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No Easy Fixes For Problems In Republicans' $1.5T Tax Cut

By **Vidya Kauri & Amy Rosen**

Law360, New York (January 1, 2018, 3:04 PM EST) -- The Republicans' $1.5 trillion tax cut legislation has been identified as having multiple errors, ambiguities and unintended consequences that need to be corrected through future legislation, but fixing these problems is a politically vexing task that could leave unclear policies in place for taxpayers.

Even before President Donald Trump signed H.R. 1 on Dec. 22, which lowered tax rates and introduced sweeping changes to the tax code, Republican leaders who drafted the bill began discussing the need for so-called technical correction bills to mend mistakes and oversights.

But their hopes to introduce such legislation on the House and Senate floors will be thwarted unless there is unanimous agreement among Democrats and Republicans on each chamber's tax writing committees that the bills actually will bring about correct understanding of H.R. 1 and won't be wholesale policy changes.

Given the lack of bipartisanship on Capitol Hill in recent lawmaking ventures, Alexander Reid, a tax attorney at Morgan Lewis & Bockius LLP, said he didn't foresee the passage of technical corrections, "no matter how screwed up the statute is."

"What counts as a technical correction depends on the makeup of Congress and how much agreement there is," Reid said. "If there is a lot of bipartisanship and broader consensus generally, then the definition of what is a mere technical correction rather than a change of policy is broader than it is when things are more contentious."

The Democrats who have opposed every aspect of the new law have indicated they may continue to oppose future amendments. After House Ways and Means Chairman Kevin Brady, R-Texas, conceded that H.R. 1 would need revisions, Senate Minority Leader Chuck Schumer, D-N.Y., dismissed the idea of fixing it with a few "small little tweaks."

"We'll see what they propose, but we're going to hammer away at this," Schumer said. "This is going to be an issue for us all year."

Some of the areas where practitioners anticipate fixes will be needed include the taxation of pass-through businesses and foreign transactions. These novel provisions are highly complex and as new consequences are unearthed, lawmakers may be faced with taxpayer responses they weren't expecting, according to Chris Edwards, the director of tax policy studies at the Cato Institute.

“I would bet business lobbyists will be busy next year to make changes to parts of the tax code that harm them,” Edwards said. “If we start seeing news stories about corporations responding to the tax changes in a way Congress didn’t plan, then there will be pressure for Congress to step in and [make changes].”

The pass-through provisions, allowing a deduction for half of W-2 wages, could be problematic because pass-through income didn’t have to be separated from wage income in the past, and taxpayers may find loopholes in the anti-abuse rules to take advantage of the preferential tax treatment. The new law also bars some types of enterprises from qualifying for the deduction and those that “don’t get the special lower rate will, of course, lobby to be included,” Edwards said.

It is also possible that new anti-base-erosion rules for multinational corporations may be relatively easy to game or they could end up being more punitive for businesses than Republicans had intended, Edwards said.

“Multinationals are already figuring out how to restructure to get around the rules. That’s just what happens,” he said.

If lobbyists’ demands appear under the guise of technical corrections that Republicans offer, Democrats, who have rebuked their colleagues for conducting backroom dealings with powerful interest groups, are even less likely to support any proposed changes.

If history is any indication, correcting errors in H.R. 1 will be a protracted effort. Following the last big tax reform in 1986, lawmakers and officials at the U.S. Treasury Department spent years resolving issues, mostly through annual legislation addressing largely noncontroversial topics. The number of errors in H.R. 1, however, is expected to dwarf those in the Tax Reform Act of 1986, given the haste with which it was rushed through Congress, the absence of public hearings and the addition of multiple last-minute amendments.

A lack of bipartisan agreement is the reason why technical corrections needed for former President Barack Obama’s Affordable Care Act — resolutely opposed by Republicans — have not been hammered out, according to Reid, a former legislation counsel for Congress’ Joint Committee on Taxation.

David Noren, a tax partner at law firm McDermott Will & Emery LLP, said now the “shoe is on the other foot,” but ultimately it will be up to Democrats to decide if they want to help Republicans make the needed corrections.

“The inclination may be not to help, but there are always horses to be traded on the Hill,” Noren said. “So it would seem possible that some sort of deal might be worked out.”

Absent technical corrections, the Treasury Department may have to issue interpretive guidance to make H.R. 1 work, but Congress has established limits curtailing Treasury’s authority to decode the statutes it enacts.

If taxpayers sue Treasury for its reading and construction of the law, courts could invalidate regulations that are deemed as being beyond Treasury’s authority, deviating from Congress’ intent or not keeping in line with a federal judge’s interpretation of the policy.

Another problem that could arise during the litigation phase is that courts may find it difficult to gauge congressional intent, given the absence of legislative history by way of public hearings and the restricted amount of time lawmakers had to understand a bill crafted behind closed doors by Republican leaders.

Broadly written statutes are not altogether uncommon, according to Peter Connors, a tax lawyer at Orrick Herrington & Sutcliffe LLP, and in such instances, the Internal Revenue Service typically has taken a thoughtful but aggressive approach when writing its regulations.

“There may be some uncertainty about what was intended because the legislative history isn’t there, but … [the IRS] will solicit comments and they will identify issues and make suggestions for how the statute should operate,” Connors said. “What’s important is: Will the way the statute is written work or can regulations offer clarity to the way the statute operates?”

-- Additional reporting by Alex M. Parker. Editing by Eric Kroh and Tim Ruel.