

Tax Cuts and Jobs Act (H.R. 1) – Multistate Tax Considerations and Conformity

Overview

On December 2, 2017, the Senate passed its version of the Tax Cuts and Jobs Act (H.R. 1, or “TCJA”) by a vote of 51 to 49.¹ The House of Representatives had previously approved its version of the TCJA on November 16th by a vote of 227 to 205. President Trump is encouraging Congress to send him a bill to sign by Christmas, and the two versions of the TCJA are currently the subject of intense work in conference.²

The two versions of the TCJA share many similar proposals, but they also include notable differences. This tax alert highlights the federal income tax elements of the TCJA that are likely to generate significant interest for businesses and provides an overview of the associated multistate tax considerations.

Provision	“To-Do”	Observation
Federal Corporate Rate Reduction (House (eff. 1/1/18) and Senate (eff. 1/1/19))	<ul style="list-style-type: none"> Analyze state deferred tax asset inventory Evaluate impact of proposed federal accounting method changes/other decisions to accelerate deductions/defer income and update plans to enhance utilization of state deferred tax assets Consider accelerating payment of state taxes: <ul style="list-style-type: none"> Voluntary disclosure/amnesty Resolve state tax disputes RAR reporting 	<ul style="list-style-type: none"> State tax deferred assets will grow in relative importance due to declining federal tax rates and are often overlooked in federal tax planning Resolving of state tax disputes during period of higher federal tax rates may yield other non-tax benefits (e.g., eliminate ASC 740 reserves for state tax liabilities resolved through VDA; state audit resolution may free up resources, etc.)
Repatriation (House and Senate; House rates @ 14%/7% for cash/non-cash; Senate rates @ 14.49%/7.49% for cash/non-cash)	<ul style="list-style-type: none"> Model impact of increased Subpart F income recognition for state taxes; develop plan for managing state exposure Calculate inventory of pre-deemed repatriation and post-repatriation foreign E&P Develop plan for actual repatriation 	<ul style="list-style-type: none"> State tax treatment of Subpart F income varies States that are unable to tax deemed repatriation may seek avenues to impose tax on actual repatriation State and local C&I opportunities may be significant upon reinvestment
Limitations on federal income tax deduction for interest (House and Senate)	<ul style="list-style-type: none"> Evaluate state conformity to proposed amendments to IRC Sec. 163(j) and new IRC Sec. 163(n) imposing limits on deductions for interest expense Evaluate state impact of taxpayers shifting away from debt (e.g., franchise taxes) 	<ul style="list-style-type: none"> If limitation on interest expense deduction leads to less lending, this could impact on whether specific entities qualify as financial institutions for state tax purposes States expected to continue to scrutinize taxpayer interest expense
State and Local C&I Leading to Taxable Contributions to Capital (House Only)	<ul style="list-style-type: none"> Identify taxpayer assets subject to state and local C&I incentives Calculate potential federal income tax exposure that could result if inventoried assets transferred via capital contribution Evaluate state conformity to new IRC Section 76 	<ul style="list-style-type: none"> New IRC Section 76 would apply to contributions made and transactions entered into after enactment of HR 1; could apply to assets that receive state and local C&I incentives prior to enactment but contributed to capital after enactment

¹ For additional information on the TJCA, please review Deloitte’s Tax News & Views analysis of the Senate’s passage of H.R. 1 available [here](#). The different versions of the TCJA will be referred to herein as the “House TCJA” and the “Senate TCJA,” as appropriate.

² Theodric Meyer, Aaron Lorenzo, and Colin Wilhelm, “Lobbyists Push GOP in Last-Minute Scramble to Save Tax Breaks,” Politico.com (December 7, 2017), available at <https://www.politico.com/story/2017/12/07/lobbyists-tax-breaks-mortgage-211496>.

