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ARTICLES

DEDUCTING SUCCESS: CONGRESSIONAL POLICY GOALS AND THE TAX CUTS AND JOBS ACT OF 2017*

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Since the enactment in 2017 of the legislation commonly known as the Tax Cuts and Jobs Act,¹ commentators have suggested that the Tax Cuts and Jobs Act failed to achieve Congress's three stated policy goals: fairness, simplicity, and tax cuts.² On the first objective—fairness—critics often point to the \$10,000 cap on itemized deductions for state and local taxes. On the second objective—simplicity—commentators point to the length and complexity of § 199A's new pass-through deduction³ and the new international tax rules. Criticism of Congress on both counts is fair, but Congress did achieve a certain level of success in making the Internal Revenue Code (Code) fairer and simpler. In regard to the third objective—

* The views expressed in this article are those of the authors alone and not necessarily those of Williams Couelson Johnson Lloyd Parker & Tedesco, LLC. Stephen J. Pieklik presented an earlier version of this article on April 19, 2018 at the Pittsburgh Tax Review's Summit on Recent Tax Reform.

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¹ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (the legislation received its colloquial title through incorporation of prior drafts and not explicit congressional designation).

² See, e.g., BENJAMIN H. HARRIS & ADAM LOONEY, TAX POLICY CTR., THE TAX CUTS AND JOBS ACT: A MISSED OPPORTUNITY TO ESTABLISH A SUSTAINABLE TAX CODE 3, 12 (2018), https://www.brookings.edu/wp-content/uploads/2018/05/es_20180524_harris-looney_taxreform.pdf.

³ The length of § 199A's new pass-through deduction language is nine pages. Tax Cuts and Jobs Act § 11011, 131 Stat. at 2063–71.

tax cuts for American workers—critics correctly note that the results often vary.

Congress was successful in that the vast majority of Americans will likely see a reduction in their federal income tax burden. Many Americans will spend less time, money, and effort when filing their annual tax returns. But the amount of tax reduction enjoyed by the American people varies greatly over the socioeconomic spectrum and is dependent upon how an individual makes his or her income. The amount of reduction is also impacted by geography, namely taxpayers' state of residence, due to changes in the state and local tax deduction.

This article discusses the legislative history of the Tax Cuts and Jobs Act and in particular presents the stated policy goals of those responsible for framing the legislation, including congressional leaders and Trump administration officials. Furthermore, this article surveys specific provisions in the Tax Cuts and Jobs Act and discusses how those provisions alter the Code and impact individual taxpayers, businesses, and various economic interests. Finally, this article analyzes whether Congress was successful in achieving its stated policy objectives through the enactment of the Tax Cuts and Jobs Act. This article concludes that although there are many valid criticisms of the Tax Cuts and Jobs Act, Congress achieved some level of success in meeting various parts of its stated tax policy goals of furthering fairness and simplicity and providing tax cuts.

I. INTRODUCTION

On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act.⁴ The Tax Cuts and Jobs Act was the most sweeping reform of the Code since the Tax Reform Act of 1986.⁵ However, unlike past tax reform

⁴ *E.g.*, MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RESEARCH SERV., R45092, THE 2017 TAX REVISION (P.L. 115-97): COMPARISON TO 2017 TAX LAW 1 (2018), <https://fas.org/sgp/crs/misc/R45092.pdf>.

⁵ Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; WILLIAM G. GALE ET AL., TAX POLICY CTR., EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf.

legislation, the Tax Cuts and Jobs Act was passed with the support of only one party, the Republican Party.⁶

Due to increased political polarization in the last couple of decades, Congress is gridlocked and it has become increasingly difficult for Congress to pass major legislation.⁷ Under the current system of political polarization, ever-increasing fundraising, and endless campaign cycles, legislation with major policy implications typically passes only during periods of unified government in Washington.⁸ In 2017, the Republican Party had such an opportunity to pass major legislation in a unified government—the Republicans had taken control of both houses of Congress and the presidency.

The Tax Cuts and Jobs Act contains major policy implications for hundreds of millions of people throughout the United States, both with regard to their personal tax liability and with regard to how the tax laws create or remove incentives for various business and personal actions. However, due to the partisan nature of the legislation and the larger policy implications of the bill, there has been little discussion of whether or not the Tax Cuts and Jobs Act actually achieved its authors' stated policy goals.

As a broad overview of the legislation, the Tax Cuts and Jobs Act reduces, if only temporarily, income tax rates for individuals, with “[s]ome deductions, credits, and exemptions for individuals [having been] eliminated, while others [were] substantively modified.”⁹ Indeed, most of these changes are temporary.¹⁰ In regard to business taxpayers, the Tax Cuts and Jobs Act

⁶ See, e.g., *Tax Reform Has Passed. What Now?*, Economist: DEMOCRACY IN AM. (Dec. 20, 2017), <https://www.economist.com/democracy-in-america/2017/12/20/tax-reform-has-passed.-what-now>.

⁷ Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 323–24 (2014).

⁸ See, e.g., Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). The Patient Protection and Affordable Care Act is commonly known as Obamacare. It was passed when the Democratic Party controlled the presidency and both houses of Congress, without any Republican votes. See also Catanese, *supra* note 7, at 323–24 (stating that in the current congressional climate, there is little incentive for members of Congress to work in a bipartisan manner, because electoral threats typically only come from primary challengers in gerrymandered districts).

⁹ SHERLOCK & MARPLES, *supra* note 4, at 1.

¹⁰ *Id.*

enacted a “reduction in effective tax rates [through] a new deduction” for pass-through entities,¹¹ and the Tax Cuts and Jobs Act permanently reduced the corporate tax rate.¹² It also modified and established new “deductions, credits, and other [tax] provisions for businesses.”¹³ With respect to the international tax regime, the Tax Cuts and Jobs Act “generally moved the U.S. tax system towards a territorial system” and away from a worldwide tax system.¹⁴

This article examines the technical changes to the Code, and it addresses some of the public policy implications of what these changes mean to hundreds of millions of Americans, their families, their businesses, and the economy. It provides a technical analysis of how the changes to the Code alter the tax burdens of individuals and various business entities, and, by extension, the owners of those business entities. This article also argues that under the circumstances, Congress achieved some success in implementing its stated policy objectives.¹⁵

Part II of this article provides background information on the Tax Cuts and Jobs Act. It discusses stated policy goals provided by congressional leaders and members of the Trump administration. It also provides legislative history and the background on the implementation of the Tax Cuts and Jobs Act. Part III discusses how the Tax Cuts and Jobs Act amends the Code and what those amendments mean in practice. Part IV analyzes whether Congress was successful in meeting its stated tax policy goals through the amendments to the Code contained in the Tax Cuts and Jobs Act.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ This article does not necessarily comment on whether the incentives sought by Congress were either wise or good policy. Rather, this article analyzes whether or not Congress’s stated goals were actually achieved through the enactment of the Tax Cuts and Jobs Act.

II. BACKGROUND

The Republican Party has long advocated for tax reform and it has enacted such legislation in the past.¹⁶ Since 1980, the Republican Party platform has frequently included specific tax reform policy goals, such as reducing individual and corporate tax rates.¹⁷ In 2016, the Republican Party platform included specific language advocating for tax reform, including goals for making the Code simpler and fairer.¹⁸ It also stated the goal of reducing the corporate tax rate, which it claimed was the highest in the world.¹⁹ However, in regard to tax policy generally, the platform included opposition to retroactive taxation and stated that a “national sales tax must be [combined with] the simultaneous repeal of the Sixteenth Amendment.”²⁰

When presented with the opportunity to pass tax reform in 2017, Republican leaders and Trump administration economic and fiscal policy advisors began formulating goals for tax reform. This Part II of the article discusses the various stated policy goals of the Tax Cuts and Jobs Act, how the actual legislation was formed and drafted, and the Tax Cuts and Jobs Act’s implementation.

A. Stated Goals of Tax Reform

Relatively early in the 115th Congress, congressional leaders laid out their vision for tax reform. A July 27, 2017 press release from the “Big

¹⁶ See Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752; see also Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

¹⁷ E.g., Marc Fisher, *GOP Platform Through the Years Shows Party’s Shift from Moderate to Conservative*, WASH. POST: POLITICS (Aug. 28, 2012), https://www.washingtonpost.com/politics/gop-platform-through-the-years-shows-party-s-shift-from-moderate-to-conservative/2012/08/28/09094512-ed70-11e1-b09d-07d971dee30a_story.html.

¹⁸ PLATFORM COMM. FOR THE REPUBLICAN PARTY, 2016 REPUBLICAN PLATFORM 1–2 (2016), <https://prod-cdn-static.gop.com/static/home/data/platform.pdf>.

¹⁹ *Id.* at 2.

²⁰ *Id.*

Six”²¹—House Speaker Paul Ryan, Senate Majority Leader Mitch McConnell, Treasury Secretary Steven Mnuchin, National Economic Council Director Gary Cohn, Senate Finance Committee Chairman Orrin Hatch, and House Ways and Means Committee Chairman Kevin Brady—made a joint statement laying out the tax reform goals of Republican congressional leaders and the Trump administration.²² In the press release, the “Big Six” stated their joint belief that tax reform would “grow [the] economy and help the middle class get ahead.”²³ They also said that the overall mission of the bill was “to protect American jobs and make taxes simpler, fairer, and lower for hard-working American families.”²⁴

The joint statement established some specific goals, including providing “tax relief for American families,” “a lower tax rate for small businesses so they can compete with larger ones, and lower rates for all American businesses so they can compete with foreign ones.”²⁵ The joint press release provided some specific detail:

The goal is a plan that reduces tax rates as much as possible, allows unprecedented capital expensing, places a priority on permanence, and creates a system that encourages American companies to bring back jobs and profits trapped overseas. And we are now confident that, without transitioning to a new domestic consumption-based tax system, there is a viable approach for ensuring a level playing field between American and foreign companies and workers, while protecting American jobs and the U.S. tax base.²⁶

Later, after the committees were at work, the Trump administration, the House Committee on Ways and Means, and the Senate Committee on Finance presented a document entitled “Unified Framework for Fixing Our

²¹ E.g., Alan Rappeport, *Top G.O.P. Tax Negotiators Move Closer to a Unified Plan*, N.Y. TIMES: POLITICS (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/taxes-republicans-congress-trump.html>.

