



**NOTE:** This report reflects developments as of noon EDT on April 29, 2019. See *TaxNewsFlash-Tax Reform* page for developments after that date.

# Twenty questions about possible technical corrections to the 2017 Tax Act

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Since the enactment of the 2017 tax legislation commonly known as the “Tax Cuts and Jobs Act,” KPMG professionals have received a host of questions about possible “technical corrections” to that legislation. This report addresses some of the questions we’ve been asked most frequently – including questions about whether some technical corrections to the 2017 legislation might be enacted this year and what the process for moving possible technical corrections legislation might be.

This report reflects developments as of noon EDT on April 29, 2019. Thus, some information in this report might not be current or completely accurate after such date. Please see [TaxNewsFlash-Tax Reform](#) for subsequent developments.

## Introduction

On December 22, 2017, the president signed into law massive tax legislation commonly known as the “Tax Cuts and Jobs Act” (Public Law No. 115-97) that made a host of changes to the taxation of individuals, businesses in all industries, multinational enterprises, and others. Notwithstanding its size and scope, the legislation (the “2017 Tax Act”) moved through the legislative process extremely quickly – indeed, it was enacted less than two months after the date it first was released as a legislative proposal by then-Chairman of the House Ways and Means Committee, Rep. Brady (R-TX).

Given the sheer size of the new law and how rapidly it moved through the process, it is not surprising that technical issues were discovered after enactment. Although the Treasury Department (“Treasury”) and Internal Revenue Service (“IRS”) have been able to address some of these issues through the guidance process, there are other issues that Treasury and IRS do not believe they have the authority to address given the statutory language. Instead, further legislation may need to be enacted to resolve those issues – and some of the proposed legislative changes may qualify as “technical corrections.”

This document addresses at a high level some frequently-asked questions (FAQs) about what might be expected with regard to legislation making technical corrections to the 2017 Tax Act. This document is organized as follows:

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## Technical corrections - In general

### FAQ 1: What is a technical correction?

Generally speaking, a technical correction is a provision that fixes a technical error made in drafting previously enacted tax legislation so that the law, as corrected, reflects what Congress intended at the time of initial enactment. In other words, technical corrections generally are supposed to fix drafting errors – not to make substantive changes in policy. Or,

as stated in part “J” of a discussion of the revenue estimating process on the [website of Joint Committee on Taxation](#) (“JCT”):

From time to time enacted tax legislation may not exactly reflect the intent of the legislators. When this occurs, legislators may seek a technical correction to fix the statutory language.

## FAQ 2: Who determines if a provision is a technical correction?

In the past, the determination of whether a proposed change to the Tax Code constitutes a technical correction traditionally has been made by agreement among the chairmen and the ranking members of the House and Senate tax-writing committees, working with the Treasury and the JCT staff. In other words, the determination typically has been both bipartisan and bicameral – and has usually taken into account input from the Treasury and JCT staffs (including, sometimes, input regarding what was assumed in estimating the revenue effects of the underlying legislation being corrected).

## FAQ 3: What are some of the consequences of classifying a proposed change in law as a technical correction?

Classifying a proposed change in tax law as a technical correction can have several important consequences. For example:

- As explained in FAQ 4, the JCT typically does not “score” a technical correction as having a revenue impact (given that the correction merely reflects what was intended in drafting the provision being corrected). Thus, lawmakers do not need to be concerned about the legislation being scored as increasing the deficit or about finding a way to offset a potential revenue cost.<sup>1</sup>
- As explained in FAQ 5, technical corrections typically are retroactive to the date the provision being corrected was first effective – that is, there typically is not a “gap” during which the “uncorrected” law applies.
- Past technical corrections typically have

<sup>1</sup> Note, however, that the lack of revenue effect can be an obstacle in including technical corrections in a bill that is being moved under special “budget reconciliation” procedures. See note 3 *infra*.

been bipartisan and bicameral, often making them less potentially controversial than substantive changes in tax policy as well as easier – although not necessarily easy – to move through the legislative process.

## FAQ 4: How are technical corrections usually “scored”?

Given that technical corrections are supposed to reflect what Congress intended at the time a law initially was enacted, the JCT’s convention is to score them as having no revenue effect. As explained on the JCT’s [website](#):

The Joint Committee staff does not provide estimates of the revenue effect of technical corrections. This convention stems from the view that the original revenue estimate reflects the intent of the legislation. Therefore, an estimate of the correcting provision would be a double counting of the effect of the original policy.