	<ul style="list-style-type: none"> Consider whether contributions to capital could be made prior to enactment of HR 1 	<ul style="list-style-type: none"> States would presumably not be in favor of conforming to this provision as it undermines incentives
<p>Immediate Federal Expensing (House and Senate)</p>	<ul style="list-style-type: none"> Evaluate state conformity to IRC Section 168(k)(1)(A) Coordinate taxpayer planning re immediate expensing and repatriation of foreign E&P Identify state and local C&I opportunities 	<ul style="list-style-type: none"> Need to monitor state legislative response to amended IRC Section 168(k)(1)(A) Negotiated incentives can have long lead time
<p>Elimination of Federal Deductions/Credits (House and Senate)</p>	<ul style="list-style-type: none"> Evaluate state conformity to repeal of/limitations on federal incentives Evaluate state-specific opportunities for similar incentives (e.g., state-specific WOTC) 	<ul style="list-style-type: none"> States may preserve state-only application of repealed/limited federal incentives by conforming to old version of law (e.g., Oregon R&D credit does not conform to federal R&D credit expiration)
<p>Net Operating Loss Modifications (House and Senate)</p>	<ul style="list-style-type: none"> Both provisions limit NOL deductions to 90% of taxpayer's (pre-NOL) taxable income (80% under Senate proposal after 2022) Most carrybacks eliminated House: post-2017 NOL carryforwards accrue interest to preserve value 	<ul style="list-style-type: none"> These changes could cause states that allow carrybacks to revisit allowing carrybacks
<p>Pass-through Income (House applies 25% rate*; Senate creates new 23% deduction for business profits)</p>	<ul style="list-style-type: none"> Evaluate state conformity to new pass-through provisions, including calculation of capital percentages Consider state impact of restructuring that could follow corporate rate reduction below pass-through income rates Evaluate opportunities for tax payment acceleration and increasing capital percentages 	<ul style="list-style-type: none"> Need to monitor state legislative response to new federal pass-through treatment
<p>Federal "base erosion minimum tax" on taxable income in excess of deductible payments to related foreign parties (Senate Only)</p>	<ul style="list-style-type: none"> Evaluate state conformity to new IRC Section 59A For states that conform to new tax, apportionment calculations required Consider state add-back provisions on calculation of state-specific taxes in conforming states Consider structuring and other tax planning options 	<ul style="list-style-type: none"> Need to monitor state legislative response to new federal minimum tax
<p>Federal Taxation of Foreign High Returns via Subpart F (House Only)</p>	<ul style="list-style-type: none"> Evaluate state conformity to new IRC Section 951A Evaluate state income tax treatment of Foreign High Return Income (e.g., deemed dividend, available state DRD, etc.) Evaluate current state taxation of Foreign High Return income (e.g., WW, 80/20, tax haven filings, etc.) Consider structuring and other tax planning options 	<ul style="list-style-type: none"> State taxation of Foreign High Returns may lead to more complex state apportionment calculations and unitary business determinations
<p>Federal Excise Tax on Payments to Foreign Affiliates/ECI Election (House Only)</p>	<ul style="list-style-type: none"> Evaluate state conformity to new IRC Section 4491 Identify taxpayer payments that may be subject to new excise tax Identify taxpayers that may opt for ECI election by foreign affiliates in lieu of excise tax Evaluate nexus/unitary business/apportionment for foreign affiliates making ECI election 	<ul style="list-style-type: none"> Need to monitor state legislative response to new IRC Section 4491 Ability/desire of states to impose state-specific excise tax on payments to foreign affiliates unclear