²² Press Release, Tax Policy Subcomm. of the House Ways & Means Comm., Joint Statement on Tax Reform (July 27, 2017), <https://waysandmeans.house.gov/joint-statement-tax-reform/>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Broken Tax Code.”²⁷ In a press release, they stated that the legislation would “deliver fiscally responsible tax reform by broadening the tax base, closing loopholes and growing the economy.”²⁸ Also in the press release, Secretary Mnuchin reiterated that “[t]his unified framework is the foundation Congress will use to craft legislation around middle-income tax cuts, a simpler and fairer tax code, and the most competitive business tax rates, so American companies of all sizes can create jobs, give their workers a pay raise, and grow the economy.”²⁹

The report itself identified specific related goals.³⁰ After stating that the Tax Cuts and Jobs Act would “deliver fiscally responsible tax reform by broadening the tax base, closing loopholes and growing the economy,” the report identified five particular goals.³¹ These goals included: “[t]ax relief for middle-class families,” the ability for the “vast majority of Americans” to have “[t]he simplicity of ‘postcard’ tax filing,” “[t]ax relief for businesses” and small businesses in particular, “[e]nding [tax] incentives to ship jobs, capital, and tax revenue overseas,” and “broadening the tax base [by] providing greater fairness for all Americans by closing special interest tax breaks and loopholes.”³²

In addition to the framework document, congressional leaders and the Trump administration presented a one-page summary titled “Highlights of the Unified Tax Reform Framework.”³³ The one page summary stated that the Tax Cuts and Jobs Act would “Lower[] Taxes for Individuals and Families,” “Double[] the Standard Deduction and Enhance[] the Child Tax

²⁷ Press Release, U.S. Dep’t of the Treasury, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0166.aspx> (click on link at bottom of page to access full framework document) [hereinafter Unified Framework].

²⁸ Press Release, U.S. Dep’t of the Treasury, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0166.aspx>.

²⁹ *Id.*

³⁰ Unified Framework, *supra* note 27, at 3.

³¹ *Id.*

³² *Id.*

³³ Press Release, U.S. Dep’t of the Treasury, Unified Framework for Fixing Our Broken Tax Code (Sept. 27, 2017), <https://www.treasury.gov/press-center/press-releases/Pages/sm0166.aspx> (click on link at bottom of page for one page overview) [hereinafter One Page Overview].

Credit,” and “Eliminate[] Loopholes for the Wealthy,” but keep tax incentives enjoyed by the middle class such as the “mortgage interest and charitable contribution deductions.”³⁴ It also stated that the Tax Cuts and Jobs Act would “Repeal[] the Death Tax and Alternative Minimum Tax (AMT).”³⁵ The one-page summary also stated that the Tax Cuts and Jobs Act would “Create[] a New Lower Tax Rate and Structure for Small Businesses,” would “create jobs and promote competitiveness,” would “lower[] the corporate tax rate,” would “Allow[] ‘Expensing’ of Capital Investments,” would reduce incentives to offshore jobs, and would “impos[e] a one-time, low tax rate on wealth . . . accumulated overseas so there is no tax incentive to keeping the money offshore.”³⁶

Ultimately, Republican leaders in both houses of Congress and economic leaders in the Trump White House were clear on the broad objectives of tax reform: they wanted to make the Code fairer, simplify taxation, and reduce taxation for all Americans, particularly for the middle class and small businesses.

B. Legislative History

In October 2017, the House of Representatives and the Senate agreed to a budget resolution for fiscal year 2018.³⁷ The House Concurrent Resolution “directed the House Committee on Ways and Means and the Senate Committee on Finance to [draft] legislation . . . that would increase the deficit by no more than \$1.5 trillion over [the next] ten years.”³⁸ The resolution started the budget reconciliation process, which expedited the legislative process in both houses of Congress, and, notably, limited debate in the Senate to twenty hours.³⁹ Thus, the legislation did “not require the

³⁴ *Id.* at 1.

³⁵ While there is no such federal tax known as “The Death Tax,” the Tax Cuts and Jobs Act ultimately did not repeal the federal estate tax. Similarly, the Tax Cuts and Jobs Act did not repeal the AMT.

³⁶ One Page Overview, *supra* note 33, at 1.

³⁷ H.R. Con. Res. 71, 115th Cong. (2017).

³⁸ SHERLOCK & MARPLES, *supra* note 4, at 1.

³⁹ *Id.*

support of [sixty] Senators to invoke cloture [in order] to avoid a filibuster [prior to] a final vote on the bill.”⁴⁰

Subsequently, both the House Committee on Ways and Means and the Senate Committee on Finance held mark-ups on the proposed tax reform.⁴¹ After each house passed its version of the bill, representatives of the two chambers met in conference and produced a conference report on December 15, 2017.⁴² The House voted in favor of the conference report by a vote of 227–203.⁴³ When the Senate considered the conference report, “points of order were sustained against certain language included in the conference report, and that language was subsequently stricken from the bill.”⁴⁴ On December 20, 2017, the Senate passed its amended version by a vote of 51–48.⁴⁵ On the same day, the House voted in favor of the legislation as passed by the Senate, in a vote of 224–201.⁴⁶ President Trump signed the legislation into law on December 22, 2017.⁴⁷

Ultimately, because Republicans did not have sixty votes in the Senate to end debate (i.e., to vote for cloture and end a filibuster),⁴⁸ the Republicans used budget reconciliation to pass the Tax Cuts and Jobs Act, a process that allowed them to pass the bill with a simple majority.⁴⁹ Nevertheless, because

⁴⁰ *Id.*

⁴¹ *Id.* at 1–2.

⁴² H.R. REP. NO. 115-466, at 1 (2017) (Conf. Rep.).

⁴³ *Final Vote Results for Roll Call 692*, OFF. OF THE CLERK U.S. HOUSE OF REPRESENTATIVES (Dec. 19, 2017), <http://clerk.house.gov/evs/2017/roll692.xml>.

⁴⁴ SHERLOCK & MARPLES, *supra* note 4, at 2–3 (showing that the language violated the Senate’s “Byrd Rule”). See generally BILL HENIFF JR., CONG. RESEARCH SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” (2016).

⁴⁵ Senate Roll Call Vote Number 323, U.S. SENATE (Dec. 20, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm?congress=115&session=1&vote=00323.

⁴⁶ *Final Vote Results for Roll Call 699*, OFF. OF THE CLERK U.S. HOUSE OF REPRESENTATIVES (Dec. 20, 2017), <http://clerk.house.gov/evs/2017/roll699.xml>.

⁴⁷ *E.g.*, SHERLOCK & MARPLES, *supra* note 4, at 3.

⁴⁸ See *Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm (last visited Nov. 2, 2018).

⁴⁹ See MEGAN S. LYNCH & JAMES V. SATURNO, CONG. RESEARCH SERV., R44058, THE BUDGET RECONCILIATION PROCESS: STAGES OF CONSIDERATION 6–8 (2017); see also Sarah Ferris, *Reconciliation Explained*, POLITICO: FIN. & TAX (Oct. 2, 2017, 5:00 AM), <https://www.politico.com/interactives/>

budget reconciliation was used, the drafters of the Tax Cuts and Jobs Act were forced to keep the total cost of the tax reform below \$1.5 trillion over the course of the next ten years.⁵⁰ As a result, many of the Tax Cuts and Jobs Act's provisions that reduce tax rates for individuals expire before January 1, 2026.⁵¹ The corporate tax cuts do not expire.⁵²

C. Implementation

As with any major legislation, particularly tax legislation, the federal government takes time to issue regulations that interpret various provisions of the new law.⁵³ However, in this situation, the Internal Revenue Service (IRS) was diligently monitoring the legislative process in order to immediately begin to implement the new law upon its enactment.⁵⁴

After the enactment of the Tax Cuts and Jobs Act, the IRS quickly adjusted its focus in order to issue guidance on the new legislation. As of the date of the drafting of this article, the IRS has largely relied on issuing notices, which do not go through the formal notice and comment process that a Treasury Regulation typically does, as a way to quickly issue guidance to taxpayers.⁵⁵ The IRS has already issued guidance on a number of provisions affected by the Tax Cuts and Jobs Act. For example, the IRS issued guidance

2017/what-is-reconciliation/ (“Budget reconciliation is very attractive because it allows passage of a bill in the Senate with just a **simple majority** of votes.”).

⁵⁰ Jasmine C. Lee & Sara Simon, *How Every Senator Voted on the Tax Bill*, N.Y. TIMES: POLITICS (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-senate-live-vote.html>.

⁵¹ *E.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a)–(b), 131 Stat. 2054, 2054–58 (2017) (codified at § 1(j)(1)).

⁵² *Id.* § 13001(a)–(b), 131 Stat. at 2096–98 (codified at § 11(b)).

⁵³ Howard Gleckman, *How Will Treasury Fill in the Blanks of the Tax Cuts and Jobs Act?*, FORBES: BELTWAY (Apr. 17, 2018, 11:15 AM), <https://www.forbes.com/sites/beltway/2018/04/17/how-will-treasury-fill-in-the-blanks-of-the-tax-cuts-and-jobs-act/#63ab20e2998d>.

⁵⁴ Press Release, Treasury Inspector Gen. for Tax Admin., Tax Cuts and Jobs Act: Assessment of Implementation Planning Efforts (Apr. 16, 2018), https://www.treasury.gov/tigta/press/press_tigta-2018-10.htm.

