

TAX CUTS AND JOBS ACT OF 2017: SUCCESS OR FAILURE?

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ABSTRACT: This article examines the implications and likelihood of accomplishing the stated objectives of the Tax Cuts and Jobs Act of 2017. After reviewing certain limited economic impacts realized to date, an evaluation of the positions of business and individuals as to whether the law properly addresses the global and domestic tax issues of the times follows. This paper also compares the approach taken in 2017 to that adopted in prior tax legislation. In conclusion, the 2017 approach has a high degree of achieving the desired results but in all likelihood will have to make necessary adjustments as dictated by actual results and future events.

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I. INTRODUCTION¹

In the current debates over looming U.S. and global issues such as infrastructure, healthcare, and climate change, discussions inevitably and inexplicably circle back to the enactment of the Tax Cuts and Jobs Act of 2017 (the “2017 Act”). In the eyes of many, the 2017 Act represents misguided priorities and economic mismanagement.

The purpose of this article is to offer a preliminary assessment of the likelihood of the 2017 Act’s success. Results should be judged against the law’s stated objectives of (1) tax relief for middle-income families, (2) simplification of the personal income tax code, (3) economic growth through tax relief and increased domestic investment and (4) repatriation of overseas earnings.

Notwithstanding the limited passage of time since the 2017 Act’s enactment on December 22, 2017, the battlefield

¹ I would like to acknowledge Grove City College accounting students Alexandria Rapson and Alec Allison for their excellent and timely tax research. The editors of this *Journal* also deserve much praise for their essential oversight and constructive suggestions. I owe a special thanks to Thomas Marchland, Esq. for his final reading of this paper as well as for his valued friendship spanning many decades.

testing of the 2017 Act after the 2018 corporate reporting and individual filing seasons provides objective evidence to demonstrate whether it has achieved its intended outcomes as well as unintended consequences. A short wish list herein presents suggestions for potential tax law amendments.

II. RELEVANT HISTORY

Tax reform has been brewing since the last major overhaul of the Internal Revenue Code (the “Code) in 1986. A review of other recent attempts to achieve a substantial rewrite lends help in better understanding the 2017 Act. As always, the attendant political, economic and social environment affected the shaping of, legislative path to and enactment of the final provisions comprising the 2017 Act.

A. CAMP PROPOSAL (2014)

Former Republican Senator David Camp and his working committee represented the most serious effort to enact true tax reform post-1986. He attempted comprehensive tax reform but focused primarily on converting the taxation of international operations from a worldwide concept to a

single country or “territorial system” of taxation as followed by many developed countries.

This effort culminated in 2014 with the Camp Proposal. It contained concepts of a one-time, low-tax, deemed repatriation of earnings (an idea borrowed from 2004 tax legislation) coupled with a complete conversion to a territorial tax system.

With a divided government, the proposal failed to gain traction. There was Democratic interest espoused by then-President Obama in only limited tax reform focusing solely on middle-class individual relief with offsetting increases to the corporate tax base. With this deadlock, the Camp Proposal was pushed aside but initiated a philosophical change to the U.S. approach to taxing multinational companies.

B. THE REPUBLICAN TAX BLUEPRINT (2016)

Senator Camp passed the torch for championing the Republican version of tax reform to former Republican Representative and Speaker of the House Paul Ryan. Eminently qualified and versed in tax matters, Rep. Ryan had previously chaired the House Ways and Means Committee.

His working group set about crafting a long-term strategic plan for overhauling the nation's tax code with the overall objective of reducing budget deficits.

Primary targets for tax amendments were elimination of individual deductions for mortgage interest and state and local taxes. Entitlements, including social security and Medicare, would have been slashed as they represent a substantial percentage of annual federal expenditures. Although such proposals constituted political suicide for any candidate, the Republicans had nothing to lose since the chances of adoption at this time were nil. Significantly, the Republican Tax Blueprint initiated the discussion of eliminating certain individual itemized deductions as “pay-fors” in subsequent tax reform efforts.

C. RUSH TO PASS THE LEGISLATION (2017) –

“THE BIG SIX”

The election of Candidate Donald J. Trump as President of the United States, along with existing Republican majorities in both houses of Congress, provided the alignment of political forces to enable enactment of

meaningful tax legislation. These unexpected events left the Republican party in total control of government but with limited time to deliver on the opportunity before the 2018 midterm elections. Furthermore, the Republicans lacked a cohesive legislative proposal for ready adoption. Given this dynamic, Congress fell back upon previous plans – the Senate on the Camp Proposal and the House on the Republican Tax Blueprint – as the only meaningful substantive works-in-progress.

With time and political capital wasted on a failed Obamacare repeal, a tax working group formed that summer to confidentially draft an outline of tax reform. This committee of six members (the “Big Six”) was comprised of two members each from the Executive Branch, the House of Representatives and the Senate. Following were the Big Six members:

- Gary Cohn, National Economic Council Director
- Steven Mnuchin, Treasury Secretary
- Paul Ryan, Speaker of the House
- Kevin Brady, House Ways and Means Committee Chairman

- Mitch McConnell, Senate Majority Leader
- Orrin Hatch, Senate Finance Committee Chairman

Throughout the summer and fall of 2017, the Big Six experimented with various term sheets of their ideas. After gauging presidential, congressional, public and private reactions to their proposals, they reconvened to separately redraft the substance of what would eventually become the outline for the Ways and Means Committee and Finance Committee to propose separate tax reform legislation. Cuts to entitlement programs that were a cornerstone of Ryan's Republican Tax Blueprint were eventually taken off the table completely. Even ideas introduced by Rep. Brady to scale back tax incentives for employee benefit programs such as 401(k) plan savings were quickly scuttled. President Trump weighed in to attempt to control the dialogue surrounding the appropriate level of corporate income tax-rate cuts; thereby trying to deliver on a signature campaign promise. He would add significant non-tax amendments, such as permitting oil and gas drilling in the Alaska National Wildlife Area

Refuge (ANWAR), in the final stages of the 2017 Act further complicating the effort.

D. BUDGET RECONCILIATION PROCESS

Owing to the small amount of time remaining before the perceived year-end deadline imposed by President Trump, the legislative calendar was extremely condensed, leaving no room for errors or missteps in the legislative process. Republican Senator Pat Toomey became the chief architect of utilizing the budget reconciliation process to get the tax legislation finalized. Through deft negotiation, he convinced his colleagues to agree up front to a total limit on the impact resulting from enacting tax reform via this process. This resulted in an essential caveat: the tax reforms could not be “scored” by the Congressional Budget Office (CBO) with a projected deficit in excess of \$1.5 trillion over the prescribed ten-year scoring period (2018-2027). President Obama used this same approach to pass his signature healthcare overhaul just prior to seating of the 2010 class of incoming Senators that changed control of the Senate. Through this mechanism, the somewhat disparate 2017 House and Senate tax versions,

although separately adopted, would be reconciled. Identified differences were to be resolved by limited negotiations occurring between designated members of both houses of Congress. However, due to scoring by CBO that showed a deficit in excess of the cap, the bill was rewritten several times prior to and during reconciliation. The House and the Senate would then vote upon the compromise bill and it would finally be sent to the President for signature. This is exactly how the process played out in late 2017.

