M/($5B + 50% x $1B)	$7.2M ($1B x 9% x 8%)
100% GILTI Inclusion	8.33% ($500M/($5B + $1B)	$6.67M ($1B x 8.33% x 8%)

Module 1: Global Intangible Low Taxed Income
Apportionment – Example (cont'd)

raised by GILTI



GILTI Income - $1B
CFC Gross Receipts - $10B, CFC Total Income $1.2B

US State A Gross Receipts - $500M
US State A Everywhere - $5B

State A uses Single Sales Factor and a 8% tax rate

Apportionment Treatment	State A Apportionment	Tax Liability on GILTI
CFC Factor Inclusion	CFC Inclusion Amount: $\frac{\text{CFC GILTI Income}}{\text{CFC Total Income}} = \frac{\$1B}{\$1.2B} = 83\%$ 83% x CFC Gross Receipts ($10B) = $8.33B State A Apportionment = 3.48% ($500M/($5B + $8.33B)	$2.7M ($1B x 3.48% x 8%)

Polling Question #4

Trends in State Responses

Trends in State Responses to Federal Tax Reform

- Transition Tax
  - States that have enacted IRC conformity-related legislation typically have decoupled (or required addback) of Section 965(c) participation deduction
  - Rhode Island and Nebraska historically allowed a DRD for Subpart F income but did not generally allow a subtraction for Section 965(a) income
- GILTI
  - Many states have allowed a DRD/subtraction for GILTI, with some notable exceptions (e.g., New Jersey, New York City, etc.)
    - Some subtractions have been threatened in state budget talks (e.g., Massachusetts)
  - Still limited guidance regarding GILTI apportionment from taxing authorities, and no published judicial decisions yet
- Section 163(j)
  - Trend of states decoupling from Section 163(j) (e.g., GA, WI, IN, CT) in 2019 did not continue as much in 2020
  - Small number of states decoupling from 50% ATI in CARES Act, but most fixed date states have not affirmatively adopted

Section 199A

Section 199A

State Conformity

- Section 199A allows a deduction for certain owners of passthrough businesses

- Deduction is taken after adjusted gross income (AGI) to compute taxable income

- Most states take AGI as the starting point to calculate state taxable income for individuals. Only a very small number of states begin with federal taxable income (e.g., Colorado, North Dakota, Idaho, etc.)

  - Oregon starts with federal taxable income, but decoupled from section 199A
  - Iowa starts with AGI but allows a modification for section 199A

Questions?

New York University
39th Institute on State and Local Taxation
December 2-4, 2020

COVID-19 IMPACTS ON STATE TAXATION AND IMPLICATIONS OF REMOTE WORKFORCE

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Disclaimer

The following information is not intended to be “written advice concerning one or more Federal tax matters” subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230.

The information in this presentation is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser.

Polling question #1

COVID-19 and the virtual workforce environment

Why this topic right now?

Going virtual is not a new trend, but the rate of change has accelerated as a result of COVID-19 and the state fiscal climate.

- Expansion of traditional remote employment
- Virtual internship programs
- Virtual board of directors meetings
- Decentralizing offices
- Downsizing or eliminating real estate footprints

This acceleration does not appear to be temporary.

- Informal surveys indicate 75% of businesses intend to extend, expand, and/or make permanent virtual work arrangements
- Material increase in people moving from key population centers

The nature of work may be changing permanently as businesses have been forced to overcome issues and are reaping benefits from remote operations.

Polling question #2

Business tax considerations

State and local business tax implications of expanding virtual workforce arrangements, decentralization, and closing offices.

- Entity and individual level business income tax
  - Nexus & P.L. 86-272 protection
  - Apportionment
  - Business nerve center in a virtual world
  - Effect on operating models (e.g., intercompany agreements, transfer pricing, etc.)
- Sales and use tax
  - Process, process, process!
  - You might be focused on Wayfair economic nexus, but physical presence still creates nexus
  - Use tax on software, computers, and other equipment could be a source of hidden risk
- Other taxes
  - Gross receipts taxes
  - Net worth taxes
  - Local taxes

Business tax considerations (cont'd)

State and local business tax implications of expanding virtual workforce arrangements, decentralization, and closing offices.

- Credits and incentives
  - Claw backs on existing arrangements
  - Negotiating workforce based credits and incentives without physical plant
- State payroll tax withholding
  - Layers of responsibility
  - Reciprocity
  - Federal and state legislative relief
- State and local administrative relief continues to evolve

Temporary change for COVID-19, permanent virtual transformation, or something in between? Does it matter?

Polling question #3

Individual tax considerations

Individual tax and residency issues in a virtual work environment

- The importance of legal residence
- Can I have more than one state of residence, and what does it mean if I do?
- Paying tax to nonresident states and a second look at the convenience of the employer rule
- The credit for taxes paid to other states may not fix all problems
- Changing residency. Should I stay or should I go?
  - It's not all about taxes
  - The go or no-go decision and the importance of timing
  - Changing residency is a complex process
- Interplay with trust planning
  - Where are you, beneficiaries, and trustees, and why does it matter?
  - If your trust owns a business, how will virtual workforce impact trust filing requirements?

Examples

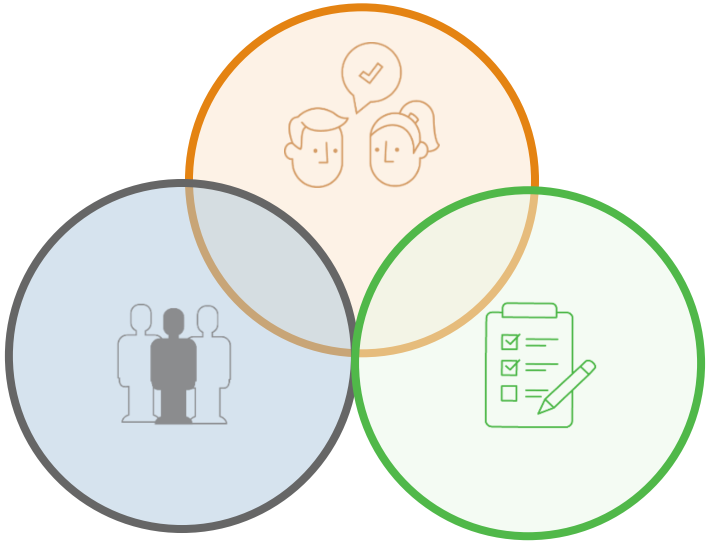
Company A’s sole office is in New York City. Because of COVID, employees are temporarily working from locations other than the NYC office. Employees have been productive working remotely and the NYC lease is coming up for renewal, so Company A is rethinking the office space. What should Company A be considering from a state and local tax perspective?

Company B has a California-based employee. The employee moved to a vacation property outside of California when COVID hit, and has since decided to establish residency there. The company has nothing else in that state but is willing to let the employee work from there. What should Company B be considering from a tax perspective?

Polling question #4

Some final thoughts

KEY TAKEAWAYS



1. IT'S NOT ALL ABOUT TAX
2. THE DEVIL IS IN THE DATA
3. TIMING COUNTS
4. BE DELIBERATE ABOUT BUSINESS CHANGE
5. THE INDIVIDUAL IMPLICATIONS MATTER
6. GET INFORMED, BE FLEXIBLE, ACT NOW

QUESTIONS?