⁵⁵ Kristin Esposito & Amy Wang, *IRS Guidance Still Needed on Key Tax Reform Issues*, AICPA (June 27, 2018), <http://blog.aicpa.org/2018/06/irs-guidance-still-needed-on-key-tax-reform-issues.html#sthash.8ZSDejmr.dpbs>.

on the business expense deduction for meals and entertainment on October 3, 2018.⁵⁶ Furthermore, the IRS has issued guidance pertaining to individual taxpayers,⁵⁷ businesses,⁵⁸ exempt organizations,⁵⁹ new clean renewable energy bonds,⁶⁰ and payments made in exchange for state and local tax credits.⁶¹

Before the passage of the Tax Cuts and Jobs Act, the IRS had endured cuts to its budget and it was already understaffed.⁶² The time spent implementing the Tax Cuts and Jobs Act will further delay the IRS's previously planned regulatory efforts.⁶³ Indeed, the IRS estimates that implementing the changes produced by the Tax Cuts and Jobs Act will take several years, require \$397 million in additional funding, and necessitate the hiring of 1,734 full-time employees.⁶⁴

For example, the IRS issued the proposed Treasury Regulations for the new § 199A pass-through deduction, which allows certain taxpayers to take a deduction based on the income earned through the operation of a qualified business. The preamble to the regulations is twenty-three pages long and the

⁵⁶ I.R.S. Notice 2018-76, 2018-42 I.R.B. 599; Press Release, Internal Revenue Serv., IRS Issues Guidance on Tax Cuts and Jobs Act Changes on Business Expense Deductions for Meals, Entertainment (Oct. 3, 2018), <https://www.irs.gov/newsroom/irs-issues-guidance-on-tax-cuts-and-jobs-act-changes-on-business-expense-deductions-for-meals-entertainment>.

⁵⁷ I.R.S. Notice 2018-14, 2018-7 I.R.B. 353; I.R.S. Pub. No. 5307, Tax Reform Basics for Individuals and Families (2018).

⁵⁸ I.R.S. Notice 2018-18, 2018-12 I.R.B. 443; Press Release, Internal Revenue Serv., The Highlights of Tax Reform for Businesses (Oct. 26, 2018), <https://www.irs.gov/newsroom/the-highlights-of-tax-reform-for-businesses>; *IRS Tax Reform Guidance for 1120 Filers*, INTERNAL REVENUE SERV., <https://www.irs.gov/forms-pubs/tax-reform-guidance-for-1120-filers-09-apr-2018> (last updated Oct. 26, 2018).

⁵⁹ I.R.S. Notice 2018-67, 2018-36 I.R.B. 409; I.R.S. Notice 2018-55, 2018-26 I.R.B. 773.

⁶⁰ I.R.S. Notice 2018-15, 2018-9 I.R.B. 376.

⁶¹ I.R.S. Notice 2018-54, 2018-24 I.R.B. 750.

⁶² Patricia Cohen, *Have You Ever Felt Sorry for the I.R.S.? Now Might Be the Time*, N.Y. TIMES, Dec. 19, 2017, at A1.

⁶³ *Id.*

⁶⁴ TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2018-44-027, TAX CUTS AND JOBS ACT: ASSESSMENT OF IMPLEMENTATION PLANNING EFFORTS 4 (2018), <https://www.treasury.gov/tigta/auditreports/2018reports/201844027fr.pdf>.

proposed regulations as a whole are over fifty pages.⁶⁵ Moreover, this is only a proposed regulation. The IRS will likely receive a significant amount of comments from academics, practitioners, and policy groups concerning the IRS's interpretation of § 199A that might lengthen the regulations.

While § 199A is one of the most complex provisions of the Tax Cuts and Jobs Act, this is just one example of the level of resources that the IRS must now devote to promulgating new regulations. The regulations must provide clear guidance to taxpayers and foreclose potential areas of abuse. The IRS also cannot view a new provision, like § 199A, in a vacuum, but must carefully analyze its effect on other Code sections. The same analysis must be done for all other new or altered provisions of the Code.

As a whole, tax professionals—including tax attorneys and accountants— anxiously await additional regulations that implement the Tax Cuts and Jobs Act.

III. THE TAX CUTS AND JOBS ACT'S CHANGES TO THE CODE

The implementation of the Tax Cuts and Jobs Act varies from the stated expectations of those who authored and supported the bill. However, many of the stated goals of the Tax Cuts and Jobs Act have come to fruition. This Part III explores how various provisions of the Tax Cuts and Jobs Act amended the Code and how these changes affect individual taxpayers, tax incentives, the economy, and the IRS. Although this Part addresses major changes, it does not address all of the changes made by the Tax Cuts and Jobs Act.

A. Changes to the Taxation of Individuals

As with any piece of tax legislation, one of the key goals of the Tax Cuts and Jobs Act was to reduce the tax burden on individual taxpayers. Many incremental changes were made to the taxation of individuals. The individual income tax rates were lowered and the tax brackets were expanded, as shown in figure 1.

⁶⁵ Qualified Business Income Deduction, Prop. Treas. Reg. §§ 1.199A-1 to -6, 2018-35 I.R.B. 353.

Figure 1: Comparison of Old and New Income Tax Rates⁶⁶

Income Tax Rate		Income Levels for Those Filing As:	
2017	2018–2025	Single	Married-Joint
10%	10%	\$0-\$9,525	\$0-\$19,050
15%	12%	\$9,525-\$38,700	\$19,050-\$77,400
25%	22%	\$38,700-\$82,500	\$77,400-\$165,000
28%	24%	\$82,500-\$157,500	\$165,00-\$315,000
33%	32%	\$157,500-\$200,000	\$315,000-\$400,000
33%-35%	35%	\$200,000-\$500,000	\$400,000-\$600,000
39.6%	37%	\$500,000+	\$600,000+

The standard deduction was increased dramatically, from \$6,350 to \$12,000 for single filers and from \$12,700 to \$24,000 for married couples filing jointly,⁶⁷ and the personal exemption, which was previously \$4,050, was repealed.⁶⁸

In addition to the changes to tax rates and tax brackets, other provisions of the Tax Cuts and Jobs Act had an equally powerful impact on some taxpayers. For example, for separation agreements entered into after December 31, 2018, alimony is no longer deductible by the payor spouse and it is no longer income to the payee spouse.⁶⁹ Additionally, the child tax credit

⁶⁶ Kimberly Amadeo, *Trump's Tax Plan and How It Affects You*, BALANCE: U.S. ECON., <https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968> (last updated Oct. 25, 2018) (the table is found under the "Income Taxes" heading).

⁶⁷ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11021(a), 131 Stat. 2054, 2072 (2017) (codified at § 63(e)(7)(A)(ii)).

⁶⁸ *Id.* § 11041(a), 131 Stat. at 2082 (codified at § 151(d)(5)(A)).

⁶⁹ *Id.* § 11051(a), 131 Stat. at 2089 (repeal of § 215).

was increased and phase-out limits were raised significantly.⁷⁰ The taxes on a child’s investment and other unearned income, commonly referred to as the “Kiddie Tax Rules,” were overhauled to simplify the determination of tax.⁷¹ The AMT exemption amount and the threshold for triggering the phase-out of the exemption were increased, and both amounts are now adjusted annually for inflation.⁷² Fewer taxpayers will now owe additional taxes under the AMT rules.⁷³

With these changes, many Americans will experience reduced tax liabilities. However, other incremental changes might either further reduce tax liabilities or possibly counter some or all of the tax savings created by the Tax Cuts and Jobs Act.⁷⁴

B. Tax Deductions

While the Tax Cuts and Jobs Act reduced the marginal tax rates, there were also significant changes to deductions. Ultimately, changes to deductions have many implications—including the obvious impact on the total amount of tax paid by a taxpayer.

1. Changes to Itemized Deductions

Some of the most significant changes in the Tax Cuts and Jobs Act were the modifications to itemized deductions through 2025. There were five major changes to itemized deductions for individual income taxpayers. First, the deduction for state and local taxes is now capped at \$10,000 per year.⁷⁵ Second, the mortgage interest deduction was scaled back from a previous

⁷⁰ *Id.* § 11022(a), 131 Stat. at 2073–74 (codified at § 24(h)(2)–(3)).

⁷¹ *Id.* § 11001(a), 131 Stat. at 2054–55 (codified at § 1(j)(4)).

⁷² *Id.* § 12003(a), 131 Stat. at 2095–96 (codified at § 55(d)(4)(A)–(B)).

⁷³ FRANK SAMMARTINO ET AL., TAX POLICY CTR., THE EFFECT OF THE TCJA INDIVIDUAL INCOME TAX PROVISIONS ACROSS INCOME GROUPS AND ACROSS THE STATES 7–8 (2018), https://www.taxpolicycenter.org/sites/default/files/publication/154006/the_effect_of_the_tcja_individual_income_tax_provisions_across_income_groups_and_across_the_states.pdf.

⁷⁴ GALE ET AL., *supra* note 5, at 13.

⁷⁵ Tax Cuts and Jobs Act § 11042(a), 131 Stat. at 2085–86 (codified at § 164(b)(6)(B)).

principal cap of \$1,000,000 to \$750,000.⁷⁶ Third, interest on home equity loans is no longer deductible.⁷⁷ Fourth, casualty and theft losses were significantly curtailed.⁷⁸ Fifth, miscellaneous itemized deductions were repealed in their entirety.⁷⁹

The new \$10,000 cap on the state and local tax deduction was the biggest change to itemized deductions. Many state legislatures and commentators saw this as an attack on states with high taxes on the East and West Coasts.⁸⁰ Illustrative of the regional disagreement surrounding this provision, all but one of the twelve Republican House members who voted “Nay” on the Tax Cuts and Jobs Act were from California, New York, or New Jersey.⁸¹

The change in the cap on the deduction for mortgage interest was far less controversial. Only taxpayers financing home purchases in excess of \$750,000 are affected.⁸² States with a higher cost of living—which typically corresponds to higher rates of taxation—are disproportionately affected by the change in the mortgage interest deduction.⁸³

The interest paid on home equity loans or home equity lines of credit is no longer deductible.⁸⁴ The rationale for eliminating the deduction for interest on home equity loans is consistent with other existing policy. Home equity loans can be used to finance the purchase of anything—that is,

⁷⁶ *Id.* § 11043(a), 131 Stat. at 2086 (codified at § 163(h)(3)(F)(i)(II)).