E. LACK OF BIPARTISANSHIP

Final enactment of the 2017 Act contrasted with that attendant to passing the 1986 Tax Reform. In 1986, Democrat Dan Rostenkowski chaired the House Committee on Ways and Means. Republican Bob Packwood chaired the Senate Committee on Finance. Through partisan negotiation, they achieved comprehensive tax reform with the stated goals of tax reduction and simplification. Technical corrections followed within a reasonable time. The legislative blue book reflected the high level of cooperation between both major parties while also reflecting different philosophies on the

purpose of a particular tax revision. The 1986 law became part of President Reagan's legacy along with his initial Economic Recovery and Tax Act of 1981.

Contrast 1986 with the acrimony and dysfunction of the 2017 Congress. Although Republicans controlled both the legislative and executive branches, consensus on legislation was not assured. The Conservative Tea Party in the House and Republican presidential primary contenders Senators Ted Cruz and Marco Rubio each held their own views on what constituted meaningful tax reform. To gain votes from key senators, as well as the President, the bill was amended many times to add things such as Section 529 plan disbursements for pre-college tuition and enhanced childcare tax credits.

Acting as the spoiler, the Democratic offer and approach remained to fix the individual tax system first, and address the corporate and international wish list later. Not surprisingly, the Democrats were totally cut out of the process leading to clearly one-sided drafting and adopting of the new law. When the Republicans' intent to exclusively pursue their own vision of tax reform became clear, the

Democrats made it their sole mission to obstruct, undermine, and publicly spin the 2017 Act as an attack on middle-class America via giveaways to the wealthy and substantial corporate tax cuts and enhanced incentives. This centerpiece of the Democratic platform for the 2018 midterm elections met with great success.

The 2017 Act could not be finalized without drama. Toward the end of the process, a colloquy in the Senate between retiring Senator Hatch and Democrat Ron Wyden deteriorated into a perceived personal attack on Hatch's integrity alleging overall deceit on the American public. Adding insult to injury, the bill contained technical violations of the Senate's "Byrd Rule" applicable to budget reconciliation that required tweaks to the statutory wording. The President considered delaying the actual signing until January 2018 to deal with these finer points of order in the Senate Chamber. Democrats seized this moment to contend that the President could not, in fact, deliver on his promise of tax legislation by year-end. Thus, a hastily arranged signing by the President was orchestrated on the morning of December 22, 2017, with a minimally-attended

ceremony taking place that afternoon. Interestingly, Messers. McConnell and Ryan were not present for the signing event in the Oval Office. This brought an inglorious end to an expedited and convoluted process, but one that resulted in the most significant tax reform legislation in over thirty years. Moreover, the finalization of the 2017 Act still represents the most significant legislation passed by President Trump.

III. RESULTS TO DATE

Several reports have been issued regarding the economic results of the 2017 Act. These include the Economic Report of the President, the Tax Policy Center and the Tax Foundation. The reports contain different and even disparate statistics in an attempt to shape the narrative. Nonetheless, the data presented does indicate certain financial trends resulting from enactment of the 2017 Act. Following is a summary of the various reports in an attempt to reach certain tentative conclusions regarding the effectiveness of the 2017 Act.

A. INCREASED U.S. FISCAL DEFICITS

The CBO scored the 2017 Act at a cumulative ten-year deficit of \$1.5 trillion through 2027. Certain congressmen, including Senator Pat Toomey, predicted an even more robust economy. Results to date actually show increased U.S. fiscal deficits in 2018 of \$779 billion. This represents a \$113 billion, or 17%, increase in the overall deficit, constituting 3.9% of GDP (0.4% increase).²

Presently, the costs are much greater than revenues, with certain observers concluding that the overall increases in debt and deficits are unsustainable. Updated estimated increased deficits of \$1.9 trillion by 2028 have been predicted by the CBO. At that rate, the 2028 federal debt would be 105% of GDP, its highest since World War II. Further extensions of tax sunset provisions would exacerbate the issue.³

2 *Treasury: 2018 Deficit was \$779 Billion* COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET, <https://www.crfb.org/blogs/treasury-2018-deficit-was-779-billion> (last visited Apr. 27, 2018).

3 Benjamin H. Harris and Adam Looney, *The Tax Cuts and Jobs Act: A Missed Opportunity To Establish A Sustainable Tax Code*, URBAN INSTITUTE AND BROOKINGS INSTITUTION 4 (2018), https://www.brookings.edu/wp-content/uploads/2018/05/es_20180524_harris-looney_taxreform.pdf.

B. RETAINED/CREATED MORE U.S. JOBS

Job retention and creation represented a centerpiece of the President's campaign for tax reform. An estimated 155,000 jobs were created in 2018.⁴ Companies used tax savings to invest in workers immediately after the tax law came into effect. Other labor market effects showed increased average household income of between \$3,400 and \$9,900 with an average raise of \$5,500. The issue is whether these were just one-time bonuses or ongoing base-wage increases. Data from the Bureau of Labor Statistics' Job Openings and Labor Turnover Survey says there was a sharp increase in labor demand directly after passing the law. Worker wage growth changed from a pre-enactment rate of 5.4% per year to a post-adoption rate of 9.3% per year. Such effects are expected to grow over time as a result of increased capital spending, raising the amount of capital invested per worker, labor productivity, and wages. However, there could be unfavorable impacts by the tax sunset policies expiring (see *infra*). Lastly, the enhanced child tax credit could encourage

4 Nichole Kaeding, *The Tax Cuts and Job Act After a Year*, TAX FOUNDATION (Dec. 17, 2018), <https://taxfoundation.org/tcja-one-year-later/>.

the birth rate and lead to a larger labor supply.⁵

C. USES OF REPATRIATED FUNDS

Many debates center upon whether corporations use the repatriated monies for “good or bad” purposes. Particular scrutiny was directed at “give backs,” share repurchases, and capital distributions to shareholders. A major criticism of the tax law is that monies distributed to shareholders detract from expenditures that would otherwise grow the economy. This highlights an “agency conflict” that arise between shareholders and corporate managers. Firms have substantial cash flow in excess of that required to fund all projects having positive net present values when discounted at the relevant cost of capital. Essentially, share repurchases happen because firms have no projects worth pursuing, as the repurchases present no risk. Simultaneously, there has been an overall decrease in foreign investment in the U.S. representing outbound repatriation of U.S. investment. Along with the increase in domestic capital spending, there

