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No plans – for now – to delay TCJA corporate revenue raisers, Mnuchin says

Treasury Secretary Steven Mnuchin said this week that the Trump administration has no current plans to call for postponing the imposition of corporate revenue raisers in the 2017 tax code overhaul (known informally as the Tax Cuts and Jobs Act or TCJA) that are set to take effect in the next few years.

Mnuchin made his comments at a March 3 House Ways and Means Committee hearing on President Trump's fiscal year 2021 budget proposal. (The Treasury secretary was the sole invited witness.)

Taxwriter Mike Thompson, D-Calif., who chairs the Ways and Means Select Revenue Measures Subcommittee, noted that the president's budget blueprint assumes a permanent extension of the TCJA's tax cuts for individuals, passthroughs, and estates which are currently scheduled to expire at the end of 2025. He also noted that some business taxpayers are hoping for a delay – or even an outright repeal – of certain corporate revenue-raising provisions in the TCJA that become effective later in the 10-year budget window, such as amortizing research and development expenses and harsher limitations on the business interest deduction – both of which are set to begin in 2022 – and a scheduled increase in the rate on global intangible low-taxed income (GILTI) beginning in 2026.

Thompson asked Mnuchin if the administration intends to accommodate those calls from the business community when it rolls out its promised "Tax Cuts 2.0" package later this year. (The White House originally intended to unveil its proposal in April, but the most recent target date from the administration has shifted to September.)

Mnuchin replied that the administration intends to leave these revenue raisers in place "as of now," although when pressed by Thompson he cautioned that he could not predict whether the White House's plans might change "down the road."

No appetite for corporate minimum tax

Rep. Brendan Boyle, D-Pa., citing a recent report from a Washington think tank that found that 91 profitable Fortune 500 companies paid no federal tax on their 2018 income, asked whether the Trump administration would support a minimum tax on corporations to avoid such an outcome in the future.
URL: https://itep.org/corporate-tax-avoidance-in-the-first-year-of-the-trump-tax-law/

Mnuchin replied that the US already has base tax rates in place for domestic and offshore corporate income. And although he said he could not comment on the tax situations of specific companies, he noted that in general "if people aren't paying taxes it's because they don't have taxable income," a result he attributed to the fact that the tax code includes "incentives to make capital purchases and shift income from one year to the next." He added that he supports providing the IRS with proper audit resources to ensure taxpayers are not abusing the tax system but emphasized that incentives in the system to reduce taxable income are "operating appropriately."

Neal: Infrastructure beats corporate rate cut for economic stimulus

Also at the hearing, Chairman Richard Neal, D-Mass., told Mnuchin that the administration should follow through on its long-promised plan to enact a broad infrastructure bill – rather than pursue an additional cut in the corporate tax rate – as it considers a stimulus package to address the potential economic effects of the spread of the coronavirus.

Neal was responding to recent comments from White House Acting Chief of Staff Mick Mulvaney that the president was mulling a proposal to reduce the corporate tax rate to 20 percent (from the 21 percent enacted in the TCJA).

Neal contended that a corporate rate cut would primarily fund stock buybacks and would not benefit the middle class or stimulate the economy.

"What would stimulate the economy is a strong infrastructure [package]," Neal said.

Mnuchin commented in his opening statement that the fundamentals of the US economy are strong as a result of President Trump's "economic freedom agenda" – a combination of "tax cuts, regulatory reform, and better trade deals." But he said in an exchange with Neal that "[i]f there's a need to stimulate the economy as a result of the coronavirus, I am sure that infrastructure is a priority for the president."

Still searching for infrastructure offsets: House Democrats released a $760 billion infrastructure framework in January and Neal has been negotiating with the Treasury secretary since then on a potential deal to pay for it. House taxwriters are "hoping the that the president's leadership in finding appropriate offsets will help us in that endeavor," Neal told Mnuchin.
URL: https://transportation.house.gov/imo/media/doc/Moving%20Forward%20Framework.pdf

Ways and Means Committee Democrat Earl Blumenauer of Oregon subsequently tried, without success, to get Mnuchin to identify potential funding mechanisms – such as an increase in the federal tax on gasoline and diesel fuel – that the administration would be willing to accept to generate additional revenue for infrastructure projects.