⁷⁷ *Id.* (the formatting and punctuation is a result of drafting errors).

⁷⁸ *Id.* § 11044(a), 131 Stat. at 2087 (codified at § 165(h)(5)(A)–(B)).

⁷⁹ *Id.* § 11045(a), 131 Stat. at 2088 (codified at § 67(g)).

⁸⁰ Aaron Lorenzo, *Tax Bill Whacks Liberal Big Cities*, POLITICO (Dec. 19, 2017, 5:06 AM), <https://www.politico.com/story/2017/12/19/cities-republican-tax-bill-304123>.

⁸¹ Sarah Almukhtar et al., *How Each House Member Voted on the Tax Bill*, N.Y. TIMES: POLITICS, <https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-house-live-vote.html> (last visited Nov. 2, 2018).

⁸² See Tax Cuts and Jobs Act § 11043(a), 131 Stat. at 2086 (codified at § 163(h)(3)(F)(i)(II)).

⁸³ See Andrew Khouri, *Homeownership Will Get More Expensive for Some Californians Under the GOP Tax Bill*, L.A. TIMES: BUS. (Dec. 20, 2017, 3:00 AM), <http://www.latimes.com/business/la-fi-mortgage-interest-20171220-story.html>.

⁸⁴ Tax Cuts and Jobs Act § 11043(a), 131 Stat. at 2086 (codified at § 163(h)(3)(F)(i)(I)).

financing from home equity loans is not restricted to the purchasing of a home or paying for home improvements.⁸⁵ In contrast, mortgages are generally restricted to the purchase of a home, and mortgage interest continues to be deductible.⁸⁶ Thus, Congress continues to encourage homeownership through tax policy. A home equity loan is the same as financing a purchase with a credit card, except that the financing is secured by the home, which allows for lower interest rates.⁸⁷ Since credit card interest is not deductible, it follows then that the interest on a home equity loan should not be deductible either.

The casualty loss deduction was significantly curtailed.⁸⁸ The deduction is now limited to areas that are declared a disaster by the president.⁸⁹ Because of this, fewer taxpayers will be using this deduction. Accordingly, this may make administration of the deduction easier because the loss will be much easier to substantiate and for the IRS to review.

Lastly, all miscellaneous itemized deductions were repealed. Deductions for individual tax preparation fees, legal fees, and unreimbursed employee expenses are no longer deductible.⁹⁰ While appearing to be a rather modest change, some taxpayers will be severely harmed by this repeal. Plaintiffs who receive taxable court awards or settlement proceeds will not

⁸⁵ See, e.g., *What Is a Home Equity Loan?*, CONSUMER FIN. PROTECTION BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-a-home-equity-loan-en-106/> (last updated Sept. 25, 2017). The legislative history of the Tax Reform Act of 1986 shows while debt securing either a primary or secondary residence was intended to be deductible, consumer debt was not. H.R. REP. NO. 99-426, at 298 (1985) (“[A]ll nonbusiness interest is subject to the limitation on deductibility, including consumer interest . . . Nonbusiness interest subject to the limitation under the bill does not include interest on debt secured by the taxpayer’s principal residence . . . and interest on debt secured by the second residence of the taxpayer.”); S. REP. NO. 99-313, at 806 (1986) (“[C]onsumer interest is not deductible. Consumer interest generally includes all interest not incurred or continued in connection with the conduct of a trade or business . . . Interest on debt secured by the taxpayer’s principal residence and a second residence remains deductible as under present law. Thus, consumer interest includes, for example, interest on a loan to purchase an automobile for personal use . . .”).

⁸⁶ Tax Cuts and Jobs Act § 11043(a), 131 Stat. at 2086 (codified at § 163(h)(3)(F)(i)(II)).

⁸⁷ See *What Is a Home Equity Loan?*, *supra* note 85.

⁸⁸ See Tax Cuts and Jobs Act § 11044(a), 131 Stat. at 2087 (codified at § 165(h)(5)(A)–(B)).

⁸⁹ Presidential Determination, 44 C.F.R. § 206.38 (2018).

⁹⁰ See Tax Cuts and Jobs Act § 11045(a), 131 Stat. at 2088 (codified at § 67(g)).

be able to deduct their legal fees as a way to reduce their tax bills.⁹¹ In cases where plaintiffs engage their counsel on a contingency fee, the effects of this can be significant.

In one example, plaintiff Dewayne Johnson won a verdict of \$289 million against Monsanto.⁹² Of that verdict, \$39 million was nontaxable compensatory damages and the remaining amount of \$250 million was taxable punitive damages.⁹³ Because Johnson hired counsel on a contingent basis, his attorneys will receive a percentage of the settlement proceeds, likely around 40%.⁹⁴ Even though the plaintiff will never receive the full amount of his damages, he is taxed on the entirety of his award, whether it is a jury verdict or a settlement.⁹⁵ Before the Tax Cuts and Jobs Act, a plaintiff would have taken advantage of the itemized deduction for legal fees, subject to the limitation on miscellaneous itemized deductions.⁹⁶ Thus, because of the repeal of the miscellaneous itemized deduction, the plaintiff will receive a significantly reduced award.⁹⁷ He must pay taxes on the entire award, even the part that is paid to his counsel and that his counsel pay tax on themselves.⁹⁸

⁹¹ E.g., Robert W. Wood, *New Tax on Litigation Settlements, No Deduction for Legal Fees*, 158 TAX NOTES 1387, 1391 (2018).

⁹² Robert W. Wood, *How IRS Taxes Kill Plaintiff's \$289M Monsanto Weedkiller Verdict*, FORBES (Aug. 13, 2018, 8:59 AM), <https://www.forbes.com/sites/robertwood/2018/08/13/how-irs-taxes-kill-plaintiffs-289m-monsanto-weedkiller-verdict/#9e64792402ed>. Although this case is still illustrative of the potential impact on plaintiffs, it is notable the trial court reduced the punitive damages to \$39 million to match the other damages. *Groundskeeper Accepts Reduced \$78 Million Monsanto Verdict*, AP NEWS (Nov. 1, 2018), <https://www.apnews.com/a74de6fac839494e89746c574422c400>.

⁹³ Wood, *supra* note 92.

⁹⁴ *Id.*

⁹⁵ See Wood, *supra* note 91, at 1388, 1391; see also Wood, *supra* note 92.

⁹⁶ I.R.C. § 67.

⁹⁷ See Wood, *supra* note 91, at 1387–88; see also Wood, *supra* note 92.

⁹⁸ Wood, *supra* note 92; see Wood, *supra* note 91, at 1387, 1391.

2. Standard Deduction

As may be expected, due to the limitations on itemized deductions discussed above⁹⁹ and the increase in the standard deduction from \$6,350 to \$12,000 for single taxpayers and from \$12,700 to \$24,000 for married couples,¹⁰⁰ many more taxpayers will utilize the standard deduction. For example, in 2014, approximately 44 million of 148.6 million returns, or approximately 30% of all returns, were filed using itemized deductions instead of the standard deduction.¹⁰¹ As a result of the increase in the standard deduction and the limits placed on itemized deductions, some analysts expect that fewer than 8% of taxpayers will now itemize their deductions.¹⁰² If fewer taxpayers itemize their deductions, then the preparation of tax returns for many individual taxpayers will be less expensive and less time consuming.¹⁰³

3. Unintended Consequences

One unintended consequence of the changes to deductions—both in regard to the larger standard deduction and the elimination of many itemized deductions—is that the rate of charitable giving may decline.¹⁰⁴ “The Urban-Brookings Tax Policy Center estimates that, while only 26% of taxpayers itemized their deductions in 2017, those taxpayers were responsible for 82%

⁹⁹ See *supra* Part III.B.1.

¹⁰⁰ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11021(a), 131 Stat. 2054, 2072 (2017) (codified at § 63(c)(7)(A)(i)–(ii)).

¹⁰¹ Chenxi Lu, *Itemized Deductions: Tax Debate 2017*, TAX POLICY CTR. (Jan. 27, 2017), <https://www.taxpolicycenter.org/publications/itemized-deductions/full>.

¹⁰² Ryan Ellis, *Nine in Ten Will Claim the Standard Deduction Under Tax Reform According to New White House Study*, FORBES (Nov. 22, 2017, 2:56 PM), <https://www.forbes.com/sites/ryanellis/2017/11/22/nine-in-ten-will-claim-the-standard-deduction-under-tax-reform-according-to-new-white-house-study/#3b26df49172d>. See generally COUNCIL OF ECON. ADVISERS, EVALUATING THE ANTICIPATED EFFECTS OF CHANGES TO THE MORTGAGE INTEREST DEDUCTION 8 (2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Effects%20of%20Changes%20to%20the%20Mortgage%20Interest%20Deduction%20FINAL.pdf>.

¹⁰³ Geoff Williams, *With Trump's New Tax Plan, Will You Need a Tax Preparer?*, U.S. NEWS: TAXES (Jan. 30, 2018, 10:26 AM), <https://money.usnews.com/money/personal-finance/taxes/articles/with-trumps-new-tax-plan-will-you-need-a-tax-preparer>.