5 ECONOMIC REPORT OF THE PRESIDENT, EXEC. DOC., 54-61 (2019).

has been a decrease in investments abroad.⁶

D. GROWTH IN GDP OF THE U.S. ECONOMY AND
CAPITAL SPENDING

Deficits are driven by the impacts on overall Gross Domestic Product (GDP) caused by tax reform. Those estimates vary significantly from an average .3% (Moody's Analytics) to 2.1% (Tax Foundation) for the ten-year scoring period.⁷

Economic output and investments have improved with increases in capital spending. The 2017 Act increased the United States' GDP higher than the 2.0% projected for 2018 at an actual growth of 3.0%. The original CBO 2017 pre-enactment estimate was 2.5% lower than current projection. Its 2017 estimate was also 1.2% lower than the current projection.⁸

Regarding tax revenue, the CBO still estimates a deficit increase between \$480 to \$600 billion over ten years.⁹ Tax revenue as a percentage of GDP is also enjoying

6 ECONOMIC REPORT *supra* note 5, at 67-69.

7 Harris and Looney, *supra* note 3, at 7.

8 ECONOMIC REPORT *supra* note 5, at 47-50.

9 *Id.*, at 49-50.

a relative increase. Benchmark rates referenced for different time periods include:

1962 to 2016:	17.4%
2018-2022:	16.7
2028 (without sunset provisions):	18.5
2028(with sunset provisions):	17.5 ¹⁰

IV. BENEFITS

A. UPDATE NEEDED FOR INTERNAL REVENUE CODE TO REFLECT CHANGES IN GLOBAL BUSINESS PRACTICES AND TO MAKE THE UNITED STATES MORE COMPETITIVE AND FAIRER THROUGH LOWER TAX RATES

Dramatic changes have occurred in business since 1986, due to technological innovation and electronic commerce. At the same time, sophisticated and systematic tax-avoidance techniques have placed stress on taxation systems. Additionally, globalization of business caused more foreign direct investment to take place outside of the United States. Multinationals were seeking low-cost labor and

¹⁰ *How Did the TCJA Affect the Federal Budget Outlook?* TAX POLICY CENTER, <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-affect-federal-budget-outlook> (last visited Apr. 27, 2018).

cheaper raw materials in foreign countries. This resulted in U.S. companies' willingness to outsource and offshore both manufacturing and service jobs. Thus, the 2017 Act aimed to solve two major issues: rising international capital mobility and increasingly uncompetitive U.S. business taxation relative to the rest of the world.¹¹

Foreign countries' aggressive lowering of income tax rates to attract inbound investment away from the U.S. led to a wave of corporate inversions since 2000. Certain Obama Executive Orders reacted to the proliferation of outbound transactions coupled with leveraging of US-based operations. The 2017 Act focused on this harmful tax planning and had an immediate and large effect on business.¹²

B. REMOVED IMPEDIMENTS THAT KEPT FOREIGN EARNINGS OFFSHORE

The U.S. moved from a worldwide system of taxation to a nominally territorial one. The old system discouraged companies from repatriating foreign profits. Prior to the 2017 Act, the law encouraged companies to move legal

11 ECONOMIC REPORT *supra* note 5, at 62-67.

12 *Id.*

headquarters out of the U.S. through inversions and other tax planning techniques.

The new approach relies upon a borrowed “participation exemption” concept that exempts from domestic taxation most foreign remittances to the U.S. Foreign dividends paid to U.S. parent corporations are exempt because they are fully deductible, subject to certain conditions, including ownership and holding period. No exemption is allowed if the dividend also received a tax benefit in the other country, such as a foreign tax deduction.¹³

The “deemed repatriation” required that accumulated foreign earnings were remitted to the US, albeit at a lower tax rate payable over a number of years. Liquid assets deemed repatriated were assessed at a 15.5% tax with a lower rate on non-liquid assets of 8%. Of the estimated \$4.3 trillion held abroad, approximately \$571 billion has been repatriated in the first three quarters of 2018. Importantly, there have been a number of inbound transactions. This represents assets coming back to the U.S. due to the perceived adverse

13 Kyle Pomerleau, *A Hybrid Approach: The Treatment of Foreign Profits Under the Tax Cuts and Job Act*, TAX FOUNDATION (May 3, 2018), https://taxfoundation.org/treatment-foreign-profits-tax-cuts-jobs-act/#_ftn4.

Global Intangible Low-Taxed Income (GILTI) and beneficial Foreign Derived Intangible Income (FDII) tax provisions.

Overseas profits purportedly are finding their way back to the US. Although pessimistic on the 2017 Act, Mark Whitehouse of Bloomberg offered:

Before 2018, U.S. nonfinancial corporations tended to add about \$50 billion to earnings held abroad every three months. But in the first three months of 2018, that number turned to a negative \$158 billion, according to the Federal Reserve. That's the biggest reversal on record going back to 1946, and much more than companies brought back in 2005, the last time the government tried something similar.

Procter & Gamble (P&G) spokesperson Ms. Jennifer Corso said P&G actually repatriated about \$7 billion back to the U.S. in the 2018 fiscal year or 14% of its \$49 billion held offshore. The P&G money was repatriated in the form of dividends (\$7.3 billion), share buybacks (\$7 billion) and capital spending (\$400 million increase).

C. ENCOURAGE DOMESTIC INNOVATION WITHOUT EXPORTING INTELLECTUAL PROPERTY

New tax incentives mimic the Irish tax structure in an attempt to retain intellectual property domestically versus

exporting via buy/sell and research and development cost share arrangements with foreign affiliates. Under the new tax FDII provision, a corporation pays an effective rate of 13.125%, rather than 21%, on its above-routine income arising from foreign markets. A taxpayer claiming FDII is eligible for a deduction of 37.5% for taxable years beginning after December 31, 2017 through taxable years beginning before January 1, 2025. This results in an effective 13.125% tax rate (the 21% corporate tax rate multiplied by $(1 - 0.375)$). After December 31, 2025, the deduction declines to 21.875%, resulting in a rate of 16.406% (21% multiplied by $(1 - 0.21875)$).¹⁴

Traditionally, the U.S. has relied upon a tax incentive to promote exports. Some argue that this is fundamentally opposed to normal tax principles. However, FDII only applies to “C” corporations. The subsidy is zero for export income earned by “S” corporations, partnerships, limited liability companies, and individuals. As an export incentive,

14 Jane Gravelle and Donald Marples, *Issues in International Corporate Taxation: The 2017 Revision (P.L.115-97)*, CONGRESSIONAL RESEARCH SERVICE (May 1, 2018), <https://fas.org/sgp/crs/misc/R45186.pdf>.

