

# TAX REFORM: FINALE OR INTERMISSION?

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When President Trump signed the Tax Cuts and Jobs Act ("TCJA") on December 22, 2017, it wasn't the grand finale of the tax reform process — it was merely the end of the first act. Already, Congress has begun considering modifications to the landmark tax reform bill, including issues left on the proverbial cutting room floor. Meanwhile, the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") are issuing guidance to interpret and implement the most sweeping tax rewrite in 30 years that affects virtually every taxpayer.

*You can play a role in that process.* Now is the time to identify legislative changes that are necessary to clarify the impact of unclear drafting, inconsistencies, and the unintended consequences. Now is the time to be thinking about how regulations and other guidance can be drafted to minimize burden and maximize efficiency. No issue is too big or too small for consideration as Congress and the Trump administration move forward. No taxpayer or business is too big or too small to participate. The K&L Gates tax policy team is available to help identify issues and to advise on a strategy tailored to your needs and priorities.

## LEGISLATIVE OPPORTUNITIES: TECHNICAL AND OTHER CORRECTIONS

Legislative attempts to fine-tune TCJA are expected throughout 2018. Both the pace and the process leading up to the bill resulted in a number of ambiguities, uncertainties, and unanswered policy questions in the final legislation. Consideration of the bill from introduction in the House of Representatives until the president's signature took just seven weeks — a blistering pace for such significant legislation. Moreover, the budget reconciliation process imposed certain rules and restrictions that resulted in numerous phase-ins, phase-outs, changes in rates, and other choppy policies in order to comply with procedural requirements and prevented some policies from being included altogether.

Congressional leadership and the tax writers have already indicated that they intend to address and fix some of these problems in corrective legislation this year. Some changes may be accomplished through technical corrections, which by definition do not have a cost and are merely clarifications of original congressional intent. Technical corrections will require 60 votes since they do not have a budgetary impact and do not qualify for reconciliation procedures. Other changes with a revenue impact could be done either through procedures requiring 60 votes in the Senate or another reconciliation bill arising from the FY 2019 budget resolution, which would require only a majority vote.

As noted above, this effort won't be limited just to "big ticket" items. Any legislative vehicle offers opportunities to advance discrete provisions that may apply to a narrow subset of businesses and industries. Targeted, efficient

outreach and engagement to key policymakers on Capitol Hill can lead to outsize benefits through the elimination or modification of unworkable or burdensome policies.

## **ADMINISTRATIVE OPPORTUNITIES: REGULATIONS AND OTHER GUIDANCE**

In parallel with the legislative process, many regulatory and guidance projects will be initiated in 2018. Like most major legislative initiatives, TCJA grants significant authority to Treasury and the IRS to interpret and administer the new tax rules through regulatory and other guidance. This broad grant of authority can result from Congress's inability to decide on the details, insufficient time to decide the details, or concerns that certain decisions might violate procedural rules. Treasury and the IRS have indicated that they will rework the Priority Guidance Plan (a list of current guidance projects) to incorporate their new workload resulting from TCJA. Stakeholder input may help drive this reprioritization. Additionally, these regulatory and sub-regulatory projects, including notices, revenue procedures, and other guidance, will offer many chances through meetings, comment letters, and hearings to impact how the changes to the code will be interpreted, administered, and enforced. Treasury and the IRS have already begun working on preliminary guidance on the most urgent provisions in the bill, issuing guidance late in December on deemed repatriation.

## **PROCEDURAL OPPORTUNITIES: JOINT COMMITTEE ON TAXATION BLUEBOOK**

Additional opportunity to influence the interpretation of TCJA is with the Joint Committee on Taxation's ("JCT") annual Bluebook, which describes the tax legislation enacted during the previous year, including the reasons for the changes enacted by Congress. While there is no formal comment process, suggestions to clarify congressional intent can be submitted during the development of JCT's work and help mitigate the fact that in the flurry of activity surrounding the legislative process memorializing legislative intent may be given short shrift. Legislative intent is important both when interpreting and implementing new legislation and in years down the road when the IRS may challenge a deduction or when litigation is necessary to defend a position.

## **MISCELLANEOUS OPPORTUNITIES: OTHER LEGISLATIVE VEHICLES**

Beyond legislative efforts focused squarely on TCJA, there will likely be other bills that include a tax title — any one of which could present an opportunity to effect change. Senate Republicans have already introduced "extenders" legislation to renew various expired tax provisions that could move forward in connection with a government funding bill. The reauthorization of the Federal Aviation Administration, due by March 31, will also carry a tax title. Both bills are examples of vehicles that, while not targeted at tax specifically, could provide the requisite nexus to advance tax corrections and modifications. Additional vehicles are likely to arise sporadically throughout the year and require diligent effort and attention in order to avoid missed opportunities.

## **THE PATH FORWARD FOR TAX LEGISLATION IN THIS ELECTION YEAR**

The 2018 mid-term elections will contribute to a challenging legislative environment this year. It is unclear whether Democrats will be willing to vote to mend a tax reform bill that they did not support. Without Democratic support,

Republicans in the Senate may be stymied unless they again resort to the budget reconciliation process that was used to pass tax reform in 2017. This would limit the nature of the changes that could be made, just as reconciliation limited some of the policies in TCJA. However, each session of Congress bears challenges that must be overcome and there may be several opportunities to tackle tax-related issues. It's also worth noting that a number of Senate Democrats will be defending seats in red states, which could motivate bipartisan legislation. Sitting things out may risk a missed opportunity to address pending issues. As with any great performance, it is important to remain attuned, attentive, and engaged in the tax reform process until the final curtain falls.

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