¹⁰⁴ David Trimmer & Karen A. Gries, *First Look at the Tax Cuts and Jobs Act: Impact on Exempt Organization Employers and Employees*, CPA J. (Apr. 2018), <https://www.cpajournal.com/2018/04/23/first-look-at-the-tax-cuts-and-jobs-act/>.

of [all] charitable giving.”¹⁰⁵ Thus, it is conceivable that if those taxpayers were motivated by the ability to itemize their deductions, there may be a reduction in charitable giving as the number of taxpayers who itemize their deductions drops significantly.¹⁰⁶

Similarly, there may be changes in the rates of home ownership and corresponding consequences for those employed in the real estate industry, as there may be fewer tax incentives for Americans to own their homes. Due to the increase in the standard deduction and the cap of \$750,000 on the mortgage interest deduction, fewer Americans will take advantage of the mortgage interest deduction.¹⁰⁷ However, as of this writing, broader impact on home prices and the housing market has yet to materialize.¹⁰⁸

C. Tax Changes for Businesses

Two key criticisms of the Tax Cuts and Jobs Act are that it is a tax cut primarily for corporations and that it has not done much to help regular Americans.¹⁰⁹

1. Corporate Tax Cut

The corporate tax rate was permanently cut from a graduated rate schedule with a top marginal rate of 35% to a flat 21% rate.¹¹⁰ This changed the corporate tax structure from a progressive tax to a flat tax.¹¹¹

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Ellis, *supra* note 102.

¹⁰⁸ See Svenja Gudell, *Housing Market Shows Few Ill Effects from Tax Reform*, FORBES (Aug. 31, 2018, 6:15 PM), <https://www.forbes.com/sites/zillow/2018/08/31/housing-market-showing-few-ill-effects-from-tax-reform/#3b28d7d112bc>; Jim Tankersley, *The Trump Tax Cuts Were Supposed to Depress Housing Prices. They Haven't*, N.Y. TIMES, Aug. 27, 2018, at B1.

¹⁰⁹ E.g., Paul Krugman, Opinion, *Stop Calling Trump a Populist*, N.Y. TIMES, Aug. 3, 2018, at A23 (“Start with tax policy, where Trump’s major legislative achievement is a tax cut that mainly benefits corporations—whose tax payments have fallen off a cliff—and has done nothing at all to raise wages.”).

¹¹⁰ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13001(a)–(b), 131 Stat. 2054, 2096–98 (2017) (codified at § 11(b)).

¹¹¹ See *id.* § 13001(a), 131 Stat. at 2096 (codified at § 11(b)).

2. Sole Proprietorship and Pass-Through Business Deduction

Because corporations received a significant permanent rate reduction, from 35% to 21%, Congress enacted a deduction for sole proprietors and owners of pass-through entities, like partnerships, that allows such taxpayers to deduct 20% of the income received from their sole proprietorship or pass-through entity.¹¹² There are, however, limitations and caps on the deduction.¹¹³ Furthermore, § 199A contains multiple formulas used to calculate the deduction, making this one of the most complex additions to the Code.¹¹⁴ The proposed regulations, as previously discussed, were even more complex and left many unanswered questions.¹¹⁵ Importantly, Congress selected “winners” and “losers” in drafting the § 199A deduction, which is at odds with Congress’ stated goal of making the tax code fair. For example, some business owners who provide services, such as attorneys, are not eligible to take full advantage of the deduction while others, such as engineers, can.¹¹⁶

D. Other Important Provisions

1. Estate & Gift Tax

While Republicans have consistently called for, and attempted to, repeal the federal estate and gift taxes, pejoratively labeled the “Death Tax,” those taxes were not repealed. However, the unified exemption amount for lifetime transfers was doubled,¹¹⁷ which will lead to an even smaller minority of

¹¹² Qualified Business Income Deduction, Prop. Treas. Reg. § 1.199A-1 to -6, 2018-35 I.R.B. 353, 354. Kelly Phillips Erb, *IRS Issues Proposed Regulations on Section 199A Deduction for Solos & Pass-Through Businesses*, FORBES, (Aug. 8, 2018, 2:23 PM), <https://www.forbes.com/sites/kellyphillips/2018/08/08/irs-issues-proposed-regulations-on-section-199a-deduction-for-solos--pass-through-businesses/#74e461e9755b>.

¹¹³ Erb, *supra* note 112.

¹¹⁴ *E.g.*, I.R.C. § 199A(a), (b)(1)–(3).

¹¹⁵ E-mail from Alan S. Gassman et al. to Steve Leimberg, Leimberg’s Information Services, Inc. (Aug. 13, 2018), available at http://www.leimbergservices.com/all/LISIGassmanShenkmanKetroneDenicoloCrottyPDF8_13_2018.pdf.

¹¹⁶ Peter J. Reilly, *Types of Work that Will Not Qualify for 20% Deduction—Some Devilish Details*, FORBES (Dec. 27, 2017, 8:02 PM), <https://www.forbes.com/sites/peterjreilly/2017/12/27/types-of-work-that-will-not-qualify-for-20-deduction-some-devilish-details/#56a58122cc4c>.

¹¹⁷ *Id.* § 11061(a), 131 Stat. at 2091 (codified at § 2010(c)(3)(C)).

taxpayers having to concern themselves with the gift and estate tax regime. This increase will allow the wealthiest Americans to transfer even more wealth to future generations without incurring any estate or gift tax.

2. International Corporate Taxation—Change to a Hybrid Territorial System of Taxation

Before passage of the Tax Cuts and Jobs Act, the United States taxed U.S. corporations on their worldwide income.¹¹⁸ The vast majority of other countries, however, use a territorial system, taxing only those corporate profits earned in the taxing country.¹¹⁹ The Tax Cuts and Jobs Act significantly changed the U.S. worldwide taxation system for corporations by changing the Code to become more like a territorial tax system.¹²⁰ The Tax Cuts and Jobs Act created a one-time “toll charge” on a U.S. corporation’s foreign deferred earnings, and it created a more territorial-style system with protections and antiabuse rules to avoid erosion of the U.S. tax base.¹²¹ One anticipated effect of the change to a more territorial system is that a U.S. corporation’s incentives to engage in corporate inversions are now gone.¹²²

3. Elimination of the Individual Mandate

One of the key provisions of the Affordable Care Act, also known as Obamacare, was the individual mandate.¹²³ Under § 5000A(a), most individuals were required to maintain health insurance coverage or pay a penalty for noncompliance. This provision is known as the individual mandate. Beginning in 2019, the Tax Cuts and Jobs Act reduces the tax penalty for noncompliance with the individual mandate to \$0.¹²⁴ Thus, the

¹¹⁸ Stuart Lyons, *International Tax Provisions of the Tax Cuts and Jobs Act*, BAKER NEWMAN NOYES (Jan. 18, 2018), https://www.bnnca.com/services/employee_benefit_plans/blog/international_tax_provisions_of_the_tax_cuts_and_jobs_act.

¹¹⁹ *Id.*

¹²⁰ Tax Cuts and Jobs Act § 14101(a), 131 Stat. at 2189 (codified at § 245A(a)); Lyons, *supra* note 118.

¹²¹ Lyons, *supra* note 118.

¹²² *Id.*

¹²³ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(b), 124 Stat. 119, 244–49 (2010).

¹²⁴ Tax Cuts and Jobs Act § 11081(a), 131 Stat. at 2092 (codified at § 5000A(c)(3)(A)).

Tax Cuts and Jobs Act effectively eliminates this provision from the Affordable Care Act because there will be no incentive for individuals to comply.

IV. ANALYSIS

Many commentators have focused on the actual language of the Tax Cuts and Jobs Act and in so doing have focused on the policy decisions made in the new legislation. This Part IV, however, analyzes whether or not Congress was successful in meeting its three primary goals and some of its other stated goals for the Tax Cuts and Jobs Act. Specifically, this Part analyzes whether Congress was successful in making the Code fairer and simpler and in reducing taxes on individuals and businesses. This Part also considers Congress's stated goals that were more nuanced, as discussed above in Part II.A.

A. Fairness

It is difficult to analyze whether Congress achieved its goal of greater fairness in the Code through the Tax Cuts and Jobs Act. Fairness is inherently subjective and cannot be tangibly measured. What may be considered fair to one person, say a flatter income tax system, may be considered unfair to another person, such as a person who expects society's most well-off to pay their fair share of the government's tax burden.¹²⁵ Thus, previously held notions regarding fairness will skew any analysis that seeks to assess Congress's attempt to make the tax system fairer. Therefore, the authors base the analysis of fairness on the statements discussed above,¹²⁶ and the authors also attempt to measure Congress's actions from other perspectives.

In a statement preceding the enactment of the Tax Cuts and Jobs Act, in the jointly presented document entitled "Unified Framework for Fixing Our Broken Tax Code,"¹²⁷ the framers of the legislation stated that "closing

¹²⁵ Jared Bernstein, *The Elusive Goal of Tax Fairness*, WASH. POST: POST EVERYTHING (Oct. 26, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/26/the-elusive-goal-of-tax-fairness/>.

¹²⁶ See *supra* Part II.A.

¹²⁷ Unified Framework, *supra* note 27.

special interest tax breaks and loopholes” would “provid[e] greater fairness for all Americans.”¹²⁸ Using this statement as the measure of fairness—reducing the number of itemized deductions, or at least reducing the number of itemized deductions taken—it appears as though Congress was successful in making the Code fairer. First, it is expected that approximately 92% of all taxpayers will utilize the new, larger standard deduction.¹²⁹ By definition, when the standard deduction is used, tax “loopholes” (i.e., itemized deductions) are not utilized.

However, approximately 8% of taxpayers will still elect to itemize, albeit with fewer itemized deductions to choose from.¹³⁰ The 8% of taxpayers who continue to itemize will most likely be among the wealthiest Americans.¹³¹

It is also notable that even though the number of tax deductions decreased, the total number of tax expenditures—that is, the various “loopholes, deductions, exemptions, credits, and preferential rates”—actually increased.¹³² “Prior to [the] enactment of the Tax Cuts and Jobs Act there were 216 tax expenditures.”¹³³ After the enactment of the Tax Cuts and Jobs Act, the number increased to 223 tax expenditures.¹³⁴

Furthermore, the impact of the Tax Cuts and Jobs Act is not fairly distributed throughout the fifty states. “The impact of the [Tax Cuts and Jobs Act] across states will differ depending on the economic and demographic characteristics of state populations as well as state-specific characteristics that may affect ultimate income tax liability. Average federal income taxes

¹²⁸ *Id.* at 3.