FDII is viewed as favoring pharmaceutical and technology companies over manufacturing.¹⁵ Finally, the deduction for FDII can be viewed as a destabilizer that does not provide tax benefits when businesses need them the most.¹⁶

D. FLEXIBILITY AFFORDED VIA FUTURE TAX RATE ADJUSTMENTS AS NEEDED

The corporate income statutory tax rate was dramatically reduced from 35% to 21%. Yet, future tax rates can be adjusted in either direction as appropriate. This is similar to post-1986 tax reform, where marginal individual rates were raised to 39.6% and the corporate rate was adjusted to 35%. Already, it has been suggested that Congress immediately reverse these 2017 windfall tax cuts and move towards a traditional broad-base income tax at the individual, corporate and shareholder levels.¹⁷

15 Martin Sullivan, *Economic Analysis: What Economic Purpose Does FDII Serve?* TAX NOTES (Oct. 16, 2018), <https://www.taxnotes.com/tax-reform/economic-analysis-what-economic-purpose-does-fdii-serve>.

16 Tim Dowd and Paul Landefeld, *The Business Cycle and the Deduction for Foreign Derived Intangible Income: A Historical Perspective*, 71 NATIONAL TAX JOURNAL, 729, 729-750.

17 Harris and Looney, *supra* note 3, at 4-5.

E. SIMPLIFICATION OF INDIVIDUAL TAXATION
THROUGH INCREASING THE STANDARD DEDUC-
TION

Substantial simplification resulted from increasing individual tax allowances, standard deductions and credit incentives. In effect, the 2017 Act swapped personal exemptions for generous child tax credits and resulted in a huge increase in the number of persons taking the standard deduction to the 90% level (a 20% increase). It is estimated that this reduces compliance costs by \$3 billion to \$5 billion.¹⁸ An increase of real disposable income per household also resulted from this, although estimates vary widely.¹⁹

F. APPROPRIATE RESPONSE TO ORGANIZATION FOR
ECONOMIC COOPERATION AND DEVELOPMENT
(OECD) BASE EROSION AND PROFIT SHIFTING
(BEPS) BY INSTALLING U.S. BASE EROSION ANTI-
ABUSE TAX (BEAT)

18 Kaeding, *supra* note 4.

19 Harris and Looney, *supra* note 3, at 4-5.

The Europeans had implemented a tax regime to prevent moving income to low-tax jurisdictions and creating mismatches of income and deductions to reduce the overall tax base. The U.S. has responded with the BEAT adoption. BEAT only applies to “C” corporations and with a gross receipts threshold. A significant exception exists based upon the level of the cost of goods sold thereby befitting manufacturing companies.²⁰ BEAT starts at 5% beginning with the 2018 calendar year, then ratchets up to 10% after that first year and jumps again in 2026 to 12.5%.²¹ BEAT becomes more complex once FDII and the GILTI tax (see below) and subsidiary companies are layered into the calculations.

Some fear that BEAT threatens to impact the finances of insurance companies when they are most vulnerable when paying out claims. “It’s going to drive up premiums and it’s going to make it more expensive for

20 Luis Abad, et al., *Tax Reform May Be the Epicenter, But Be Wary of Trade and Customs Aftershocks*, BLOOMBERG BNA (March 9, 2018), <http://src.bna.com/BV2>.

21 Kimberly Majure and John DerOhanesian, *INSIGHT: Fundamentals of Tax Reform: BEAT*, BLOOMBERG (Sept. 21, 2018), <https://www.bna.com/insight-fundamentals-tax-n73014482752/>.

property and casualty insurance,” said Bernie Pastille, tax partner at Morrison & Forester LLP.²² Others believe that it will penalize transactions that are already under scrutiny for transfer pricing compliance. This is one reason why foreign governments are likely to challenge BEAT.²³

Detractors notwithstanding, many believe that BEAT is working as intended. The Coalition for American Insurance states that “It already has helped to prevent base erosion, level the playing field and stop companies from leaving the United States through inversions.” The usual critiques of BEAT involve often illogical hypotheticals with an extremely low likelihood of actually occurring.²⁴ As expected, the U.S. Treasury Department has promised regulations spelling out guidance. Lawmakers have also said they are listening to companies’ concerns and considering potential changes. One particular area of ambiguity concerns

22 Ezequiel Minaya and Nina Trentmann, *A Tax Change Threatens to Hit Insurers When Most Vulnerable*, THE WALL STREET JOURNAL (Aug. 21, 2018), <https://www.wsj.com/articles/a-tax-change-threatens-to-hit-insurers-when-most-vulnerable-1534843801>.

23 Elizabeth Stevens and Peter Barnes, *INSIGHT: BEAT Strikes the Wrong Note*, BLOOMBERG (March 16, 2018), http://www.capdale.com/files/22787_insight_beat_strikes_thewrong_note.pdf.

24 Harry Ballan, *U.S. WTO Violations: Will This Time Be Different?* 9 COLUM. J. TAX L. TAX MATTERS 14 (2018).

purchases from non-US companies and whether the tangibles and intangibles have to be separated for the BEAT.²⁵

G. WORLD TRADE ORGANIZATION (WTO) SCRUTINY
OF FDII AND BEAT

There is a decades-long history of the WTO successfully challenging U.S. export incentives. First came the Domestic International Sales Corporation (DISC), then Foreign Sales Corporation (FSC) which was replaced with Extraterritorial Income Exclusion (ETI). The WTO successfully challenged all of them. The Bush-era replacement using the Section 199 deduction was suspect. At the very least, adoption of FDII and BEAT will allow time for the U.S. to continue to protect its domestic businesses²⁶.

Potential violations by FDII revolve around whether FDII is a prohibited export subsidy under WTO rules. The Agreement on Subsidies and Countervailing Measures (SCM) bars “prohibited subsidies,” which include “the allowance of special deductions directly related to exports or export performance, over and above those granted in respect

25 Minaya and Trentmann, *supra* note 22.

26 Gravelle and Marples, *supra* note 14.

to production for domestic consumption.”²⁷ Under OECD and SCM standards, FDII could violate the minimum standard for preferential regimes. Specifically, it may violate the OECD BEPS Action 5 recommendations on substantial activity requirements for intellectual property (IP) incentive regimes. Digging in, the U.S. Treasury believes that the FDII rules comply with the BEPS Action 5 recommendations.²⁸ Some argue that FDII should never have been enacted due to its added complexity. Others support making FDII elective so that firms operating in certain countries do not have to use FDII. Still other ideas include making FDII limited to just royalties.²⁹

H. REPEAL OF THE CORPORATE ALTERNATIVE MINIMUM TAX (AMT)

For decades, individuals and corporations alike have reviled the AMT for its complexity and failure to index for inflation until after 2012. Minimum Tax Credits (MTCs)

27 Ballan, *supra* note 25.

28 Robert Sledz, *European Commission Says U.S. BEAT and FDII Rules May Violate Int’l Standards*, THOMSON REUTERS (June 20, 2018), <https://tax.thomsonreuters.com/blog/european-commission-says-u-s-beat-and-fdii-rules-may-violate-intl-standards/>.

