

Peter Barnes Weighs in on OECD Pillar Two in Law360

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If countries enact Pillar Two rules that override their tax treaties with the U.S., "we're going to have a train wreck," said Peter Barnes, former senior tax counsel at General Electric Co. who is now Of Counsel at Caplin & Drysdale. The only way to avoid treaty conflicts is for the U.S. to also pass legislation that conforms with Pillar Two, he said.

"That's where I think the U.S. interests in revenue and the taxpayers' interests in tax administration will align," Barnes said.

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Even if GILTI is a CFC regime under Pillar Two, it will "just be chaos and extremely difficult for U.S. companies," according to Barnes at Caplin & Drysdale. At some point, the business community is going to tell Congress that corporations "have to live with this around the world" and request that GILTI conform with Pillar Two by operating with a 15% rate on a country-by-country basis, he said.

Companies could also be in a chaotic situation without U.S. Pillar Two rules if other countries enact Pillar Two legislation and terminate their U.S. tax treaties, which may conflict with certain top-up taxes, according to Barnes. The business community is currently focused on other Pillar Two issues, but the U.S. eventually has to adopt Pillar Two because "the alternative is just not acceptable," he said.

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In a similar vein, Barnes at Caplin & Drysdale said more clarity is needed to know revenue estimates if GILTI remains in its current form and is treated as a CFC tax.

The current unknowns center on the sequence in which countries should apply different domestic measures under Pillar Two, including CFC taxes. A Treasury official said during a conference earlier this month that this unanswered question is a topic for upcoming administrative guidance.

Once the revenue estimates become clearer and a critical mass of countries move ahead with Pillar Two, U.S. companies won't have a hard choice to make, according to Barnes.

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