¹²⁹ Ellis, *supra* note 102.

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Last Year’s Tax Law Did Not Simplify the System—It Added More Tax Breaks*, PETER G. PETERSON FOUND.: BLOG (Aug. 13, 2018), <https://www.pgpf.org/blog/2018/08/last-years-tax-law-did-not-simplify-the-system-it-added-more-tax-breaks> [hereinafter *Tax Law Did Not Simplify the System*].

¹³³ *Id.* (citing STAFF OF THE JOINT COMM. ON TAXATION, JCX-3-17, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016–2020 (Comm. Print 2017)).

¹³⁴ *Id.* (citing STAFF OF THE JOINT COMM. ON TAXATION, JCX-34-18, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2017–2021 (Comm. Print 2018)).

will decline in all states, but by varying amounts.”¹³⁵ While the Tax Cuts and Jobs Act may reduce the number of taxpayers who itemize by increasing the standard deduction and limiting itemized deductions, the alterations made to the deduction for the state and local taxes may lead many to believe that the Tax Cuts and Jobs Act unfairly, and disproportionately, targeted taxpayers in Democratic-leaning states. As detailed by the Urban-Brookings Tax Policy Center, there are more people in Democratic-leaning states who will pay more income tax following implementation of the Tax Cuts and Jobs Act than there are in Republican-leaning states.¹³⁶

The percentage of taxpayers with a tax increase from the major individual provisions will range from less than 4 percent in six states (Alaska, Indiana, North Dakota, South Dakota, West Virginia, and Wyoming) and more than 8 percent in six states (California, Connecticut, District of Columbia, Maryland, New Jersey, and New York), with tax increases for more than 9 percent of taxpayers in Maryland, New Jersey and the District of Columbia.¹³⁷

Much of the difference in how the Tax Cuts and Jobs Act affects taxpayers across state lines has to do with the state and local tax deduction.¹³⁸

There is more variation in the size of the tax cuts across states for taxpayers in specific income groups than in the overall state averages. Some of this reflects differences in the way people earn income (for example larger tax cuts where more people can take the new deduction for business income), and some of this reflects differences in family composition (and thus the trade-off between the loss of dependent exemption and the increase in the [child tax credit]). Much of the difference across states, however, results from the limit on the state and local tax (SALT) deduction.

The [Tax Cuts and Jobs Act] capped the annual itemized deduction for state and local taxes at \$10,000. Under prior law, taxpayers could deduct the full amount of their state and local property taxes and either income or sales taxes if they itemized their deductions¹³⁹

¹³⁵ SAMMARTINO ET AL., *supra* note 73, at 5.

¹³⁶ *See id.* at 6.

¹³⁷ *Id.* (citation omitted).

¹³⁸ As discussed *supra* Part III.B.1, it is notable that all but one of the Republican dissenters in the final passage of the Tax Cuts and Jobs Act were from California, New Jersey, or New York, which were disproportionately hurt by the cap on the state and local tax deduction. *Tax Reform Has Passed. What Now?*, *supra* note 6.

¹³⁹ SAMMARTINO ET AL., *supra* note 73, at 7.

In addition to the differences in how the Tax Cuts and Jobs Act treats taxpayers differently based on where they live, there are also differences based on how much money people make. Not all taxpayers receive comparable tax cuts. Some may view this as unfair.

While all income groups will have reduced federal tax burdens, estimates show that “higher income households [will] receive larger average tax cuts as a percentage of [their] after-tax income, with the largest cuts . . . going to taxpayers in the 95th to 99th percentiles of the income distribution.”¹⁴⁰ Specifically, the changes in percentage points to the average federal tax rate, defined to “include[] individual and corporate income tax, payroll taxes for Social Security and Medicare, the estate tax, and excise taxes[,] as a percentage of average expanded cash income” favors the top income quintile.¹⁴¹ The lowest quintile sees a reduction of 0.4%, the second quintile sees a reduction of 1.1%, the middle quintile sees a reduction of 1.4%, the fourth quintile sees a reduction of 1.6%, and the top quintile sees a reduction of 2.2%.¹⁴² Overall, the reduction is 1.8%.¹⁴³ It is also notable that approximately 5% of taxpayers will be paying *more* tax following the enactment of the Tax Cuts and Jobs Act.¹⁴⁴

Given that many of the benefits of the Tax Cuts and Jobs Act are enjoyed by the wealthiest Americans, business owners in particular, it is debatable whether the changes enacted by the Tax Cuts and Jobs Act actually made the Code fairer. For example, the new § 199A—the much-discussed “special 20-percent individual income tax deduction for owners of pass-through businesses”—“disproportionately benefit[s] the wealthy.”¹⁴⁵ “The Joint Committee on Taxation projected that half the benefits of the provisions

¹⁴⁰ TAX POLICY CTR., DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT 1 (2017), https://www.taxpolicycenter.org/sites/default/files/publication/150816/2001641_distributonal_analysis_of_the_conference_agreement_for_the_tax_cuts_and_jobs_act_0.pdf.

¹⁴¹ *Id.* at 3 tbl.1 n.(c).

¹⁴² *Id.* At 3 tbl.1.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1, 2, 6.

¹⁴⁵ Steven M. Rosenthal, *Treasury’s New Pass-Through Rules Double Down on the Deduction’s Regressivity*, TAX POLICY CTR.: TAXVOX (Aug. 14, 2018), <https://www.taxpolicycenter.org/taxvox/treasurys-new-pass-through-rules-double-down-deductions-regressivity>.

would go to millionaires and only a small fraction would help taxpayers making less than \$200,000.”¹⁴⁶ The regulations promulgated by the Treasury Department exacerbate the policy outcome that only the wealthiest are able to take advantage of § 199A’s benefits. Under the language of the Tax Cuts and Jobs Act, and despite possible negative ramifications such as the loss of various benefits, many workers could potentially shift their status from employee to independent contractor for tax benefits.¹⁴⁷ But, under the promulgated regulations, the Treasury Department stated that if an employee were classified as an employee prior to passage of the Tax Cuts and Jobs Act, he or she would be presumed to remain an employee.¹⁴⁸

In addition to arguments about whether the Tax Cuts and Jobs Act is fair to different types of Americans in today’s economy, fairness can also be measured by how legislation treats today’s taxpayers versus future generations. There are arguments that the Tax Cuts and Jobs Act is fiscally irresponsible because it is projected to “reduce federal revenue by \$1,456[] billion between FY2018 and FY2027.”¹⁴⁹ According to the Joint Committee on Taxation, the Tax Cuts and Jobs Act is expected to reduce federal revenue from individuals by \$1,126.6 billion over this ten-year period.¹⁵⁰ Likewise, it is expected to reduce federal revenue from businesses, excluding those taxed under the individual income tax system, by \$653.8 billion over that ten-year period.¹⁵¹ Notably, the Tax Cuts and Jobs Act is expected to increase revenue from international transactions by \$324.4 billion over the same period, and revenues would increase in 2027 as various provisions expire.¹⁵² When taken as a whole, these reductions in revenue are effectively pushing today’s spending to future generations of Americans.¹⁵³ This may not be fair.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ SHERLOCK & MARPLES, *supra* note 4, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ It is important to note that the amount of projected revenue reduction caused by the Tax Cuts and Jobs Act depends on the accounting method used. *See* GRANT THORNTON, BREAKING DOWN THE GOP TAX REFORM BILL 6, 13 (2018), <https://www.grantthornton.com/-/media/content-page-files/tax/>

Finally, however, in using a neutral source for a definition, Merriam-Webster defines “fair” as “marked by impartiality and honesty: free from self-interest, prejudice, or favoritism.”¹⁵⁴ In using this dictionary definition of “fair,” it is possible to deem the Tax Cuts and Jobs Act a success in meeting Congress’s goal, considering that the reduction of itemized deductions—or, more precisely, the number of taxpayers relying on itemized deductions—reduces “self-interest, prejudice and favoritism” from the Code. But the legislation may not be “fair” using the same criteria, considering the fact that the number of tax expenditures increased from 216 to 223 under the Tax Cuts and Jobs Act.¹⁵⁵

Thus, when considering all of the impacts of the legislation on various constituencies, and when considering various ways of determining “fairness,” Congress has a mixed record on whether or not it was successful in making the Code fairer.

B. Simplicity

In many respects, Congress was successful in simplifying the Code as it pertains to the vast majority of American taxpayers. However, Congress was also unsuccessful in its goal of simplifying the Code as a whole. The Tax Cuts and Jobs Act added complexity to the Code,¹⁵⁶ and it also added additional tax expenditures to the Code.¹⁵⁷

While the Code remains enormously complex, Congress was successful in making taxation simpler because the act of paying taxes, for the vast majority of Americans, will be simpler. Taxation is simpler primarily because of the changes to the standard deduction and to itemized deductions, which collectively means that significantly fewer taxpayers will elect to

pdfs/Breaking-down-tax-reform-bill.ashx. Some estimates limit the revenue reduction to “only” \$1 trillion. *Tax Reform Has Passed. What Now?*, *supra* note 6. Notably, Senator Bob Corker, a Republican from Tennessee, voted against an earlier version of the Tax Cuts and Jobs Act because of concerns relating to increasing the size of the national debt. *Id.*

¹⁵⁴ *Fair*, MERRIAM-WEBSTER’S DICTIONARY AND THESAURUS 298 (14th prtg. 2014).

¹⁵⁵ *Tax Law Did Not Simplify the System*, *supra* note 132.

¹⁵⁶ *See supra* Part III.