Blumenauer commented that there is "broader support for [infrastructure legislation] than [for] any other controversial issue on Capitol Hill" and urged the administration to study the bipartisan initiatives to increase infrastructure spending that have been adopted in 34 states.

"I would hope that we could get to the point where we could look at what happened there to get people to come together," he said.

Digital taxes

Several taxwriters – including Neal and Republican Devin Nunes of California – raised objections to the digital services taxes (DSTs) targeting large Internet companies that have been enacted or are under consideration in countries such as France, Italy, Spain, and the United Kingdom.

DSTs are based on the premise that digital companies that are making profits in countries where they have large customer or user bases but no physical presence should be taxed where those profits are earned. To avoid the prospect of a patchwork of unilateral DSTs and similar tax measures across the globe, the Organisation for Economic Co-operation and development (OECD) is currently developing a proposal for a multilateral agreement that would revise international tax rules to reflect the growing digital economy.

Mnuchin agreed with taxwriters that DSTs are "discriminatory" and that opposition to them in Washington is bipartisan and "absolute." In an exchange with Chairman Neal, Mnuchin said President Trump was "personally involved" in US efforts to convince France to suspend collection of its DST until the end of this year. (The US, in turn, agreed to hold off on imposing retaliatory tariffs on various products imported from France. For prior coverage, see *Tax News & Views*, Vol. 21, No. 3, Jan. 24, 2020.)
URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200124_1.html

And in response to a question from Rep. Darin LaHood, R-Ill., Mnuchin stated that he has had "specific conversations" with Italy, Spain, and the UK about delaying imposition of their proposed DSTs until after the OECD reveals its proposed multinational tax agreement later this year.

"I think we have a commitment if there is an OECD solution that [those countries' DSTs] would be rolled back and the OECD solution would be implemented," he said. (For an update on the status of the OECD project, see *Tax News & Views*, Vol. 21, No. 8, Feb. 28, 2020.)
URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200228_2.html

Electric vehicle credit

Discussion about the credit for four-wheeled electric vehicles, which the budget blueprint proposes to repeal (along with several other alternative-energy incentives) and which House Democrats would like to expand as a part of green energy legislation that the Ways and Means Committee expects to mark up in the coming weeks, broke predictably along party lines.

GOP taxwriter Jason Smith of Missouri commented that over 50 percent of taxpayers claiming the credit are from California and asked whether it was "fair" for Congress to provide a tax benefit with such a narrow geographic distribution. (Mnuchin said he agreed with Smith that the credit was unfair.)

Smith also noted that an audit report released last September by the Treasury Secretary General for Tax Administration (TIGTA) found high rates of improperly claimed electric vehicle credits. Repealing the credit would eliminate "waste, fraud, and abuse," he contended. (For prior coverage of the TIGTA report and a request from Senate Finance Committee Republicans for information about how the IRS administers the credit, see *Tax News and Views*, Vol. 21, No. 4, Jan. 31, 2020.)
URL: https://www.treasury.gov/tigta/auditreports/2019reports/201930072fr.pdf
URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200131_4.html

Democratic taxwriter Dan Kildee of Michigan countered that the credit has broad support from auto manufacturers, consumer groups, and environmental organizations. He asked Mnuchin what steps the IRS has taken to implement TIGTA's recommendations to reduce abuses in the program – including a recommendation for the IRS to use the Vehicle Identification Numbers reported by taxpayers to identify improper credit claims.

Mnuchin replied that he would discuss the status of the TIGTA recommendations with the IRS and report back to Kildee.

TCJA issues

Several taxwriters raised various discrete issues with the Tax Cuts and Jobs Act that they believe need to be addressed through additional legislation.

Qualified improvement property: Democratic Rep. Jimmy Panetta of California and Republican Jackie Walorski of Indiana commented on the need for a technical correction to the TCJA that would clarify the cost recovery period for qualified improvement property (QIP).