<p>Federal Tax on "Global Intangible Low-Taxed Income" ("GILTI") (Senate Only)</p>	<ul style="list-style-type: none"> • Evaluate state conformity to new IRC Section 951A • Evaluate state income tax treatment of GILTI • Evaluate current state taxation of GILTI (e.g., WW, 80/20, etc.) • Consider structuring and other tax planning options 	<ul style="list-style-type: none"> • State taxation of GILTI may lead to more complex state apportionment calculations and unitary business determinations • Coordinate GILTI with state tax provisions for deductibility (or not) of payments to related parties for intangibles
<p>Elimination of IRC Section 108(e)(6) (House Only)</p>	<ul style="list-style-type: none"> • Evaluate state conformity to repeal of IRC Section 108(e)(6) and federal consolidated return regulations • Evaluate taxpayer's filing group differences federal and state income tax filings • Consider state-specific impact of repeal of IRC Section 108(e)(6) on taxpayer plans to retire/reduce intercompany debt • Consider strategic solutions to mitigate risks created by repeal 	<ul style="list-style-type: none"> • Reduction in federal interest expense deduction (and possible concerns regarding the 385 Regulations) may lead taxpayers to consider 'cleaning up' intercompany debt • State disconnect from federal consolidated return regulations could lead to state income recognition on debt 'clean-up' • Repeal of IRC Section 108(e)(6) contained in larger section of House version of TCJA and is not prominently featured, so the repeal may not be initially noticed by a number of taxpayers

State Conformity to the Internal Revenue Code and Associated Amendments

The chart below provides a basic IRC conformity overview. Of the more than forty states plus the District of Columbia that impose corporate income taxes, a significant number automatically conform to IRC amendments on a "rolling" basis. The remaining states only conform to the IRC in effect as of a specific date and some of those lag in conformity for multiple years. Even where a conformity date is noted below, whether the state merely leverages the federal taxable income as a numerical starting point versus incorporating the actual federal provisions into its own laws can potentially impact the analysis. Further, it is important to understand whether the state has only selectively conformed to certain provisions, or, selectively decoupled from the specific amended federal provisions at issue. Finally, state-specific nuances inevitably remain to be analyzed -- such as how to interpret federal provisions in a separate or combined filing state tax regime -- especially in the majority of states that do not follow the consolidated return regulations.

If enacted, companies should carefully evaluate the ASC 740 implications associated with the final tax reform legislation, including the state tax implications of conformity to the IRC. This may impact a company's state effective tax rate as well as state specific deferred tax assets/liabilities; potential base broadening may also result in attribute utilization where, to date, a full valuation allowance has existed.

To assist in understanding the current state conformity of the federal Internal Revenue Code, please see the chart below. A proactive approach to modeling and planning is highly advisable, given the potential for enactment prior to the end of 2017.

Jurisdiction	Status of State Conformity to Internal Revenue Code – as of December 2017
Alabama	Alabama selectively conforms to the current version of the IRC as amended and in effect.
Alaska	Alaska conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Arizona	Arizona currently conforms to the IRC as amended and in effect as of January 1, 2017 , subject to disconnecting from specific provisions.
Arkansas	Arkansas selectively conforms to specific provisions of the IRC , and the conformity date for each IRC section varies according to the specific Arkansas conformity statute.
California	California selectively incorporates to specific provisions of the IRC, as amended and in effect as of January 1, 2015.

Colorado	Colorado conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Connecticut	Connecticut conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Delaware	Delaware conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
District of Columbia	The District conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Florida	Florida conforms to the IRC as amended and in effect as of January 1, 2017 , subject to disconnecting from specific provisions.
Georgia	Georgia conforms to the IRC provided for in federal law enacted on or before January 1, 2017 , subject to disconnecting from specific provisions.
Hawaii	Hawaii conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.
Idaho	Idaho conforms to the IRC as amended and in effect as of January 1, 2017 , subject to disconnecting from specific provisions.
Illinois	Illinois conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Indiana	Indiana conforms to the IRC as amended and in effect as of January 1, 2016 , subject to disconnecting from specific provisions.
Iowa	Iowa conforms to the IRC as amended and in effect as of January 1, 2015 subject to disconnecting from specific provisions.
Kansas	Kansas conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Kentucky	Kentucky conforms to the IRC as amended and in effect as of December 31, 2015 , subject to disconnecting from specific provisions.
Louisiana	Louisiana conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Maine	Maine conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.
Maryland	Maryland conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Massachusetts	Massachusetts conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Michigan	Michigan conforms to the IRC as amended and in effect as of January 1, 2012 or, at the option of the taxpayer, in effect for the current tax year , subject to disconnecting from specific provisions.
Minnesota	Minnesota conforms to the IRC as amended and in effect as of December 16, 2016 , subject to disconnecting from specific provisions.
Mississippi	Mississippi selectively conforms to the current version of the IRC as amended and in effect.
Missouri	Missouri conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.