## FAQ 5: If enacted, when are technical corrections typically effective?

If enacted, a technical correction typically applies as of the effective date of the underlying provision it is correcting. That is, technical corrections usually are retroactive. This, again, is consistent with the concept that a technical correction is merely fixing an error made in drafting prior legislation so that the law, as corrected, reflects what Congress initially intended.

## FAQ 6: What has been the typical process for moving technical corrections legislation in the past?

As indicated in FAQ 2, the chairmen and ranking members of the House and Senate tax-writing committees, working with the staff of JCT and Treasury, traditionally have agreed on what

proposed changes to previously enacted legislation qualify as technical corrections. Both the Republican and Democratic tax staffs of the House Ways and Means and Senate Finance Committees have been very involved in this process.

Each of the respective chairmen of the House and Senate tax-writing committees (in consultation with other key lawmakers) also typically has considered which particular proposed technical corrections to advance. The committee chairman often has convened a meeting of the full committee to formally “mark up” the chairman’s proposed package of corrections (and, possibly, other tax provisions).<sup>2</sup> The chairman’s “mark” typically could be modified during the markup, with the bill that ultimately was approved by the committee reported to the full House or Senate, as the case may be.

Decisions also have been made as to how to move a package of technical corrections through the legislative process—and, in particular, to what other legislation to attach the package. Technical corrections provisions typically have been attached to a larger “vehicle” to advance through the legislative process. (See FAQ 7.)

In many other regards, the process has largely been the same as for most other legislation. For example, each of the House and Senate has passed its version of the legislation. Further, at least 60 votes usually have been needed for the Senate to pass the legislation—not just a simple majority—and amendments often could have been made on the Senate floor.<sup>3</sup> Moreover, to

become law, both the House and the Senate ultimately have passed identical versions of the legislation and the president has signed the legislation into law.

## FAQ 7: Have technical corrections bills typically moved on their own - or have they usually been attached to larger bills?

In recent decades, tax technical corrections have not moved on a “stand-alone” basis, but have been added to larger bills – such as legislation that was perceived as “must pass” or that had broad and deep support.

## FAQ 8: For those technical corrections that have been enacted in the past, how long has the process taken?

The time has varied significantly. There’s no set time frame that must be met.

For example, Congress did not pass the first technical corrections to the Tax Reform Act of 1986 until 1988. Further, in some past situations, over a decade has passed between the time a Code provision was enacted or modified and the time a technical correction to such prior law was enacted.<sup>4</sup> In other situations, however, a technical correction has been enacted much more quickly.

<sup>2</sup> A formal markup is not essential. In prior Congresses, for example, some tax legislation has been considered by the full House or Senate without a prior markup by the tax-writing committee. In the current House, markups may be relatively more common given the adoption of a House rule intended to encourage greater member participation in the legislative process.

<sup>3</sup> Passage of any legislation generally requires the support of 60 senators in order to avoid a filibuster. There is an alternative to the general Senate rules—known as “budget reconciliation”—that can allow some types of legislation (including certain tax measures) to be moved forward in the Senate with only a simple majority vote; however, various procedural limitations sometimes can make it difficult to use this process to address provisions like technical corrections

because objections can be raised regarding provisions that have no revenue effect. Moreover, as a practical matter, budget reconciliation procedures are not likely to be used for tax legislation in the current Congress given that both the Democratic-controlled House and the Republican-controlled Senate would need to agree to a budget resolution before reconciliation procedures could be used – and reaching such agreement appears quite unlikely.

<sup>4</sup> See, e.g., the Consolidation Appropriations Act, 2018 (Pub. L. No. 115-141), which made technical corrections to a number of prior laws, including the American Jobs Creation Act of 2004, effective as if such provisions were included in the legislation begin corrected.



Importantly, as indicated in FAQ 9, there are other situations in which technical corrections that have been proposed with respect to previously enacted laws are still pending or are no longer being given serious consideration.

## FAQ 9: Once a technical correction has been identified, has its ultimate enactment been assured?

No. Some technical corrections to previously enacted legislation that were identified by key Congressional players were modified prior to enactment or simply were never enacted. Thus, it is not a sure thing that any particular technical correction that is proposed ultimately will be enacted.

## Technical corrections to 2017 Tax Act - Possible process

### FAQ 10: Might the legislative process for technical corrections to the 2017 Tax Act be similar to the process used for past technical corrections legislation?

