

INSIGHTS

Steady Progress on Tax Regs, but Big Questions Remain

May 31, 2018

By: [Liam P. Donovan](#)

As Congress grapples with a jam-packed legislative calendar and a fraught campaign season looms, most of the near-term movement on the tax front continues to come from the executive branch. The months following the December enactment of the Tax Cuts and Jobs Act have seen slow if steady progress in implementing the new law, but a wave of major Treasury rules are anticipated in the coming months. While uncertainty persists amid personnel changes within the Administration, the process has played out relatively smoothly to date.

In February, Treasury and IRS jointly released their [updated Priority Guidance Plan \(PGP\)](#), highlighting 18 TCJA provisions on which they intend to provide some form of guidance or interpretation. The PGP will serve as an ongoing road map for implementation of the new law in the months and years to come. While the nominal target date for completion is June 30th, major releases are unlikely until later in the summer. Treasury officials have said publicly that they expect implementation efforts for the entire tax law to continue for up to two years, on par with the 1986 Tax Reform Act.

The first significant wave of notices arrived on April 2, offering initial guidance on [partnership withholding](#), [repatriation](#), and [interest deductibility](#). Minor releases on [alimony payments](#), [blended corporate rates](#) for fiscal-year taxpayers, [health savings accounts limits](#), and [life insurance reporting](#) followed later in the month. Most recently, in May, Treasury and IRS [issued a notice](#) indicating that they plan proposed regulations related to certain states' efforts to skirt the new cap on the state and local tax (SALT) deduction.

Looking ahead, most of the attention will be focused on three areas: administration of the deduction for qualified business income under Section 199A, treatment of business interest expense under Section 163(j), and the new international tax mechanisms to prevent base erosion and extreme tax avoidance. The new pass-through deduction was paired with anti-abuse "guard rails" in the form of a wage-based limitation and a list of specified service activities that do not qualify. Each raise significant questions, ranging from the level of the calculation (i.e. can related entities be grouped together?) to treatment of businesses that engage in a mix of qualified and specified service trades, however the latter might be delineated. The specified exceptions to the limitation on business interest expense raises similar questions—how does one properly allocate interest on indebtedness held at one level to operations involving exempt (or non-exempt) activities at another? And the new base erosion and anti-abuse tax (BEAT) and global intangible low-tax income (GILTI) concepts raise all sorts of complex issues ranging from defining the applicable tax base to calculating the liability for

consolidated groups.

Beyond the inherent challenge of solving complex tax policy issues, the relevant agencies have been plagued by personnel issues. At the beginning of the year, Treasury's Office of Tax Policy—the office charged with leading implementation efforts—was led by two respected and experienced hands. Assistant Secretary David Kautter, a veteran practitioner and former Senate aide, was supported by his principal deputy Dana Trier, a well-known tax attorney who had served in the same position in the wake of the 1986 tax law. But with IRS experiencing its own staffing issues, Kautter was charged with moonlighting as Acting Commissioner, leaving Trier as the clear day to day lead within Treasury. While Trier's candid public comments at bar events around the country provided the best window into the department's intentions, this candor at one such event cost the deputy assistant secretary his job, as comments deemed critical of the legislation [led to his abrupt resignation](#) in late February.

With no replacement in sight, Kautter's double-duty creates something of a vacuum until a new commissioner can be confirmed. And while the Senate has received nominations for [Chuck Rettig](#) as IRS Commissioner and [Michael Desmond](#) as the Service's chief counsel, their confirmation remains in limbo until a deal is reached for Democrats to allow for unanimous consent, something that is unlikely without a broader agreement.

Another twist is the involvement of the White House's Office of Management and Budget (OMB.) As most of Treasury's work occurred behind the scenes this spring, a favorite beltway parlor game related to a possible shakeup in the regulatory process, covered in the press as a [proxy battle](#) between Secretary Steve Mnuchin and OMB chief Mick Mulvaney. While Treasury has enjoyed the unfettered ability to promulgate its own regs dating back to 1983, an [April 2017 Executive Order](#) signed by President Trump directed the department to review its arrangement with OMB, adding a prospective new layer of review to the process.

The updated [Memorandum of Agreement](#), released in early April, strikes a balance between re-asserting a role for OMB and assuring that the additional step doesn't slow down the implementation of the law as some had feared. Under the MOA, Treasury may not publish any significant regulatory materials for 45 days pending OMB review. OMB may waive this period, however, and Treasury may request to limit the review period to 10 days for guidance related to TCJA. By all accounts, OMB is already working collaboratively with Treasury, so this change may be less significant than they hype it has garnered to date. In the OMB is seeking to staff up with tax experts, beginning with the addition of law professor [Kristin Hickman](#).

Pursuant to this new arrangement, OMB's Office of Information and Regulatory Affairs (OIRA) released its [spring schedule](#) in early May. The schedule tracks ongoing rulemakings for each agency, and—for the first time in this case—pegs them to an expected release date. According to OIRA, proposed rules for GILTI and BEAT are slated for October and September, respectively. Guidance on pass-throughs and interest deduction are for December. While this doesn't necessarily match up with Treasury's ambitious timetable—Kautter has suggested pass-through deduction guidance as soon as mid-July, with an interest expense rulemaking expected in late summer or early fall and —it does give a broad window for when to expect answers on these significant questions. And with the legislative gauntlet unlikely to yield any vehicles that can sustain unrelated tax policy provisions, the regulatory pipeline will be where the action is for the foreseeable future.