The Georgia Legislature introduced its annual Internal Revenue Code (IRC) conformity bill—HB 821. Georgia conformity is updated annually to conform to recent federal tax law changes. In light of the recently enacted law changes (the Federal Tax Reform Act), this year’s conformity bill will receive particular attention. HB 821 would conform to several key federal tax reform changes, including the interest deduction limitation, NOL limitations, GILTI and FDII income treatment, and the expanded limitation of executive compensation deductions. On the other hand, HB 821 would not conform to the federal changes that make some state tax incentives taxable, expand bonus depreciation and cost-recovery provisions, and impose tax on the one-time deemed repatriation of certain foreign income.

**Full expensing**

One of the Federal Tax Reform Act’s major taxpayer benefits is the change to federal bonus depreciation under IRC § 168(k), which allows for 100% bonus depreciation in the year an asset is placed in service for property acquired and placed in service after September 27, 2017, and before January 1, 2023. Georgia has traditionally decoupled from federal bonus depreciation and HB 821 would continue to decouple from IRC § 168(k), including the new 100% bonus depreciation.

**Interest deduction limitation**

The Federal Tax Reform Act significantly expands the interest deduction limitation under IRC § 163(j). The Federal Tax Reform Act limits the allowed deduction of interest paid or accrued to net interest income plus 30% of adjustable taxable income. Disallowed interest may be carried forward indefinitely.

Georgia generally adopts the IRC, while enumerating specific provisions to which it will not conform. HB 821 does not address the IRC § 163(j) interest deductions and therefore adopts the changes in the Federal Tax Reform Act. Thus, HB 821 would restrict the deductibility of interest expenses from Georgia income and allow an unlimited interest expense carryover.

**Eversheds Sutherland Observation:** The legislative history indicates that Congress intends section 163(j) to be applied at the consolidated group level. Consolidated filers should take note of the provision in HB 821 that states that each corporation’s taxable income “shall be based upon the taxable income as if the corporation had filed a separate federal tax return,” making it appear that the interest deduction limitation will be based on separate company amounts for Georgia purposes.
**NOL limitations**

The Federal Tax Reform Act imposes limitations on the use of net operating losses (NOLs) and eliminates NOL carrybacks. HB 821 clarifies Georgia’s conformity to these federal changes.

The Federal Tax Reform Act amended IRC § 172, which limits the federal NOL deduction such that losses generated in taxable years beginning after December 31, 2017, may only offset a maximum 80% of a corporate taxpayer’s pre-NOL taxable income. HB 821 provides that the 80% limitation would be calculated with respect to Georgia taxable income. Combined with HB 821’s clarification that each corporation’s taxable income “shall be based upon the taxable income as if the corporation had filed a separate federal tax return,” this NOL limitation appears to be based on separate company amounts for Georgia purposes, regardless of whether a consolidated return is filed for federal purposes.

**Expanded limitation for deducting compensation**

The Federal Tax Reform Act expanded IRC § 162(m)’s prohibition on deducting compensation paid to certain executive officers in excess of $1 million to additional types of corporate employers and additional officers and eliminates exceptions for performance-based compensation. HB 821 would conform to the Federal Tax Reform Act’s expanded limitations for deducting compensation.

**Taxation of contributions to capital**

HB 821 decouples from the Federal Tax Reform Act’s change to IRC § 118. Under that federal change, “any contribution by any governmental entity or civic group (other than a contribution made by a shareholder as such)” is no longer treated as contributions to capital, which may be excluded from gross income. Since HB 821 does not follow these federal changes, taxpayers may be able to exclude such contributions when computing Georgia income tax.

**Foreign Dividends Received Deduction and Transition Tax**

The Federal Tax Reform Act moves toward a territorial tax system by providing a 100% dividend received deduction (DRD) for foreign source dividends received from 10% owned foreign corporations. To facilitate the shift, a one-time transition tax is imposed under IRC § 965 on the deferred foreign earnings of foreign subsidiaries. Under the transition tax, the deferred foreign earnings are subject to current tax as subpart F income, subject to a deduction under IRC § 965, the amount of which depends on whether the deferred foreign earnings are held in cash or non-cash assets.