In the current Congress, the general process for moving technical corrections to the 2017 Tax Act might be similar to that described in FAQ 6, in some respects, but might be much more complicated in other respects. Possible similarities include that:

- The chairmen and the ranking members of the House and Senate tax-writing committees likely would confer as to which proposed changes to the 2017 Tax Act they agree qualify as “technical corrections.” The JCT and Treasury staffs, as well as the Democratic and Republican tax staffs of the House Ways and Means and Senate Finance Committees, can be expected to be very involved in this process.
- In the House, the chairman of the Ways and Means Committee, Richard Neal (D-MA) (likely in consultation with other key Democrats) can be expected to consider whether and when to move technical corrections legislation and which particular

technical correction provisions to advance.<sup>5</sup> If the decision is made to move forward with some technical corrections, it seems likely that Chairman Neal would release a mark reflecting his proposal for such legislation and would convene the full Committee to consider the proposal in a formal markup; a markup seems particularly likely given new House rules that are intended to promote member participation in the legislative process. The mark might be modified during this process.

- The chairman of the Senate Finance Committee, Charles Grassley (R-IA), might be expected to engage in a similar process on the Senate side.<sup>6</sup>
- Decisions would need to be made as to how to move technical corrections through the legislative process – including what other legislation might serve as the vehicle for advancing the corrections through the legislative process. (For more on potential vehicles, see FAQ 12.)
- Both the House and Senate would need to consider their respective versions of the legislation – and at least 60 votes can be

<sup>5</sup> Rep. Neal is the new chairman of the Ways and Means Committee. He replaced Rep. Brady as chairman; Rep. Brady is now the Committee’s ranking Republican member.

<sup>6</sup> Senator Grassley is the new chairman of the Senate Finance Committee; Senator Orrin Hatch (R-UT), the chairman at the time the 2017 Tax Act was enacted, has retired. Chairman Grassley has served as chairman of the Finance Committee twice before.

expected to be needed for the Senate to pass its version. Amendments also might be made on the Senate floor.

- To become law, both the House and the Senate ultimately would have to pass identical versions of the legislation and that legislation would have to be signed into law by the president. Thus, any potential differences between a House and Senate bill would need to be reconciled.

As a practical matter, however, the process may end up being significantly more complicated than has been the case in the past and could be derailed at any of a number of points. See the next FAQ for more on that.

## FAQ 11: Might moving technical corrections to the 2017 Tax Act in this Congress be more complicated than has been the case with corrections to prior legislation?

It might. Many prior technical corrections packages have been relatively uncontroversial, given that technical corrections, by definition, merely fix drafting errors in prior laws. However, making changes to the 2017 Tax Act – technical corrections or otherwise – is significantly complicated by the fact that Congressional Democrats and their staffs were not involved in drafting the 2017 Tax Act but would need to play a major role in correcting issues identified as problematic. As a result, as explained below, the process could deviate to some extent from past practice, putting technical corrections to the 2017 Tax Act in somewhat uncharted territory.

Keep in mind that the 2017 Tax Act was enacted during the prior Congress, when Republicans controlled both the House and the Senate. Republicans used special procedures to move the law through the Senate with only Republican votes.<sup>7</sup> In fact, no Democrats voted

<sup>7</sup> See note 3, supra.

for the legislation in either chamber.

In the current House, however, Democrats hold a majority of seats and control the legislative agenda. Rep. Richard Neal (D-MA), the chairman of the Ways and Means Committee, plays a critical role in determining not only what particular changes to the 2017 Tax Act constitute “technical corrections,” but also to what extent any changes that ultimately might be classified as technical corrections advance through the legislative process.

Given that House Democrats were not involved in putting together the 2017 law, Chairman Neal is expected to hold hearings to seek a better understanding of what was intended with respect to any provision for which a technical correction is being proposed before the Ways and Means Committee determines how to proceed further. At the same time, House Democrats might also consider substantive changes to the 2017 Tax Act. Thus, there could be considerable delay before the House acts on any technical corrections legislation, assuming it decides to do so.

On the other side of Capitol Hill, the Senate is still controlled by Republicans. In fact, the current Senate (with 53 Republicans and 47 Democrats) consists of two more Republicans than in the prior Congress.<sup>8</sup> Nonetheless, because Republicans still hold fewer than 60 seats, some Democratic votes in all likelihood would be required for technical corrections legislation to move through the Senate.<sup>9</sup> Further, as was explained in FAQ 10, the ranking Democrat on the Senate Finance Committee, Sen. Ron Wyden (D-OR), would be expected to be involved in decisions as to what proposed changes constitute technical corrections. Moreover, keep in mind that it is not even clear at this point whether Finance

<sup>8</sup> The 47 Democrats include two Independents who caucus with the Democrats.