Montana	Montana conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Nebraska	Nebraska conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
New Hampshire	New Hampshire conforms to the IRC as amended and in effect as of December 31, 2015 , for tax years beginning on or after January 1, 2017, subject to disconnecting from specific provisions.
New Jersey	New Jersey generally defaults to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions, as the starting point for taxable income is federal taxable income before net operating losses and special deductions as reported on Line 28 of federal return.
New Mexico	New Mexico conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
New York	New York conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
New York City	New York City conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
North Carolina	North Carolina conforms to the IRC as amended and in effect as of January 1, 2017 , subject to disconnecting from specific provisions.
North Dakota	North Dakota conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Oklahoma	Oklahoma conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Oregon	Oregon conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Pennsylvania	Pennsylvania generally defaults to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions, as the starting point for taxable income is federal taxable income before net operating losses and special deductions as reported on Line 28 of the federal return.
Rhode Island	Rhode Island conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
South Carolina	South Carolina conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.
Tennessee	Tennessee generally defaults to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions, as the starting point for taxable income is federal taxable income.
Texas	Texas taxable margin is determined using the federal provisions in effect as of January 1, 2007.
Utah	Utah conforms to the current version of the IRC as amended and in effect , subject to disconnecting from specific provisions.
Vermont	Vermont conforms to the IRC as amended and in effect for the 2016 taxable year , subject to disconnecting from specific provisions.
Virginia	Virginia conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.
West Virginia	West Virginia conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.

Wisconsin	Wisconsin conforms to the IRC as amended and in effect as of December 31, 2016 , subject to disconnecting from specific provisions.
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Understanding the timing and degree of each state's conformity is a threshold issue for analyzing the state income tax consequences of any federal income tax provision. Additionally, identification of which states "automatically conform" is only the start; even for states where legislative action is necessary to conform or decouple, depending on the factual circumstances, companies can anticipate a "Day One" state tax consequence. For a relevant example, consider deemed -- possibly soon followed by actual -- foreign dividends inclusion in state taxable income. And equally important is anticipating and evaluating the management decisions that may be made in response to these significant federal changes.

The Conference Process

The House and Senate versions of the TCJA are currently "in conference" for the House and Senate to produce a singular piece of legislation. The conference process is relatively straightforward. Both chambers have appointed conferees who are charged with resolving the differences between the House and Senate versions of the TCJA (although they are not formally named conferees, in the current instance, House Speaker Paul Ryan, R-Wis., and Senate Majority Leader Mitch McConnell, R-Ky., along with other Republican leaders, are also heavily involved in conference negotiations).

The number of conferees from each chamber is different, but a majority of the delegation of each House of Congress must approve of the final compromise bill. If a bill is approved by a majority of each chamber's delegation, the compromise will be returned to each House for an up-or-down vote, with no amendments. Because the TCJA is moving under a special filibuster-proof process known as "budget reconciliation," any conference report will have to be reassessed for compliance with the Senate's "Byrd Rule" restrictions on the content of reconciliation bills before it is voted on in that chamber.

Conferees are not in all cases bound by the areas of agreement between the two bills; for example, it is possible that the conference could produce a compromise bill that imposes a 22 percent corporate income tax rate even though both the House and Senate versions of the TCJA currently include a 20 percent corporate rate.³

Taxpayer Considerations

While the foregoing is not an exhaustive list of all state tax issues raised by each proposal contained in the two versions of the TCJA, the summary is intended to provide an overview of the range of state and local tax issues presented by the TCJA. Each taxpayer is encouraged to consider these state and local issues, including the ASC740 implications, when evaluating the impact of the TCJA on current and prospective tax planning.

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³ For general information on the conference and legislative processes, see Ellen Greenberg, *THE HOUSE AND SENATE EXPLAINED* 113 (1996).

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