Mnuchin, who has said the drafting error in the TCJA cannot be addressed through regulations, told Walorski that the treatment of QIP is "our number one tax fix request." And in an exchange with Panetta, he commented that "this is not a partisan issue. This is just a technical mistake that everyone acknowledges."

Mnuchin and Neal both indicated at the hearing that they are collaborating on a "pathway" to resolve the issue, although neither one elaborated on what such a resolution might entail.

Opportunity Zones: Democratic taxwriters Ron Kind of Wisconsin and Terri Sewell of Alabama commented on the lack of appropriate reporting requirements for the TCJA's Opportunity Zones (OZ) program and pointed to bipartisan legislation introduced in the House (H.R. 2593) and Senate (S. 1344) that would require Treasury to track and report various OZ metrics such as fund investments and effects on job creation. (Concerns around the program have spiked in recent months in the wake of press reports indicating that some OZ designations have been awarded to certain prominent, wealthy investors to fund projects that are not located in economically distressed areas. For additional background, see *Tax News & Views*, Vol. 21, No. 2, Jan. 17, 2020, and *Tax News & Views*, Vol. 20, No. 35, Nov. 1, 2019.)
URL: https://newsletters.usdbriefs.com/2020/Tax/TNV/200117_4.html
URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/191101_2.html

Mnuchin agreed that the OZ reporting requirements need to be strengthened and added that he also would work with taxwriters to determine what can be done through administrative actions while Congress pursues a legislative solution.

SALT deduction cap: Rep. Tom Suozzi, D-N.Y., criticized a TCJA provision that capped the deduction for state and local taxes (SALT) at $10,000, calling it unfair to "blue" states that have high local income and property taxes and generally send more money to Washington in federal tax payments than they receive in subsidies and other federal spending. He also noted that the House late last year approved legislation that would temporarily suspend the cap.
URL: https://www.congress.gov/116/bills/hr5377/BILLS-116hr5377rfs.pdf

Mnuchin replied that he believes the SALT deduction cap is fair and that states such as New York and California that are now seeing a population decline as residents migrate to jurisdictions with more favorable tax laws "should think about lowering their taxes."

Suozzi noted that President Trump has indicated that he is open to discussions about reinstating the SALT deduction and asked Mnuchin whether this is an issue the president has raised with him. Mnuchin replied that this is not something that he and Trump have discussed recently but said he would be "happy to bring it up with him."

Regulatory concerns

Ways and Means members also raised a variety of concerns about specific pending and published Treasury guidance.

GILTI: Republican taxwriter George Holding of North Carolina called the TCJA's international provisions "true game changers" in making US companies competitive globally and asked Treasury to consider congressional intent as it develops final regulations around the GILTI rules.

"It's important that we get this right for US companies competing in the global market," he said.

Holding and several other Ways and Means Republicans sent a letter to Mnuchin in late January urging the Treasury Department to incorporate provisions in the final regulations that would make it easier for taxpayers to opt out of the GILTI regime – for example, by allowing the election to be made annually and by setting the threshold for high-taxed income at 13.125 percent as opposed to the 18.9 percent threshold set in proposed regulations.

URL: http://newsletters.usdbriefs.com/2020/Tax/TNV/200306_1_suppA.pdf

Section 199A and agricultural co-ops: Several Democratic and Republican taxwriters whose districts include farming communities likewise urged Mnuchin to take congressional intent into account as Treasury finalizes regulations around section 199A, noting specifically that proposed regulations under section 199A(g) may be drafted in a way that would create adverse economic consequences for agricultural and horticultural cooperatives.

In a February 14 letter to Mnuchin, 13 Ways and Means members contend that "new…section 199A(g) contains the same statutory language as former…section 199 with respect to farmer cooperatives and their patrons," that "[l]egislative history provides that new…section 199A(g) was intended to operate the same as former…section 199," and that section 199A(g)(6) provides that any Treasury regulations "shall be based on regulations applicable to cooperatives and their patrons under section 199 (as in effect before its repeal)." But the letter notes – without elaboration – that "Treasury has received comments highlighting instances where the proposed regulations depart from former…section 199."
URL: http://newsletters.usdbriefs.com/2020/Tax/TNV/200306_1_suppB.pdf

Rep. Adrian Smith, R-Neb., one of the signers of the letter, asked Mnuchin to "take the appropriate time finalizing this regulation and work with us to insure the producer members of co-ops are not harmed by this."