<sup>9</sup> This assumes that the Senate does not change its rules regarding filibusters of legislation – which seems unlikely. As indicated in note 3 supra, it also seems unlikely that special budget reconciliation rules could be used to advance technical corrections legislation through the Senate with only a majority vote given the likely difficulty in both adopting a House-Senate budget resolution and including provisions with no revenue effect.

Committee Chairman Grassley is on the same page as former Ways and Means Committee Chairman Brady as to the scope of a possible technical corrections package. (More on this in FAQ 16.)

Thus, the process of reaching agreement among the key Democratic and Republican players in the House and Senate as to what changes to the 2017 Tax Act constitute technical corrections and should be addressed soon could be complicated. Moreover, other changes to the tax law might be raised in negotiations among the parties and between the chambers, further complicating the process. And, as explained in FAQ 12, even if Democrats and Republicans can agree on what tax measures to move forward, technical corrections likely would need to be attached to a larger legislative vehicle – and that vehicle itself might raise unrelated difficult and contentious non-tax issues.

Nonetheless, there is political pressure on *both* parties to reach agreement on at least *some* corrections to the 2017 Tax Act, as both have constituents adversely affected by drafting issues associated with particular provisions. Thus, even though the process may be complicated and could be derailed, there is a reasonable chance – although far from a certainty — that at least some of the more “popular” technical corrections might become law during this Congress.

## FAQ 12: Would technical corrections to the 2017 Tax Act likely need to be attached to a legislative vehicle and, if so, what might be the vehicle?

Yes. As explained in FAQ 7, in recent years, technical corrections have been added to larger legislative vehicles that are perceived as “must pass,” or that have broad and deep support, to advance through the legislative process and become law. In the current Congress, technical corrections likewise can be expected to need to be attached to a larger legislative vehicle – and, at this point, the number of potential legislative

vehicles for technical corrections appears to be limited.

This year, the most likely potential vehicles appear to be legislation funding the government for the upcoming fiscal year and legislation increasing the debt limit.<sup>10</sup> Government funding and increasing the debt limit can be expected to raise thorny and contentious issues and may take time to resolve – as reflected by the 35-day partial government shutdown that took place earlier this year as the Congress and White House attempted to resolve significant policy differences on government funding related to matters such as immigration.

Moreover, the next fiscal year does not begin until October 1, 2019. In addition, Treasury might be able to use “extraordinary” measures to avoid breaching the debt limit for at least a few more months.<sup>11</sup> As a result, Congressional Republicans and Democrats and the White House might not reach agreement as to how to proceed until government funding and debt limit matters become much more urgent. Thus, a larger legislative vehicle might not move through the legislative process and become law until later this year – perhaps some time in the fall (if not winter).

Finally, keep in mind that, even when government funding and debt limit measures may finally move, there’s a chance that Congress and the White House ultimately might agree to keep them “clean” of “extraneous” provisions – particularly given the large number of issues individual members of Congress might otherwise try to attach to those measures. So, although there may be pressure to attach some technical corrections to these “must pass” bills,

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<sup>10</sup> The limit on how much debt Treasury can issue to the public or to other federal agencies was suspended by prior legislation (Public Law 115-123) until March 2, 2019. Treasury is currently using certain accounting measures (i.e., “extraordinary measures”) to avoid exceeding the limit. In February, the Congressional Budget Office (CBO) projected that the limit might need to be increased by some time in September or October to avoid Treasury defaulting on its obligations, with the caveat that Treasury could run out of cash sooner or later depending on the timing and size of revenue collections and outlays in coming months. See [CBO’s report on Federal Debt and the Statutory Limit](#).

<sup>11</sup> See note 10, *supra*.



there's no guaranty that any technical corrections ultimately would be able to "hitch a ride."

### FAQ 13: If any technical corrections are enacted this year, when might that happen?

It's not certain. However, right now it's looking like, if any technical corrections are enacted this year, enactment might not happen until the fall at the earliest.

As addressed in FAQ 11, Democrats have indicated that they need time to examine any proposed corrections to the 2017 Tax Act given their lack of involvement in putting the legislation together and Chairman Neal has suggested that Ways and Means will hold hearings before moving any such corrections. Moreover, Republicans and Democrats in both the House and Senate ultimately need to be on the same page as to which provisions to address. Thus, the process of identifying what proposed changes constitute technical corrections and which of those changes might be addressed might take time.

In addition, as indicated in FAQ 12, the most likely legislative vehicles for technical corrections might not move through the entire legislative process until fall at the earliest. So, even if key Democrats and Republicans in both the House and Senate agree to address some technical corrections this year, House and Senate consideration of those provisions might be delayed pending potential movement of a larger legislative vehicle.