29 Gravelle and Marples, *supra* note 14.

were stockpiling for certain cyclical industries typically in the heavy manufacturing sector. Congress responded by eliminating the corporate AMT but left the individual AMT intact albeit subject to certain new indexing and exemption rules. Further, following the lead of the 1986 Tax Reform vis-a-vis investment tax credits, unused MTCs were “cashed out” pro rata for corporations. The total benefits realized by both the 2017 corporate AMT repeal and refunds are substantial and represent a vast improvement from a tax administration viewpoint over the prior AMT regime. Eliminating the AMT was important but, ultimately, updating the outdated international tax regime with a global minimum tax was the overall goal, e.g. GILTI.³⁰

V. DETRIMENTS

A. INCREASED THE BUDGET DEFICIT BY MORE THAN \$1.5 TRILLION OVER THE NEXT TEN YEARS

Recently, the U.S. Economic Council admitted that the optimistic view for maintaining reasonable budget deficits

³⁰ Harris and Looney, *supra* note 3, at 4-5.

may not be sustainable. New estimates (CBO: Congressional Budget Office) under differing methods reveal the extent of expected deficits. Under a “Conventional” method, the deficit is projected at a cumulative \$1.9 trillion. Outlier estimates include those calculations pursuant to a “Dynamic” method at the low end of \$1.4 trillion but factoring in extra debt service costs takes both the Conventional method to \$2.3 trillion and Dynamic method at \$1.9 trillion. The consensus is that this needs increased tax revenue. In order to stabilize debt in the long term, the Treasury requires revenue of 21% of GDP and more incentives toward labor supply and investment.³¹

Many are concerned that this is only the realization of one-time benefits. This remains an unanswered question. The overriding problem is whether there is just temporary economic growth causing the economic impetus from tax stimulus to be overstated.³²

31 ECONOMIC REPORT *supra* note 5, at 46-48.

32 Harris and Looney, *supra* note 3, at 1-29.

B. SUNSET PROVISIONS VERSUS LONG-TERM BENEFITS OF CERTAIN INCENTIVES

Owing largely to CBO scoring constraints, certain significant business incentives such as bonus depreciation and immediate expensing of fixed assets purchased will expire after only five years. The following sunset provisions (for the period from Jan. 31, 2017 to Jan. 1, 2026) are scheduled:

- New income tax rates and brackets
- Standard deduction increase
- Personal exemption set to zero
- New limitation on “excess business loss”
- Deduction for personal casualty and theft losses not allowed
- Gambling loss limitation modified
- Child tax credit increase
- SALT deduction
- Mortgage and home equity indebtedness interest deduction limited
- Medical expense deduction threshold temporarily reduced (ends Jan. 1, 2019)
- Charitable contribution deduction limitation increase

- Miscellaneous itemized deduction not allowed
- Overall limitation (“Pease” Limitation) on itemized deductions not applicable
- Qualified bicycle commuting exclusion not applicable
- Exclusion for moving expense reimbursements not applicable
- Moving expenses deduction not applicable
- AMT retained, with higher exemption amounts
- ABLE account changes
- Student loan discharged on death or disability
- Estate and gift tax retained, with increased exemption amount
- Temporary 100% cost recovery of qualifying business assets (ends Jan. 1, 2023/2024)
- New credit for employer-paid family and medical leave
- New deduction for pass-through income (Qualified Business Income (QBI))
- Deduction for FDII and GILTI
- Election with respect to foreign tax credit limitation³³

33 *Tax Cuts and Jobs Act: Overview of Provisions that Sunset (Expire)*, MAXWELL LOCKE & RITTER (Jan 11, 2018) <https://www.mlrpc.com/articles/tax-cuts-jobs-act-overview-provisions-sunset-expire/>.

The estimated upside from making the sunset provisions permanent is that the U.S. could see its long-term growth go from 2.6% to 5.7% of GDP.³⁴ The potentially harmful impact from the various sunset provisions is caused by uncertainty about the future. This allows hard decisions to be punted to future administrations.³⁵

C. COMPLEXITY ADDED

As expected from legislative initiatives, the goals may be straightforward but the approach and solution can become convoluted in application. Unsurprisingly, enforcement of the 2017 Act is proving complicated. Many provisions are unclear and require clarification through the issuance of detailed regulations.³⁶

The BEAT, GILTI and FDII provisions are exceedingly complex, leaving many technical questions unanswered, and they remain a large part of the regulation projects and technical corrections. Lawmakers claim that they are listening to companies' concerns and considering

34 ECONOMIC REPORT *supra* note 5, at 53-54.

35 Harris and Looney, *supra* note 3, at 1-2.

36 *Id.*

potential changes. Ambiguity is especially prominent for BEAT. For example, practitioners are asking if the tangibles and intangibles have to be separated for BEAT for any purchase of a non-U.S. company.

D. CONTAINS SIGNIFICANT WORLDWIDE TAXATION OF GLOBAL INTANGIBLE LOW-TAXED INCOME

An outcome of the 2017 Act was updating an international tax with a global minimum tax system. The GILTI rules added by new Sections 250 and 951A, and revised Section 960. The GILTI inclusion for a tax year equals the excess of the shareholder's net Controlled Foreign Corporation (CFC) tested income over its deemed tangible income return. A company would not owe additional U.S. tax if it was being taxed at the 13.125% threshold rate of foreign taxation. The drafters wrapped GILTI into the existing architecture for foreign tax credits. Many companies, however, are finding that they're paying more than 13.125% in foreign tax, but also facing a significant tax liability to the U.S. government under the GILTI regime. It particularly affects the technology, pharmaceutical,

manufacturing and banking/financial services industries. Unintended consequences include the potential loss of foreign tax credits. The 2017 Act was not designed to account for timing differences between U.S. and foreign taxes. It imposes tax on a current basis on active foreign income without deferral. Because it penalizes U.S. companies that have been acquired, it could discourage future mergers and acquisition transactions. Of the newly enacted taxes, GILTI creates the most burden in terms of financial impacts (40%) and compliance difficulty. Thankfully, GILTI only applies to gross income when subpart F does not apply to gross income.