Mnuchin told Smith that Treasury is "very focused" on the issue and will work with the Ways and Means and Senate Finance Committees to ensure that the final Treasury regulations reflect congressional intent.

Carbon sequestration: Republican taxwriter David Schweikert of Arizona asked Mnuchin when Treasury plans to release carbon sequestration regulations under section 45Q.

Mnuchin replied that he has "instructed [his] tax team to speed this up" and noted that there is "enormous" bipartisan interest in seeing the regulations released.

(The administration released two guidance items related to the credit – Notice 2020-12 and Rev. Proc. 2020-12 – late last month.)
URL: https://www.irs.gov/pub/irs-drop/n-20-12.pdf
URL: https://www.irs.gov/pub/irs-drop/rp-20-12.pdf

FIRPTA: Rep. Kenny Marchant, R-Texas, commented that the Foreign Investment in Real Property Tax Act (FIRPTA) "continues to impose a discriminatory tax" on foreign investment in US real estate and noted that he and several other Ways and Means Republicans had recently sent a letter to the Treasury Department calling for the withdrawal of "outdated" guidance (Notice 2007-55). The letter argues that the notice "subjects a liquidating distribution made by a REIT to a foreign taxpayer (which is essentially the sale of shares of stock in the REIT) to a punitive tax that is not levied on other similar types of investments." Repealing the notice, the letter contends, "will restore the intent of Congress with respect to the tax law governing liquidations, provide parity to investors, and increase direct foreign investment in US commercial real estate and infrastructure in every corner of the nation."
URL: http://newsletters.usdbriefs.com/2020/Tax/TNV/200306_1_suppC.pdf

Mnuchin replied that he shares those concerns and agreed that it doesn't make sense to discriminate against foreign investments.

IRS budget and enforcement issues

A number of Democrats on the panel commended the administration on its proposal to bump up the IRS's budget by some $500 million for fiscal year 2021, although they commented that even with the increase IRS funding continues to fall short of appropriations levels from a decade ago.

Enforcement funding: Oregon Democrat Earl Blumenauer said that the proposed $400 million program integrity cap adjustment to fund additional IRS enforcement efforts was "encouraging" and asked Mnuchin whether he would be willing to work with Congress to create a dedicated funding mechanism outside of the annual budget process that would provide a continuing revenue stream for enforcement.

Mnuchin said he found the idea "very interesting" and would look forward to working on it.

Disparate audit rates: Chairman Neal was one of several Democrats who expressed concern that IRS audit rates for lower-income taxpayers appear to exceed those for wealthier individuals.

"Low-income tax filers should not be audited at a disproportionately higher rate simply because their returns are less complicated to examine," Neal said in his opening statement. "The IRS needs to go after tax frauds and cheats at every income level."

Rep. Judy Chu, D-Calif., noted that audit rates for high-income taxpayers dropped from 39 percent in 2011 to 7 percent in 2018 but that taxpayers who claim the earned income tax credit now account for 39 percent of all audits.

Mnuchin replied that he has "specifically directed the IRS commissioner to come up with a plan to increase the amount of funding so that we can audit more high-income earners."

— Michael DeHoff
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Ways and Means subcommittee examines tax issues facing Native American tribes

During a March 4 hearing, lawmakers on the House Ways and Means Subcommittee on Select Revenue Measures dug into tax issues facing Native American tribes as they listened to testimony from various tribal leaders as well as three Native American members of Congress.

Background on tribal taxation

Federally recognized Native American tribes, and any unincorporated businesses owned by a tribe, generally are not subject to federal income tax, regardless of where their income is earned and whether the income-producing activities are commercial or noncommercial in nature. This exemption extends to federally chartered – but not state-chartered – tribal corporations, such as those chartered under section 17 of the Indian Reorganization Act of 1934.

The tax status of corporations chartered under tribal law is uncertain and has not been addressed in Internal Revenue Service guidance.