¹⁵⁷ *Tax Law Did Not Simplify the System*, *supra* note 132.

itemize their deductions.¹⁵⁸ Illustrative of the change, the IRS, in applying the Tax Cuts and Jobs Act to the actual collection of taxes, has published a new version of the standard Form 1040 income tax return. The draft form is smaller than in years past, but it is not necessarily simpler.¹⁵⁹ In its comments to the draft Form 1040 released by the IRS, the Tax Section of the American Bar Association noted that the font size on the draft Form 1040 has been decreased by one point size from the 2017 Form 1040 and that there is a lack of visual breaks which makes the form difficult to navigate.¹⁶⁰

The Tax Cuts and Jobs Act fails to simplify the Code, and in fact complicates it, in many important ways. First, as noted above,¹⁶¹ the Tax Cuts and Jobs Act actually increased the number of tax expenditures from 216 to 223.¹⁶² The additional tax expenditures created by the Act increased the overall complexity of the Code, even if fewer individual taxpayers try to take advantage of *any* itemized deduction or other type of tax expenditure.

Furthermore, the Tax Cuts and Jobs Act clearly added complexity to the Code as it pertains to international tax.¹⁶³ There is newly added complexity because of the § 199A deduction. Section 199A is complex, with the Code section itself taking up nine pages, the regulation taking up another fifty-two, and the preamble to the regulations taking up an additional twenty-three pages.¹⁶⁴ Section 199A will also cause many businesses to work with accountants and tax lawyers to ensure that the greatest possible cost savings are achieved. Moreover, there are still many remaining uncertainties as to

¹⁵⁸ E.g., *Tax Reform Has Passed. What Now?*, *supra* note 6 (stating that the Tax Cuts and Jobs Act “boosts the standard deduction (the amount that can be earned before paying tax regardless of behavior). That means fewer Americans will choose to itemise [sic] their deductions (ie [sic], add up those to which they are entitled). Less use of deductions means fewer economic distortions.”).

¹⁵⁹ Jim Tankersley, *The New Tax Form Is Postcard-Size, But More Complicated than Ever*, N.Y. TIMES, June 25, 2018, at B3.

¹⁶⁰ Section on Taxation, American Bar Association, Comment Letter on Guidance Regarding Draft 2018 Form 1040 and Related Schedules, at 3 (Oct. 2, 2018), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/100218comments.pdf>.

¹⁶¹ See *supra* Part IV.A.

¹⁶² *Tax Law Did Not Simplify the System*, *supra* note 132.

¹⁶³ See *supra* Parts III.C.2, III.D.2.

¹⁶⁴ I.R.C. § 199A; Qualified Business Income Deduction, Prop. Treas. Reg. §§ 1.199A-1 to -6, 2018-35 I.R.B. 353.

how the pass-through tax provisions of the Tax Cuts and Jobs Act will be applied.¹⁶⁵

Similarly, the Tax Cuts and Jobs Act reduces simplicity in tax planning because it creates uncertainty for future years. Many of the Tax Cuts and Jobs Act's provisions expire in less than ten years. For example, many of the tax rate reductions for individuals expire before January 1, 2026.¹⁶⁶

[T]rouble lurks in the years to come. Nearly all of the law's tax changes for individuals—including a nearly doubled standard deduction and the \$10,000 cap on state and local tax deductions that has outraged blue-state legislators—are set to expire at the end of 2025, and so are some major provisions for businesses.¹⁶⁷

As a whole, the Tax Cuts and Jobs Act makes paying taxes simpler for the vast majority of taxpayers because these taxpayers are likely to utilize the standard deduction. However, the Tax Cuts and Jobs Act also makes the Code, as a whole, more complex. So, Congress was both successful and unsuccessful in meeting its goal of simplifying the tax system.

C. Tax Cuts

One of Congress's main priorities in the Tax Cuts and Jobs Act was to cut taxes, which should be obvious from the title of the legislation. Out of Congress's three goals discussed and analyzed by this article, Congress was the most successful in achieving its goal of reducing tax liabilities. Unlike the analyses of whether or not the legislation was fair or whether the legislation made the Code simpler, the analysis of tax cuts must focus on how the tax cuts vary across the socioeconomic spectrum, geography, and how income is earned.

¹⁶⁵ See Qualified Business Income Deduction, 2018-35 I.R.B. 353, 362, 364, 369, 371 (the portions of the preamble that discuss facts and circumstances testing in various contexts); *id.* Prop. Treas. Reg. § 1.199A-3(b)(5), 2018-35 I.R.B. at 394; *id.* § 1.199A-4(b)(1)(v), -4(c)(1), 2018-35 I.R.B. at 395; *id.* § 1.199A-5(b)(2)(vii), -5(b)(2)(xii), 2018-35 I.R.B. at 398, 399.

¹⁶⁶ *E.g.*, Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a)–(b), 131 Stat. 2054, 2054–58 (2017) (codified at § 1(j)(1)).

¹⁶⁷ Jim Tankersley, *Washington's Fight over Taxes Is Only Beginning*, N.Y. TIMES (Feb. 23, 2018), <https://www.nytimes.com/2018/02/23/business/washingtons-fight-over-taxes-is-only-beginning.html>.

It is worth noting that, as discussed above,¹⁶⁸ some taxpayers will have an increased tax liability from the Tax Cuts and Jobs Act, but those instances are not the norm.¹⁶⁹ In many cases, any increase in tax liability is directly tied to how the amendments to the Code treat people differently based on their geographic locations.

As described above,¹⁷⁰ the Tax Cuts and Jobs Act plainly cut tax rates. For individual taxpayers, tax rates were slashed across the board and tax brackets were expanded.¹⁷¹ Furthermore, many Americans are likely to pay less in federal income tax because of the dramatic increases to the standard deduction for both single filers (i.e., from \$6,350 to \$12,000) and for married couples (i.e., from \$12,700 to \$24,000).¹⁷²

Nevertheless, there are variances in how successful Congress was in cutting taxes for all Americans. The top quintile of earners fared much better than the middle or bottom quintiles. Estimates show that:

[I]n 2018, just under 65 percent of taxpayers will receive a tax cut from the included individual income tax provisions—averaging about \$2,200—and about 6 percent will see an average tax increase of about \$2,800. In the bottom income-quintile, 27 percent will receive a tax cut and about 1 percent will have a tax increase, with the rest having no material change in their income tax. In the middle income-quintile, 82 percent will receive a tax cut and 9 percent will have a tax increase. In the top income-quintile, 90 percent will receive a tax cut and 10 percent will have a tax increase.¹⁷³

All in all, as discussed above,¹⁷⁴ variances in the success of the tax cuts largely depend on geography and on how individuals earn their income.

Nevertheless, Congress was successful in reducing tax liabilities for businesses of different kinds.¹⁷⁵ First, the corporate tax rate was reduced from

¹⁶⁸ See *supra* Part IV.A.

¹⁶⁹ SAMMARTINO ET AL., *supra* note 73, at 3.

¹⁷⁰ See *supra* Part III.A.

¹⁷¹ Tax Cuts and Jobs Act § 11001(a), 131 Stat. at 2054–55 (codified at § 1(j)(4)).

¹⁷² *Id.* § 11021(a), 131 Stat. at 2072 (codified at § 63(c)(7)(A)(i)–(ii)).

¹⁷³ SAMMARTINO ET AL., *supra* note 73, at 3 (citation omitted).

¹⁷⁴ See *supra* Part IV.A.

¹⁷⁵ However, in the rare instance that a taxpayer is a C corporation that earns a consistent profit of \$50,000 or less during each year, the flattening of the corporate tax rate would actually increase the taxes

35% to 21%.¹⁷⁶ Congress also reduced tax liabilities for pass-through entities in Code § 199A. This deduction is intended to help pass-through businesses compete with incorporated businesses.¹⁷⁷

Taken collectively, the amendments to the Code that reduce tax rates for individuals and businesses show that Congress successfully cut taxes.

D. Effects on Other Tax Policy Goals

While this article has discussed whether or not Congress was successful in meeting its three main policy goals through the Tax Cuts and Jobs Act, it is also worthwhile to examine whether Congress successfully achieved other policy goals.

1. Additional Money for American Workers

One of the primary reasons for the Tax Cuts and Jobs Act was to put money into the pockets of American taxpayers.¹⁷⁸ Obviously, one way to do this was to reduce the tax burdens of taxpayers, which, as discussed above,¹⁷⁹ has a mixed record depending on socioeconomic status and on geography. Another way to meet this goal is for employers to increase compensation, which many commentators expect because corporations are receiving additional savings from the Tax Cuts and Jobs Act.

on the taxpayer due to the elimination of the lower rates in the formerly graduated corporate income tax rate schedule. I.R.C. § 11 (2017). Even so, there are tax planning opportunities to make sure this result does not occur.

¹⁷⁶ Tax Cuts and Jobs Act § 13001(a), 131 Stat. at 2096 (codified at § 11(b)).

¹⁷⁷ It is notable, however, that at the time of the drafting of this article the proposed regulations under § 199A are seen as being unfriendly to individual taxpayers and small- and medium-sized businesses. Conversely, the regulations are seen as benefiting C corporations, real estate investment trusts, and publicly traded partnerships. *E.g.*, E-mail from Alan S. Gassman et al. to Steve Leimberg, *supra* note 115, at 1.

¹⁷⁸ Unified Framework, *supra* note 27, at 2 (quoting a statement that President Trump made to the *Milwaukee Journal Sentinel* on Sept. 3, 2017).

¹⁷⁹ See *supra* Part IV.C.

Many corporations announced that they would pay bonuses to workers due to the cost savings of the Tax Cuts and Jobs Act.¹⁸⁰ According to the House Republican Conference, more than five hundred companies have provided bonuses to workers as a direct result of the Tax Cuts and Jobs Act.¹⁸¹ Similarly, the Trump administration and Republican congressional leaders¹⁸² have consistently flaunted raises and bonuses for workers by large corporations, such as Wal-Mart,¹⁸³ as a result of the act's corporate tax cuts.¹⁸⁴ However, the claim that American workers' wages will significantly increase as a result of the corporate tax cut is uncertain at best.¹⁸⁵ It is too early to have enough data to make a conclusion regarding this claim.¹⁸⁶ Historically, corporate tax cuts have not brought about a significant increase in workers' wages.¹⁸⁷ While there is not enough data to definitively determine whether the Tax Cuts and Jobs Act will result in an increase in workers' wages, historical evidence indicates it will not.¹⁸⁸ In this regard, the corporate

¹⁸⁰ *Tax Reform Is Already Helping Everyday Americans*, HOUSE REPUBLICANS (Jan. 5, 2018), <https://www.gop.gov/tax-reform-already-helping/>.