Already, companies have lodged complaints about impacts from adverse GILTI taxation. Cincinnati-based P&G's CFO, Jon Moeller, indicates that GILTI discourages local job creation. P&G might be forced to move some of its operations overseas in order to compete and avoid an extra 2-3% U.S. tax on of its foreign earnings. So far, P&G claims that its domestic employment has been reduced by approximately 3,000 workers. Its effective tax rate of 36.6% has not changed from 2017 to 2018. Apple has repatriated \$252.3 billion in foreign cash without a major tax impact

and is planning to use the excess for dividends. It seems that both P&G and Apple have been seen utilizing these new funds in the U.S. for the betterment of the company and its shareholders. P&G has used the money funneled back to the U.S. for dividends and capital spending. Apple seems to be planning to use the extra cash for dividends. This represents an immense benefit for the American economy. What has not happened, however, is the creation of jobs. Apparently, neither of these companies, nor any other large companies, have utilized this money for new jobs. In fact, P&G has decreased its U.S. workforce in the past year. The ultimate question may be who the more important stakeholder is: the companies, U.S. government, investors, local communities, or employees?

E. DONE HASTILY AND IN NEED OF SUBSTANTIAL
TECHNICAL CORRECTIONS/REVISIONS

Consensus among experts is that there are difficulties with this tax reform. The legislation was passed by Republicans without any Democratic support. Amending or correcting the 2017 Act requires consensus among the

Joint Committee of Taxation, U.S. Treasury Department, Senate Finance Committee and the House Ways and Means Committee. The Senate has to deliver 60 votes in order to pass the technical corrections package over a Democratic filibuster. Senate Democrats believe the tax reform was enacted without their input and created bad policy by favoring tax breaks for corporations over individuals. Thus, a much-needed and timely technical corrections bill is not assured.

Many groups have weighed in on needed changes. For example, the AICPA suggested guidance in the following areas.

- Net operating losses (NOLs) need rules to change from tax years ending after December 31, 2017, that date, in order to accommodate fiscal year taxpayers.
- Qualified improvement property (QIP) is not mentioned in Section 168(e)(3)(E).
- Depreciation provisions also need to allow for bonus depreciation, leaving some property with a life of 39 years.
- Charitable contribution deduction has drafting errors in Section 170(b)(1)(G)(iii) regarding the gross income and charitable deduction limitation. The current wording does not allow for the 60%

deduction as Congress had intended but instead still limits it to 50%.³⁷

F. SHIFTED THE TAX BURDEN TO THE STATES
THROUGH LIMITING CERTAIN ITEMIZED DEDUC-
TIONS

Even prior to enactment, the relationship between the Federal government and the states had become toxic. State and local tax (SALT) deductions were pared back substantially, generating rushed, aggressive tax strategies advanced in 2017 and 2018 by state governments. In response, the IRS barred prepayment of 2017 and 2018 state tax. Various state workarounds were concocted. In exchange for tax credits on their residents' state tax returns, New York designed "charitable funds" for education and other services. Proposed NY legislation allowed charitable contribution – to generate SALT credits earned in a roundabout manner by allowing related contribution deduction. One by one, these gimmicks are being shut down by IRS notices and

37 *AICPA Sends Congress Recommended Technical Corrections to New Tax Law*, AICPA (Feb. 22, 2018), <https://www.aicpa.org/press/pressreleases/2018/aicpa-sends-congress-corrections-to-new-tax-law.html>.

regulation.³⁸

Individual impacts were acknowledged and conceivably could have had intended targets. The limitations mainly affected high-income individuals in high-tax states, in primarily the top 20% of income earners. It is also hurting median income house owners (average income level of \$65,000) as \$4,000 personal exemption and mortgage interest deductions were also lost. The new law includes limitations on deducting interest on HELOCs (Home Equity Lines of Credit). Some worry whether it may indirectly cause issues with home ownership among lower income families.³⁹

G. ENACTED CORPORATE TAX REDUCTIONS BUT LESS FOR INDIVIDUALS

Many contend that the middle class and below are

38 Kelly Smith, *Changes to the State and Local Tax (SALT) Deduction Hitting Taxpayers Hard*, BANKRATE (Apr. 10, 2019), <https://www.bankrate.com/taxes/salt-tax-deduction-cap-hitting-taxpayers-hard/> and THOMSON REUTERS CHECKPOINT, <https://checkpoint.riag.com/app/login?usid=2c93a2x138d1f&feature=ttoc&lastCpReqId=2fe46c8&lkn=lloginAllParm&server=18476&tempId=D9E43DAD1F20111B19A3B060A12FD87Dhhlbv6347562.t.20190420-133438> (last visited Apr. 27, 2018).

39 Kyle Pomerleau, *Eliminating the SALT Deduction Cap Would Reduce Federal Revenue and Make the Tax Code Less Progressive*, TAX FOUNDATION (Jan. 4, 2019), <https://taxfoundation.org/salt-deduction-analysis/>.

not realizing any tax benefits. Right or wrong, Democrats have effectively marketed and convinced the public that only the top 1% of Americans are receiving significant tax breaks. Public sentiment provides the greatest risk to the longevity of the 2017 Act. Already, 2020 Democratic presidential candidate Kamala Harris is pledging “day one” repeal of the law.

VI. COMPARISON TO OTHER RECENT TAX ACTS

A review of significant past tax acts going back to the Reagan years and continuing through the Obama presidency provides insight into the structure and approach in the 2017 Act. New concepts of sunseting, indexing and bonus depreciation are now combined in the 2017 Act with traditional up/down tax rate adjustments and capital gain taxation. The ebb and flow of Republican- and Democrat-controlled governments over the past thirty years also reveals political strategies, such as use of the budget reconciliation process. A common thread is the reaction to the times by each government as present-day crises required immediate

attention. Short as well as long-term policy decisions became embodied in the various tax legislation enacted.

A. ECONOMIC RECOVERY TAX ACT OF 1981 (ERTA)

Representing newly-inaugurated President Reagan's first signature legislation, ERTA reduced the top two individual tax brackets from 70% to 14%, and from 50% down to 10%. ERTA also slashed estate taxes, capital gains, and corporate taxes. Safe-harbor leasing became a method to shift depreciation deductions to those companies that benefited most from them. ERTA's avowed purpose and signature accomplishments were directed at the struggling economy Reagan inherited. ERTA succeeded in jump-starting that economy and taming inflation. On the downside, it introduced parameters for indexing the tax code for inflation and created issues with bracket creep. Critics argued that ERTA worsened federal deficits (although actually more a result of increased defense spending), whereas supporters correctly emphasized how it bolstered the economy.⁴⁰

40 Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34 (1981).