Native American individuals, on the other hand, generally are subject to federal income and employment taxes. Two major exceptions, however, relate to income derived directly from certain restricted lands held in trust by the US government for the benefit of a Native American tribe or member and income distributed on a per capita basis from certain tribal trust funds.

Prior to 2014, certain benefits provided to members by tribal governments (related to health, education, cultural development, and the like) did not qualify for the so-called "general welfare exclusion" – an administrative principle – because they were not distributed on the basis of need. However, that changed upon enactment of the Tribal General Welfare Exclusion Act of 2014 (P.L. 113-168), which provided that such benefits generally would qualify for exclusion provided they do not discriminate in favor of members of a tribe's governing body and are not lavish or extravagant, among other requirements.

These and other aspects of Native American taxation – both at the tribal and individual member level – are discussed in more detail by the Joint Committee on Taxation staff in a background document released in advance of the hearing.
URL: https://www.jct.gov/publications.html?func=startdown&id=5249

New Markets, low-income housing tax credits a focus

Subcommittee Chairman Mike Thompson, D-Calif., opened the hearing by calling attention to the comparatively high incidence of poverty among Native American populations and the concurrent low rate of New Markets Tax Credit (NMTC) investments flowing to tribal areas.

“Overall, about 25 percent of Native Americans lived in poverty in 2017, compared to about 13 percent for the US general population,” Thompson said. “At the same time, the tax incentives that we know are successful in encouraging economic opportunity are harder to access for tribes. For example, only $1 billion of the $48.3 billion of investments disbursed through the New Markets Tax Credit program have gone to businesses operating in Native American areas.”

Rep. Sharice Davids, D-Kan., herself a Native American and member of the Ho-Chunk tribe, testified that the NMTC program – if better leveraged – could deliver significant benefits to tribal areas.

“I encourage the committee to strongly consider efforts that would shore up and expand the New Markets Tax Credit whenever possible,” Davids said, “while making sure tribes have a fair shot at the same investment assistance available to the rest of the country.”

Davids also noted her support for the New Markets Tax Credit Extension Act (H.R. 1680), legislation sponsored by Ways and Means Committee member Terri Sewell, D-Ala., that would make the NMTC permanent while adjusting the credit limitation under section 45D(f) for inflation annually.

For her part, Rep. Deb. Haaland, D-N.M., a member of the Pueblo of Laguna tribe, testified in favor of changes to the low-income housing tax credit that would enable tribes to receive their credit funding directly, rather than through state or local housing credit agencies.

“Low-income housing tax credits are…critical to extend tax credit equity and housing grants to tribal lands because debt financing for affordable housing is severely limited,” Haaland said. “Like other governments, Tribes should receive their funding directly for housing tax credits so they can increase the availability of tribal housing.”

Indian employment credit

The third and final Native American member of Congress to testify, Rep. Markwayne Mullin, R-Okla., a member of the Cherokee Nation, expressed support for legislation that would permanently extend the Indian employment tax credit under section 45A. The credit – which encourages the hiring of Native American individuals on tribal lands – was extended along with most other “tax extender” provisions through 2020 as part of a year-end 2019 tax-and-appropriations measure (P.L. 116-94). (For prior coverage, see *Tax News & Views*, Vol. 20, No. 42, Dec. 19, 2019.)
ÜRL: http://newsletters.usdbriefs.com/2019/Tax/TNV/191219_1.html

Tax-exempt bonds

Another topic that received attention was tribal governments’ limited ability to issue private activity bonds (PABs) – that is, tax-exempt bonds issued by a state or local government whose primary benefits flow to private entities.

Current tax rules allow tribal governments to issue PABs, but only if they relate to financing manufacturing facilities. As a result, tribal tax-exempt bond issues generally must be “governmental” bonds in which the proceeds are used for governmental purposes. Even then, tribal governments must adhere to an additional requirement – one not imposed on state and local governments – that all bond proceeds be used in an “essential government function.”

Christina Danforth, president of the Native American Financial Officer’s Association, testified during a panel comprised of Native American leaders that this “essential government function” test found in section 7871(c)(1) is inherently unfair.

