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U.S. business tax policy after the election: Anything — or nothing — could happen

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The business community and tax bar are bracing for major tax legislation after the dust settles on the 2024 election.

Here's why: Certain business-friendly international tax provisions enacted in 2017 as part of the Tax Cuts and Jobs Act (TCJA) are scheduled to become more onerous beginning with the 2026 tax year. For example, the foreign-derived intangible income (FDII) regime enacted by the TCJA provides an effective corporate tax rate of 13.125 percent on certain foreign income earned by U.S. corporations. This effective rate is slated to increase to 16.4 percent beginning with the 2026 tax year.

Additionally, the Organisation for Economic Co-operation and Development (OECD) has been working since 2013 to address tax challenges arising from the digitalization of the world economy. A key component of its efforts was the adoption of global minimum tax rules pursuant to which large multinational companies would pay a minimum level of tax on the income arising in the jurisdictions where they operate. Such rules, generally referred to as "Pillar Two," were adopted in 2021.

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However, although the rest of the world seems to be charging ahead with implementing Pillar Two, the future of Pillar Two in the U.S. Congress remains unclear, and further guidance is needed on how Pillar Two will interact with the Internal Revenue Code or otherwise affect US-based multinationals.

With such major tax law developments coming down the pike, businesses and their tax advisors are understandably trying to divine what the next few years of tax policy may bring. While doing so, however, taxpayers should not discount a boring but plausible scenario: that nothing of significance ultimately gets enacted in the tax legislative space.

How each party could approach tax policy

Neither the Democratic nor the Republican Party is likely to favor the scenario of doing nothing at all.

If Republicans win control of Congress and the White House, they could push to make the business-friendly international tax provisions of the TCJA permanent. A second Trump administration may also take an aggressive posture against Pillar Two, using domestic policy levers in the tax and trade areas counter Pillar Two adoption.

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Conversely, if Democrats win control of Congress and the White House, they likely will be more amenable to integrating the Pillar Two rules with the Internal Revenue Code, and they may attempt to follow through on the tax-related Build Back Better legislation that they were unable to enact during President Biden's term.

For example, the Joint Committee on Taxation (JCT) and the Congressional Budget Office (CBO) have estimated that extending the taxpayer-favorable TCJA provisions would add $4.6 trillion to the national debt through 2034. A Democratic administration may use the expiration of the TCJA's provisions as leverage to extract concessionary revenue raisers (such as an increase in the corporate income tax rate, which had been proposed under Build Back Better) from Republican leadership as a condition to extension.

However, there is no guarantee that either the Democratic or Republican tax agendas would succeed or, indeed, would even be pursued.

A victorious Democratic Party may view other items as more pressing than tax policy and may therefore be inclined to simply allow the taxpayer-favorable TCJA provisions to expire. And a victorious Republican Party in 2025 is likely to be quite different from the Republican Party of 2017. There has been significant turnover in the House, and many newer Republicans may not be inclined to prioritize TCJA extension.

More generally, even if one party sweeps Congress and the White House in November, there is a high possibility that the party's margins in the House and Senate will be the kind of thin margins that stymied many of the Biden administration's tax initiatives in 2021 and 2022. And if the election results in split government, then taxpayers may see a repeat of the last two years: gridlock and omnipresent uncertainty.

Next steps for taxpayers

So, what is a taxpayer to do in the face of so many scenarios and so much uncertainty?

First, corporate taxpayers and their attorneys and advisors should get used to modeling out the consequences of many different scenarios. In light of the wide range of potential election outcomes, practitioners should anticipate making decisions amid a larger set of hypotheticals based on multifaceted factual and legal possibilities.

Second, corporate taxpayers should ensure that their tax recordkeeping and compliance processes are in good health, with solid systems in place for collecting and recording data, managing deadlines, and integrating information from various entities and jurisdictions. For example, Pillar Two compliance will require U.S.-based multinationals to make enterprise-wide decisions based on information across dozens of jurisdictions.

And if a multinational's internal tax function is siloed and does not cohere well across jurisdictions, then confusion due to accounting and recordkeeping inconsistencies, among other issues, can undermine tax planning before it even begins.

Finally, taxpayers should come to terms with the prospect of working in an environment with a higher baseline level of uncertainty. The global tax policy landscape increasingly has been in flux since the passage of the TCJA and the subsequent acceleration of progress on Pillar Two, and many taxpayers have expected the expiration of TCJA provisions and other jurisdictions' implementation of Pillar Two rules to galvanize action. Such hopes, however, may not materialize, and taxpayers may simply have to live in an era with major tax law changes, high uncertainty, and relatively little legislative guidance.

In one of the most unpredictable election cycles in recent memory, it is good practice for taxpayers and their advisors to prepare for many scenarios and the wildly different legislative outcomes that could result from them. But while doing so, taxpayers should not assume that "something" has to happen to resolve the current uncertainty for taxpayers. Always keep in mind: While "anything" can happen, "nothing" is also part of that equation when it comes to the U.S. Congress.

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