¹⁸¹ *Id.*

¹⁸² *Workers Are Getting a Raise in the Wake Tax Cuts and Jobs Act*, GOP (Feb. 14, 2018), <https://gop.com/workers-are-getting-a-raise-in-the-wake-tax-cuts-and-jobs-act-rsr/>.

¹⁸³ Harry J. Holzer, *Walmart Has 4 Reasons to Raise Wages but the New Tax Cuts Ain't One*, FORTUNE: COMMENT. (Jan. 11, 2018), <http://fortune.com/2018/01/11/walmart-minimum-starting-wages-raises-bonuses/>; Lauren Thomas & Courtney Reagan, *Walmart to Raise Its Starting Wage to \$11, Give Some Employees Bonuses Following Tax Bill Passage*, CNBC (Jan. 11, 2018, 7:59 AM), <https://www.cnn.com/2018/01/11/walmart-to-boost-starting-wage-give-employees-bonus-after-tax-bill.html> (noting that the wage increases may have less to do with the corporate tax cut and more to do with minimum wage increases and labor shortages).

¹⁸⁴ Kevin Hassett, Opinion, *The Wages of Tax Reform Are Going to America's Workers*, WALL ST. J. (Apr. 17, 2018, 6:51 PM), <https://www.wsj.com/articles/the-wages-of-tax-reform-are-going-to-americas-workers-1524005516>.

¹⁸⁵ Josh Biven & Hunter Blair, *The Likely Economic Effects of the Tax Cuts and Jobs Act (TCJA)*, ECON. POLICY INST. (June 1, 2018), <https://www.epi.org/publication/the-likely-economic-effects-of-the-tax-cuts-and-jobs-act-tcja-higher-incomes-for-the-top-no-discernible-effect-on-wage-growth-for-typical-american-workers/>; Mark Whitehouse, Opinion, *Tax Cuts Still Don't Seem to Be Helping Workers*, BLOOMBERG (May 4, 2018, 11:50 AM), <https://www.bloomberg.com/view/articles/2018-05-04/trump-s-tax-cuts-still-don-t-seem-to-be-helping-u-s-workers>.

¹⁸⁶ Biven & Blair, *supra* note 185.

¹⁸⁷ *Id.*

¹⁸⁸ Whitehouse, *supra* note 185.

tax cut will likely fail in Congress's goal of "put[ting] more money into the pockets of [American taxpayers]."¹⁸⁹

It is apparent that the majority of the tax benefits from the Tax Cuts and Jobs Act are going to the wealthiest Americans. As discussed above,¹⁹⁰ the top quintile saw a 2.2% tax reduction while the bottom quintile only saw a 0.4% reduction.¹⁹¹ Furthermore, it is apparent that the main beneficiaries of reduced corporate and business taxes were, in many instances, shareholders.¹⁹² Stock buybacks could reach over \$1 trillion by the end of 2018.¹⁹³ For example, one of the largest beneficiaries of the Tax Cuts and Jobs Act—Apple, Inc.—has dramatically increased its buying back of company stock, with the purchase of \$43.5 billion of its own stock through the first two quarters of 2018, "the most on record for a six-month period."¹⁹⁴

2. Economic Impact

Another key goal of the Tax Cuts and Jobs Act was that it would help to grow the economy, and thereby create jobs.¹⁹⁵ The Tax Cuts and Jobs Act will likely add fiscal stimulus to the economy, but, it will not stimulate the economy by as much as what the drafters of the legislation may have anticipated.¹⁹⁶

The [Tax Cuts and Jobs Act] doles out a fiscal stimulus of about 0.7% of GDP in 2018 and 1.4% of GDP in 2019. This should boost growth a little, but it will probably also quicken the pace at which the Federal Reserve raises interest rates

¹⁸⁹ Unified Framework, *supra* note 27, at 2 (quoting a statement that President Trump made to the *Milwaukee Journal Sentinel* on Sept. 3, 2017).

¹⁹⁰ See *supra* Part IV.A.

¹⁹¹ TAX POLICY CTR., *supra* note 140, at 3.

¹⁹² Jamie Condliffe, *The Stock Market's Next \$1 Trillion Milestone: Buybacks*, N.Y. TIMES: DEALBOOK BUS. & POL'Y (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/business/dealbook/the-stock-markets-next-1-trillion-milestone-buybacks.html>.

¹⁹³ *Id.* ("Corporate boards have authorized the repurchase of \$754 billion of stock so far this year, up 80 percent from the same period last year, according to a Goldman Sachs report. And that figure could reach a record \$1 trillion by the end of the year.")

¹⁹⁴ *Id.*

¹⁹⁵ Unified Framework, *supra* note 27, at 3.

¹⁹⁶ *Tax Reform Has Passed. What Now?*, *supra* note 6.

to stop the economy from overheating. The Fed's model says that deficit-financed tax cuts worth 1% of GDP eventually raise interest rates by 0.4 percentage points.¹⁹⁷

Thus, the Tax Cuts and Jobs Act will provide an economic boost, but one that may prove to be fleeting. However, for the time being, the stock market continues at record levels, which some commentators attribute to the Tax Cuts and Jobs Act.¹⁹⁸

3. Benefits to the Internal Revenue Service

Considering the various amendments to the Code and, in particular, the amendments that will impact how taxpayers pay and file their taxes, it is likely that the IRS will benefit from the amendments. With approximately twenty-five million more taxpayers taking the standard deduction,¹⁹⁹ the IRS should save a considerable amount of time and energy processing and auditing these taxpayers' returns. The repeal of personal exemptions should also avoid a recurring audit issue.²⁰⁰

4. Tax Incentives Versus Market Incentives

One broad theme throughout the Tax Cuts and Jobs Act, whether through simplification or through increasing fairness, was to reduce the number of incentives created through the Code at the expense of incentives created through market forces. As discussed above,²⁰¹ the vast majority of taxpayers will not need to concern themselves with peculiar rules concerning itemized deductions. These taxpayers will take advantage of the larger standard deduction, and thus allow market forces and other organic economic forces such as altruism to affect their financial decisions. Similarly, it is notable that the Tax Cuts and Jobs Act favors market forces over tax forces in health care decisions, given the effective elimination of the individual

¹⁹⁷ *Id.*

¹⁹⁸ *E.g.*, Ed Yardeini, *Trump's Tax Cuts Are Shifting This Powerful Stock Market into Overdrive*, MARKETWATCH (July 26, 2018, 1:20 PM), <https://www.marketwatch.com/story/trumps-tax-cuts-are-kicking-a-roaring-economy-into-overdrive-2018-07-26>.

¹⁹⁹ Ellis, *supra* note 102; *see* Lu, *supra* note 101.

²⁰⁰ *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11041(a), 131 Stat. 2054, 2082 (2017) (codified at § 151(d)(5)(A)).

²⁰¹ *See supra* Part III.B.2.

mandate from the Affordable Care Act.²⁰² As a result, health insurance consumers will not consider tax consequences when deciding whether or not to purchase health insurance.²⁰³ Simply put, market incentives, and not tax incentives, will drive a larger portion of taxpayer behavior as a result of the Tax Cuts and Jobs Act.

Nevertheless, tax incentives will continue to be a strong determinant for some of the wealthiest of Americans in terms of what they do to reduce their tax liabilities. Similarly, the amendments contained in the Tax Cuts and Jobs Act, particularly the roughly equivalent tax rates between pass-through entities and corporations, will impact business decisions such as whether to incorporate or setup a pass-through entity such as a limited liability company, an S corporation, or a partnership. Furthermore, the changes to the Code will impact business decisions regarding international commerce.

Thus, while the Tax Cuts and Jobs Act may have reduced the impact of tax policy on business decisions in favor of market forces, tax considerations will continue to play a role in many important business decisions.

V. CONCLUSION

The Tax Cuts and Jobs Act is a broad and sweeping amendment of the Code. The amendments contained in the bill affect hundreds of millions of Americans, their businesses, their relationship to the rest of the world, and the overall economy.

From the outset of the drafting of the bill, congressional leaders and Trump administration officials identified key policy goals for the Tax Cuts and Jobs Act. These policy priorities included simplifying the Code, making the Code fairer, and reducing tax liabilities for all Americans. There were also other policy goals that were not at the forefront. Ultimately, Congress had some success and some failure in achieving its stated objectives. While there are many fair criticisms of the Tax Cuts and Jobs Act concerning both fairness and simplicity, the way that the Tax Cuts and Jobs Act was written ensures that many more Americans will find it easier to pay their taxes, and fewer individuals and businesses will take advantage of various tax

²⁰² See Tax Cuts and Jobs Act § 11081(a), 131 Stat. at 2092 (codified at § 5000A(c)(3)(A)).

²⁰³ See *id.*

expenditures. Furthermore, it is beyond peradventure that the vast majority of Americans will pay less tax as a result of the Tax Cuts and Jobs Act.

With that said, however, the advantages of the Tax Cuts and Jobs Act are not evenly distributed. Many of the benefits of tax reform will be enjoyed by the wealthiest Americans and the benefits are not evenly spread throughout the country. Similarly, the success of reducing tax liability varies based upon how income is earned.

The Tax Cuts and Jobs Act also increases the complexity of the Code in many key areas. International taxation is now more complex. Additionally, the total number of tax expenditures increased because of the bill, even though fewer Americans will take advantage of them.

Tax law has always been complex and always will be complex, especially for the wealthiest Americans and their businesses. But for most taxpayers, the Tax Cuts and Jobs Act increased fairness, simplicity, and temporarily reduced tax rates until 2026 when many provisions expire—Congress's three stated objectives. Thus, Congress has achieved some success and some failure in meeting its stated policy goals through tax reform.