The New Tax Legislative and Regulatory Process

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I Background
II Enactment of TCJA
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I  Background
Partisanship

Partisanship changes since the Civil War
Data from VoteView.com.

* Source: Philip Bump, “The Unprecedented partisanship of Congress, explained,” Washington Post (Jan 13, 2016), with NOMINATE data taken from VoteView.com
Gridlock

Source: Sarah A. Binder, “Polarized We Govern,” Center for Effective Public Management at Brookings (May 2014)
Gridlock

* Source: Christopher Ingraham, “Believe it or not, Congress gets more done in election years,” Washington Post (May 1, 2014), with data from Resume of Congressional Activity
Veto Gates (and Bridges)
II Enactment
Process in Perspective

**TCJA**
- Less than Two Months
- Zero witnesses and hearings
- Sidelining of Tax Institutions
- Zero Democratic votes

**TRA 1986**
- Nearly Three Years
- 450 witnesses and 38 days of hearings
- Centrality of Tax Institutions
- Passed with Bipartisan Support
Consequences of Reconciliation

- Diminishment of Tax Institutions
- Importance of Estimates/Budget “Gimmicks”
- Partisan Legislation/Instability
- Mistakes/Ambiguities
Byrd Rule

- Requires deficit-neutrality in years beyond budget window; bill must also adhere to the cap in the reconciliation instructions

- Initial Republican strategies
  1. DBCFT
  2. Lengthen the budget window from 10 to 20 or 30 years
  3. Switch to current policy baseline
  4. Abandon JCT estimates

- Congress largely adhered to budget rules, but norms were tested and perhaps degraded.

- Some budget circumvention tactics were utilized, like the deployment of sunset and sunrise provisions. Also the current policy baseline was used to justify an additional $1/2 trillion in tax cuts.
Baselines

Official cost of legislation = Baseline – amount of revenues generated or spent after legislation in question is enacted

• Current Policy Baseline = Assumes temporary laws continue
• Current Law (Official) Baseline = Assumes temporary laws expire as scheduled
Byrd Rule

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Consequences of Reconciliation

- Diminishment of Tax Institutions
- Importance of Estimates/Budget “Gimmicks”
- Partisan Legislation/Instability/Difficulty in Base Broadening
- Mistakes/Ambiguities
“The Affordable Care Act contains more than a few examples of inartful drafting...Several features of the Act’s passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through “the traditional legislative process.”...And Congress passed much of the Act using a complicated budgetary procedure known as “reconciliation,” which limited opportunities for debate and amendment, and bypassed the Senate’s normal 60-vote filibuster requirement...As a result, the Act does not reflect the type of care and deliberation that one might expect of such significant legislation."
III Implementation
CBO Revisions

“Specifically, we have been asked about the reduction of roughly $110 billion in our projections of corporate income tax receipts related to certain provisions of Public Law 115-97, referred to here as the 2017 tax act. We revised those projections to reflect new information about the implementation of some provisions of the act, as well as new information about how taxpayers are responding.”

-CBO Blog, Feb. 7, 2020
## Examples of Regulatory Overreach

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<th>GILTI</th>
<th>BEAT</th>
<th>199A</th>
<th>Opportunity Zones</th>
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<td>• High-Tax Exception Election</td>
<td>• Bank relief</td>
<td>• Reputation or skill catch-all clause</td>
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<td>• Calculation of the Exempt Return in GILTI w/r/t interest</td>
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<td>• Definition of broker and financial services</td>
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Regulatory Process Flaws

• Non-transparent, pre-notice communications benefit special interests by giving them a first-mover advantage
  

• Industry actors dominate the formal notice and comment process

• Members of the public who are disadvantaged by Treasury giveaways to sophisticated taxpayers likely do not have standing to challenge such giveaways under current law
Possible Solutions

- Rescission of regulation through statute or joint resolution (under the Congressional Review Act)
- Empower federal officials
- Improve the regulatory process
- Require JCT estimates for significant regulations
- Better public disclosure of tax liability
- Less delegation

IV Takeaways
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