

Tax Technical and Clerical Corrections Act: Discussion Draft

January 9, 2019

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On January 2 of this year, former House Ways & Means Chairman Kevin Brady (R-TX) introduced the [Tax Technical and Clerical Corrections Act](#).¹ It contains technical corrections to existing tax law, many of which relate to Public Law 115–97, also known as the Tax Cuts and Jobs Act (TCJA) of 2017. Mr. Brady introduced this measure as a discussion draft and has invited public comment on its provisions.

The discussion draft contains several measures that most tax practitioners would consider to be substantive changes of law, rather than technical corrections, notwithstanding the conclusion of the Joint Committee on Taxation that the draft “includes technical, clerical, and deadwood-related corrections to recent tax legislation.” The link to the Joint Committee's Technical Explanation of the draft is available [here](#).²

The distinction between a technical correction versus a substantive change of law is important. Technical corrections are normally ministerial in nature and are not designed to change the scope or intent of the original legislation. Technical corrections generally are retroactive to the original enactment date of the underlying statute. In contrast, substantive changes to existing law generally are prospective from the date of introduction or enactment reflecting Congressional reticence to enact retroactive tax legislation.

Because of their nature, technical corrections do not result in any change to the Joint Committee's revenue estimates for the underlying original legislation, and when enacted do not have a revenue score (see, e.g., page 17 of the Joint Committee's Technical Explanation above). Common examples of technical corrections include correcting faulty cross-references, conforming erroneous statutory language with the tax-writing committee reports or the conference report, or clarifying statutory language to ensure compliance with the originally intended scope or application.

In this case, a number of the provisions in Mr. Brady's discussion draft go beyond the type of clarifications discussed above, and instead involve additions, including the addition of new Code

¹ Tax Technical and Clerical Corrections Act Discussion Draft, available at: https://waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf.

² Joint Committee on Taxation, *Technical Explanation of the House Ways and Means Committee Chairman's Discussion Draft of the "Tax Technical and Clerical Corrections Act"* (JCX-1-19), January 2, 2019, available at: <https://www.jct.gov/publications.html?func=startdown&id=5154>.

subsections, including sections 245(g) (exclusion for certain controlled dividends), 951(a)(2) – (6) (inclusion rule for share of certain current earnings), and 965(o) (inclusion of earnings from certain extraordinary dispositions during transition year). Each of these provisions, if given retroactive effect, could impact restructurings undertaken during the transition year in reliance on the statute as enacted.

The discussion draft, with the support of the Joint Committee on Taxation, would treat all of the provisions as technical corrections, notwithstanding that many of the provisions were not suggested technical corrections in the Joint Committee's Bluebook on TCJA.³ While certainly telling, this view is not dispositive of whether any of the draft's specific provisions will ultimately qualify as technical corrections. Under the normal legislative process, the current Chairs and Ranking Members of the House Ways & Means Committee and the Senate Finance Committee, along with the Joint Committee on Taxation and the Department of Treasury, must all agree that each provision of a technical corrections bill is in fact a technical correction and not a substantive change of law. This would include Mr. Richard Neal (D-MA), Chairman of the House Ways & Means Committee, and Sen. Chuck Grassley and Sen. Ron Wyden, Chairman and Ranking Member of the Senate Finance Committee, respectively, none of whom have weighed in on the draft.

The views of these Congressional tax leaders presumably will be informed by the commentary they receive from affected stakeholders, including the extent to which taxpayers impacted by the provisions in the discussion draft can demonstrate reliance on TCJA as originally written, and can demonstrate harm if one or more of the provisions were to be enacted with retroactive effect. Congressional tax leaders may decide to modify or not adopt the provisions, or they could give the more substantive changes a prospective effective date.

If you have any questions or would like additional information or a discussion of the draft, please contact the following members of our Tax Practice:

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³ Joint Committee on Taxation, *General Explanation of Public Law 115-97* (JCS-1-18), December 20, 2018, available at <https://www.jct.gov/publications.html?func=startdown&id=5152>.

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