B. TAX EQUITY AND FISCAL RESPONSIBILITY TAX
ACT OF 1982 (TEFRA)

TEFRA contained provisions primarily for the U.S. health care system. Reversing prior incentives, it repealed scheduled increases in accelerated depreciation deductions, tightened safe-harbor leasing rules, required taxpayers to reduce basis by 50% of investment tax credits, instituted 10% withholding on dividends and interest paid to individuals, tightened completed contract accounting rules and increased the Federal Unemployment Tax Act (FUTA) wage base and tax rates. Its purpose primarily was to address issues with ERTA. Actual results included an increase of tax revenues by almost 1% of GDP. However, promised budget cuts of \$3 reducing spending for every \$1 of tax revenue raised never happened. Passage of the bill was controversial. The House version would have lowered taxes, while the Senate version added a variety of provisions which increased taxes. Eventually, President Reagan signed the Senate bill into law. Noteworthy, as a case of first impression, a lawsuit was filed by a private citizen Garrison R. Armstrong who claimed a

violation of the Origination Clause that requires revenue bills to originate in the House. Ultimately, the courts ruled in favor of the government saying that the Senate did not exceed its authority by adding such provisions. Unflatteringly, it is the largest peacetime tax increase in history achieved primarily through the cancellation of tax cuts.⁴¹

C. TAX REFORM ACT OF 1986 (TRA 1986)

TRA 1986 represented the first major rewrite of the Code since 1954 thereby earning the right to rename it the “Internal Revenue Code of 1986.” Its avowed purpose was to simplify the tax code, broaden the tax base and eliminate tax shelters. TRA 1986 achieved the following :

- Lowered tax brackets from 50% to 38.5%
- Increased standard deduction
- Increased personal exemption
- Increased earned income credit
- Made only mortgage interest deductible
- Added low-income housing tax credit
- IRA deduction severely restricted

41 Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) Pub. L. No. 97-248 (1982).

- Restricted depreciation deductions
- Defined contribution pension plan deductions were curtailed
- Added general nondiscrimination rules to 403(b) plans
- Required SSN for children claimed as dependents
- Expanded AMT to hurt tax shelters even more
- Passive loss adopted⁴²

D. ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 (EGTRRA)

EGTRRA's purpose was to deliver on a tax cut as promised in Bush's campaign with Clinton era surpluses to allow reduced taxes. A partisan bill, it passed through the budget reconciliation process. EGTRRA first introduced sunset provisions and allowed for tax rebates, income brackets with 10% being the lowest bracket and 39.6% highest bracket to be lowered to 35% by 2006, increased standard deduction, capital gains tax reduced from 10% to 8% for those in the 15% income bracket, qualified retirement

42 Tax Reform Act of 1986 (TRA). Pub. L. 99-514 (1986).

plans, educational savings incentives and estate and gift tax rules.⁴³

E. JOBS AND GROWTH TAX RELIEF RECONCILIATION ACT OF 2003 (JGTRRA)

Simply put, JGTRRA was singularly focused as a tax cut to help the economy recover from the lingering effects of the 9/11 tragedy. Despite being a partisan bill, it barely passed with the Vice President having to break the Senate tie. The act spurred capital spending via accelerated credits and rate reduction achieved by lowered tax brackets to 10% and 35%, increased percentage rates of depreciation, decreased capital gains tax to 5% and 15% and by instituting the concept of “Qualified Dividends.”⁴⁴

F. HOMELAND INVESTMENT ACT OF 2004 (HIA)

HIA’s purpose was to increase investment in America by building plants, increasing research and development and creating jobs. That act’s main impact was to allow a one-time

43 Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). Pub. L. 107-16 (2001).

44 Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA). Pub. L. 108-27 (2003).

cash dividend at a reduced effective rate. Specifically, money was not to be used to raise dividends. Actual remittances amounted to approximately \$300 billion that came back with 92% constituting taxable dividends. Repatriations surged from an average of \$62.2 billion per year from 2000-2004 to \$298.7 billion in 2005 under the tax holiday, before falling to \$91.1 billion in 2006. Consensus was that HIA still benefited the U.S. economy even though the funds were not actually used as intended, for capital expansion and job creation.⁴⁵⁴⁶

G. TAX INCREASE PREVENTION AND RECONCILIATION ACT OF 2005 (TIRPA)

Serving a housekeeping purpose, TIRPA prevented several sunseting policies from expiring. Largely a partisan bill, controlling Republicans were in favor of a tax cut for the wealthy. The bill included an extension of reduced rates on capital gains and AMT tax, a two-year extension

45 Dhammika Dharmapala, et al., *Watch What I Do, Not What I Say: The Unintended Consequences of the Homeland Investment Act*, NAT. BUREAU OF ECON. RESEARCH (Jun. 2009), <https://www.nber.org/papers/w15023.pdf>.

46 Floyd Norris, *Tax Breaks for Profits Went Awry*, NEW YORK TIMES (Jun 4, 2009), <https://www.nytimes.com/2009/06/05/business/05norris.html>.

of enhanced Section 179, of capital gain tax treatment on self-created musical works, taxation of passive income of minors, conversions to Roth IRAs, as well as changes to the foreign income exclusion.⁴⁷

H. AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (ARRA)

The onset of the Great Recession necessitated more tax relief to save existing jobs and create new ones, provide temporary relief for those most affected by the recession and invest in infrastructure, education, health, and renewable energy. Under President Obama, and with Democratic control of both the House and Senate, ARRA was an understandably Democratic bill, focusing on individual tax relief and subsidizing renewable energy initiatives. The bill's "Buy American Provision" particularly angered Canadian businesses. Many economists supported the stimulus; some supported an even larger package. Other economists disagreed with the bill's Keynesian principles. It mostly provided tax incentives for individuals.

⁴⁷ Tax Increase Prevention and Reconciliation Act of 2005 (TIRPA). Pub. L. 109-222 (2005).

There were limited tax incentives for companies in recognition of the accumulation of huge net operating losses (NOL) starting in 2009. There were now NOL carrybacks for five years, renewable energy credits, repeal of bank credits and more bonus depreciation allowances.⁴⁸

I. TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, JOB CREATION ACT OF 2010

This bill extended sunset provisions from the “Bush Tax Cuts” in ARRA for two more years. Although it became a bipartisan bill, it was nonetheless opposed by conservative Republicans who objected to growing deficits. It also addressed some companies’ difficulties updating payroll taxes. As is customary, the IRS had to update their systems to handle the new itemized deduction changes. In addition to extending the Bush Tax Cuts and ARRA, it patched AMT, gave a 13-month extension on FUTA benefits and a one-year reduction of FICA payroll taxes.⁴⁹

48 American Recovery and Reinvestment Act of 2009 (ARRA). Pub. L. 111-5 (2009).

49 Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Relief Act). Pub. L. 111-312 (2010).

J. THE AMERICAN TAXPAYER RELIEF ACT OF 2012

This law represented a compromise: it further extended the Bush tax cuts while incorporating Obama's insistence on maintaining higher taxes on the wealthy. At the time, it was projected to add \$3.9 billion to the deficit.