“We cannot continue to use an inequitable practice against the development of activities of tribal governments,” Danforth said. “Removing this test will give tribes equal access to the tax-exempt bond market on equal terms as state and local governments.”

Subcommittee Chairman Thompson expressed a similar view in his opening remarks at the hearing.

“…[R]estrictions on the issuance of tax-exempt debt can prevent tribes from meeting financing needs in the same way our state and local governments can,” he said.

— Alex Brosseau
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House panel mulls post-*Wayfair* compliance issues facing small businesses

In an effort to understand the experiences of small businesses in the initial period since states have been permitted to collect sales tax from remote sellers without a physical presence in their jurisdictions, the House Small Business Committee's Subcommittee on Economic Growth, Tax, and Capital Access on March 3 held a hearing and heard various recommendations for reducing the compliance burden.

The Supreme Court's 2018 decision in the *South Dakota v. Wayfair, Inc.* case opened the door for the new tax collections, and 43 states plus the District of Columbia have adopted sales tax collection and remittance obligations for out-of-state sellers.

"The landscape post-*Wayfair* is that millions of small businesses are unfairly faced with overwhelming and expensive compliance," said Rep. Andy Kim, D-N.J., the subcommittee chairman, in his opening remarks.

In a majority of states, sellers do not trigger a collection and filing requirement until they reach a specified threshold of sales or transactions in the state – often $100,000 or 200 transactions. However, that threshold differs from state to state, as do sales tax rates and the compliance process itself. Among the recommendations offered by witnesses at this week's hearing were a higher – and nationally uniform – state threshold of $1 million, a single national threshold of $30 million, the elimination of the transaction threshold, and exemption from local-level sales taxes.

Make it simple

Linda Lester of K-Log Inc., a furniture company, provided another perspective.

"Make this simple enough that nexus is irrelevant," she recommended, noting that many states have dozens or even hundreds of taxing jurisdictions, often with different rates to account for local sales taxes. "If you have one rate per state and one place to file, then anybody can do this."

Lester applauded the handful of states that have a single rate, as well as Texas and Louisiana, which allow remote sellers the option of paying either a single rate or the individual jurisdiction rates. On the other end of the spectrum, she noted examples such as Colorado, with nearly 700 taxing jurisdictions and a highly burdensome reporting process, and Alabama, where many of the 800-plus local jurisdictions require separate tax registration numbers.

Rep. Kevin Hern, R-Okla., the ranking member of the subcommittee, said he appreciated Lester's perspective and the alternative to a single national policy.

"I get the ease of [a single rate at the national level]," he said; but he added that he believes "states can do it better than we can in Washington, DC, so I think it's also that we find that right balance."

Challenges for small retailers

Another witness at the hearing, Brad Scott of Halstead Bead, noted that while almost all states implemented remote seller sales tax requirements after the *Wayfair* decision, he received a notice about the change from only one state where his company sells. He said many small businesses have no idea that they are supposed to collect and remit taxes to the states where they don't have a physical presence until they get a call from a state revenue agency, which often expects immediate payment and may levy late fees.

In a memo Kim provided members of the subcommittee ahead of the hearing, he noted that most states have implemented marketplace facilitator laws that require online marketplaces to handle state tax collection obligations for small businesses third-party sellers using the marketplaces – but not local sales tax collection.
ÜRL: https://smallbusiness.house.gov/uploadedfiles/03-03-20_hearing_memo.pdf

At the hearing, Kevin Mahoney of FindTape.com, also highlighted a challenge he and other small businesses have encountered: in some cases where they sell to a large online marketplace, which warehouses the goods and then fulfills customers' orders directly, states have claimed the small companies have physical nexus as a result of the marketplace's own interstate shipments between warehouses. In such cases where the marketplace "controls the entire buying experience and we don't even have access to customer-related data for those orders," Mahoney argued that states are overstepping their authority to tax small businesses.

"Taken as a whole, there are often prohibitive costs attached to ensuring that the compliance is performed correctly, whether completed in-house with dedicated tax staff, or completely outsourced," said Jamie Yesnowitz, who spoke at the hearing on behalf of the American Institute of Certified Professional Accountants.

— Storme Sixeas
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