HB 821 would prevent Georgia taxpayers from taking the deductions resulting from IRC §§ 965 and 245A. Georgia generally allows for a deduction of all subpart F income, which should include the transition tax under IRC § 965. HB
821 would clarify Georgia law to provide that the deductions allowed within IRC § 965(c) are not allowed if the related income has been subtracted from Georgia taxable income. With respect to the foreign DRD under section 245A, because Georgia already eliminates these distributions from income, the federal DRD also must be eliminated.

Eversheds Sutherland Observation: Because Georgia excludes Subpart F income, the one-time tax on deferred foreign earnings under § 965 should not affect taxpayers’ Georgia taxable income even without passage of a conformity bill. However, without a conformity bill, the subtraction that is allowed under IRC § 965(c) might also have been allowed. For both §§ 965 and 245A, HB 821 would prevent a taxpayer from taking a deduction twice—first under Georgia’s state-specific calculation and then again under the federal conformity.

Global Intangible Low-Taxed Income (GILTI)

The Federal Tax Reform Act contains other provisions related to taxation of certain foreign intangible income referred to as GILTI. Georgia would adopt the new federal GILTI and FDII provisions under HB 821.

The Federal Tax Reform Act created new IRC § 951A known as GILTI, which taxes a US shareholder on the income of its controlled foreign corporations (CFCs) in excess of a fixed return on the tangible assets of such CFCs. Although the income is subject to tax at regular rates, under new IRC § 250 a deduction is allowed for 50 percent of the amount included in income.

HB 821 would modify Georgia law to clarify that income included under IRC § 951A is also included for Georgia income tax purposes. In other words, although these amounts are treated like subpart F income for federal tax purposes, the state’s deduction for dividends received from sources outside the United States would not be apply. HB 821 provides that the IRC § 250 deduction shall apply to the extent that the IRC § 951A income is included in Georgia taxable income.

Eversheds Sutherland Observation: In the absence of HB 821’s passage, it would be unclear whether the GILTI under § 951A would be subtracted from Georgia taxable income under O.C.G.A. § 48-7-21(b)(8)(A). The determination depends on whether the income is considered Subpart F income for Georgia purposes. However, absent clarification, the deduction under IRC § 250 would likely apply to a taxpayer’s Georgia taxable income absent the passage of HB 821, since the deduction is a “special deduction” for federal income tax purposes and Georgia’s computation of taxable income generally begins with Line 30 of federal form 1120.

Foreign Derived Intangible Income (FDII)

The Federal Tax Reform Act provides a new special deduction in IRC §250 for certain income that is earned by a US corporation. The deduction is for 37.5%
percent of the US corporation’s FDII. FDII is broadly defined as income from the sales (including licenses) of property to foreign persons, as well as income from services performed for foreign persons. To be eligible for the deduction, FDII must be in excess of a fixed return on tangible assets of the US corporation.

Under HB 821, a Georgia taxpayer would be entitled to take into account the FDII deduction under IRC § 250 to the extent that the related income is taken into account in determining Georgia taxable income.

**Base Erosion Anti-abuse Tax**

HB 821 does not address a major change of the Federal Tax Reform Act—the addition of the base erosion and anti-abuse tax (BEAT)—a form of a minimum tax that seeks to discourage US corporate parents from eroding the federal tax base through deductible or amortizable payments to foreign subsidiaries. The BEAT is separately calculated tax amount within IRC § 59A. In prior years, the federally calculated Alternative Minimum Tax (AMT) has not impacted Georgia taxable income. Thus, like the historic AMT, absent amended or additional legislation to address the BEAT, it is anticipated that the IRC § 59A provisions will not impact Georgia taxable income.

*If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under 'Related People/Contributors' or the Eversheds Sutherland attorney with whom you regularly work.*