Although it passed with Republican Senate support, House Republicans voted against it. Overall, it passed successfully. In a way, it was the biggest tax cut in history. If this had not passed, 2013 rates would have been much higher.⁵⁰ Called a "Republican fiscal dream" by New York Times (NYT),⁵¹ the Committee for Responsible Federal Budget said it averted an economic disaster, but failed to fix many issues such as deficit spending.⁵² Paul Krugman of the NYT said that revenue needed to be increased more and deficits needed to be reduced by 2% of GDP to stabilize the long-run debt situation.⁵³

50 American Taxpayer Relief Act of 2012 (ATRA). Pub. L. 112-240 (2012).

51 Jonathan Weisman, *Lines of Resistance on Fiscal Deal*, NEW YORK TIMES (Jan. 1, 2013), <https://www.nytimes.com/2013/01/02/us/politics/a-new-breed-of-republicans-resists-the-fiscal-deal.html>.

52 *The Good, the Bad, and the Ugly in the Fiscal Cliff Package*, COMMITTEE FOR A RESPONSIBLE FEDERAL BUDGET (Jan. 1, 2013), <http://www.crfb.org/blogs/good-bad-and-ugly-fiscal-cliff-package>.

53 Paul Krugman, *Perspective on the Deal*. NEW YORK TIMES (Jan. 1, 2013), <https://krugman.blogs.nytimes.com/2013/01/01/perspective-on-the->

VII. CONCLUSION

Based upon its stated objectives, the results to date are mixed but generally favorable in terms of realized benefits and potential economic upside.

A. TAX RELIEF

Successes include both the individual taxpayer and corporate changes. Middle-class relief was actually found in the increased standard deduction and enhanced childcare tax credits. Complaints about smaller 2018 tax refunds reflect more on flawed withholding economic policy and implementation than on actual tax liabilities. Clearly, the top 1% of taxpayers enjoyed substantial tax benefits, both directly and indirectly, through business tax incentives like immediate expensing of purchased assets. However, they also suffered under the SALT and mortgage interest expense limitations. The fact that many “Blue” states were hit hard by these provisions is perhaps more collateral damage and coincidence than political vindictiveness. Nonetheless, it is

deal/ and Paul Krugman, *That Bad Ceiling Feeling*, NEW YORK TIMES (Jan. 2, 2013), <https://krugman.blogs.nytimes.com/2013/01/02/that-bad-ceiling-feeling/>.

possible President Trump believes that the punitive regional and political impacts constitute rough justice.

Corporate tax relief was realized through AMT repeal and the overall lowering of corporate tax rates. Capital investment incentives became prolific under the 2017 Act. Last-minute retention of the exemption for municipal bonds further facilitates financing of those investments.

B. SIMPLIFICATION

Simplification was clearly and substantially achieved on the individual side through a reduction in required record-keeping for itemized deductions. However, taxpayers can now game the system by bundling charitable contributions and alternating the years of taking the standard deduction followed by itemizing in the higher charitable contribution years. Further, the individual income tax return “postcard” promise for taxpayers was a ruse. Under renewed pressure from Trump and the Treasury Secretary, the IRS carved up the previous Form 1040 into a cover page followed by five new supplemental schedules. These changes did little for enhanced compliance. Lastly, instead of simplification, the

creation of the transition tax, GILTI, FDII and BEAT tax regimes added complexity in the corporate area.

C. ECONOMIC GROWTH AND ENHANCED
INTERNATIONAL COMPATIBLENESS

This will need substantive work, as GILTI traps too many multinational companies. Those affected companies did not outsource offshore jobs for any other purpose than to serve a foreign market by maintaining a local manufacturing presence. Reform did effectively crack down on outbound inversion transactions by limiting domestic interest deductions, and lowering the corporate tax rate. President Obama had accomplished those similar ends through Executive Orders, though these have since been revoked by President Trump.

Over time, international tax changes can be a game-changer by combining lower tax rates with a nominally territorial foreign tax system. Thus, this remains a world-wide tax system. Foreign governments are now less motivated to assess U.S. multinationals solely to take advantage of the U.S. foreign tax credit system. The companies will now be

more motivated to fight such tax assessments, given that an offsetting foreign tax credit is no longer so readily available.

D. REPATRIATION

Here, the 2017 Act enjoyed its most success. Measured by the volume of actual repatriations, the funds can now be effectively redeployed by corporations and its investors. Whether that occurs with U.S.-based investment remains to be seen. However, the new law removes a significant tax barrier to repatriation of overseas earnings that were previously trapped.

VIII. RECOMMENDATIONS

A. CONTROL BUDGET DEFICITS

Unless entitlement reform occurs (not likely), the deficits will loom large and become unsustainable. Supply side economics can only go so far to raise additional tax revenue. The likelihood is high that subsequent amendments will be required to roll back some of the tax incentives and raise overall rates.

B. GILTI REVISIONS

Experience will show that this new international minimum tax on multinationals is detrimental. Raising the threshold for permitted overseas returns substantially above the current ten percent would greatly help to lessen this anti-competitive GILTI tax.

C. FDII AND BEAT

FDII will eventually be deemed an illegal export subsidy by the WTO. Based upon past experience with DISC, FSC and ETI, the U.S. will achieve little more than buying time. Eventually, resurrecting the Section 199 approach may prove to be more sustainable and defensible. BEAT has a good chance of surviving international scrutiny; especially given the BEPS initiative by the European Union. Administration of BEAT will be tricky and require substantial and detailed regulations to effectively achieve its intended oversight of abusive intercompany transactions.

D. BUSINESS EXPENSING OF ASSET PURCHASES.

This expensing will prove much too generous. It may not incentivize capital spending that much more than limited

expensing and bonus depreciation did before. There can be no question that a project's return on investment is greatly enhanced by these immediate write off provisions, but capex should not be overwhelmingly driven by the overall tax benefits. Such an incentive results in moral hazard whereby marginal investments can be undertaken and justified with any overall loss reduced by substantial tax benefits.

E. ONE-TIME REPATRIATION

It was prudent to have low rates; one for liquid assets and a second for all other deemed distribution of earnings and profits. However, permitting the actual tax payment to be spread over eight years was far too generous. Despite being retroactive, Congress should deplore the legality of retroactively accelerating the tax payment timing.

F. NET OPERATING LOSSES

The 2017 Act unwittingly traded off granting an unlimited carryforward period in exchange for a new 80% limitation on the use of net operating losses. Most economic theories support granting maximum tax benefits to companies while in the midst of their economic downturns. This new

approach is counterproductive and has not worked well in other foreign countries. It is strictly a revenue raiser.

In summary, the Internal Revenue Code of 1986 and ERTA, like their architect and chief advocate, Ronald Reagan, set the bar high for subsequent tax reform. The 2017 Act will not measure up to this lofty standard; among other problems, it lacks a Great Communicator to send an effective message to the American public. However, the 2017 legislation does effectively address the problems of the times. Subsequent amendments and adjustments will be needed to enhance its overall effectiveness. While it may not single-handedly make America great again, the 2017 Act will nonetheless play a substantial role.