### FAQ 14: Is it certain that at least some technical corrections to the 2017 Act will be enacted this year?

No. As discussed in FAQ 11, the process for moving technical corrections to the 2017 Tax Act through the current Congress is complicated both politically and procedurally and there is no guaranty that any such technical corrections will become law this year. Moreover, as explained in FAQ 15, even if *some* of the technical corrections that have been identified so far do become law at some future time (even if not this year), it is possible that others might never be enacted.

## Technical corrections to 2017 Tax Act - Possible substance

### FAQ 15: If this Congress does consider and pass technical corrections, which particular issues might it address?

It is still uncertain. Even if the House and Senate do act on technical corrections in the current Congress, there is a good chance they might address only *some* of the items raised as potential technical corrections so far. The broader and deeper the support for a particular correction, the more likely it may be to be addressed. In other words, even though many technical corrections relating to the 2017 Tax Act have been proposed, enacting proposed

corrections is not necessarily an all-or-nothing proposition. Congress could well choose to enact them in piecemeal fashion – and some might be deferred indefinitely or might never be addressed.

So far, the technical corrections with the broadest and deepest support appear to include the depreciation of qualified improvement property ("QIP"), the effective date of net operating loss ("NOL") deduction changes, and the deduction of legal fees in connection with sexual misconduct. There is also pressure on lawmakers to act on some other issues – and support may continue building for various provisions in the future.

## FAQ 16: Is there an official list of all the technical corrections to the 2017 Tax Act?

Not yet. The chairmen and ranking members of the House and Senate tax-writing committees (working with others) are still deciding which changes to the 2017 Tax Act they all agree constitute technical corrections.

## FAQ 17: What about the list of technical corrections to the 2017 Tax Act former Chairman Brady released earlier this year?

At the very end of the last Congress (on January 2, 2019), former Chairman of the Ways and Means Committee Kevin Brady (R-TX) released a discussion draft of technical and clerical corrections to the 2017 Tax Act (and to other prior legislation) developed up to that time. The draft indicated that staff was still working on identifying, considering, and developing technical corrections.

Although this discussion draft might provide a starting point for identifying potential technical corrections, it does not reflect an agreement among all the current key players as to what changes to the 2017 Tax Act constitute technical corrections. Thus, it might differ from any list of technical corrections to which current Ways and Means Chairman Neal, Finance Chairman Grassley, Finance Ranking Member Wyden, and Ways and Means Ranking Member Brady (in consultation with others) ultimately might agree.

In this regard, as explained in FAQ 11, keep in mind that Democrats are still evaluating what changes to the 2017 Tax Act they view as qualifying as technical corrections. Moreover, in the prior Congress, Senate Finance Committee Republicans sent a letter to Treasury that focused on only three issues in the 2017 Tax Act requiring technical corrections – the

depreciation of QIP, the effective date of NOL deduction changes, and the deduction of legal fees in connection with sexual misconduct. Read [TaxNewsFlash](#). Given that current Senate Republican taxwriters have not yet weighed in all the other potential technical corrections to the 2017 Tax Act that have been identified thus far, it is not even clear at this time whether key Republicans in the House and Senate are in complete agreement yet as to what the scope of technical corrections legislation should be – even putting aside the possible Democratic perspective.

## FAQ 18: What about the technical corrections the JCT referenced in its “Blue Book” last year?

The staff of the JCT released a 457-page General Explanation of the 2017 Tax Act (the “Blue Book”) on December 20, 2018. The Blue Book indicates in footnotes more than 90 areas where technical corrections might be needed to carry out Congressional intent.

Like former Chairman Brady’s discussion draft, the issues identified in the Blue Book might provide a starting point for identifying potential technical corrections. Nonetheless, they do not reflect an agreement among all the current key players as to what changes to the 2017 Tax Act constitute technical corrections that should be moved forward in the legislative process. Thus, the items referenced in the Blue Book might be different from any list of technical corrections to which the current chairs and ranking members of the House and Senate tax-writing committees (in consultation with others) ultimately might agree.

## FAQ 19: What about bills that have been introduced on particular issues - like qualified improvement property?

The fact that members of Congress have introduced or sponsored bills addressing particular technical corrections, such as the

depreciation of QIP, demonstrates political support for addressing those issues. As indicated in FAQ 15, the broader and deeper the support, the better the chances may be that those issues would be among those addressed if this Congress does move technical corrections to the 2017 Tax Act. Nonetheless, enactment of any technical corrections this year is not a certainty.

Moreover, even if this Congress does decide to move some technical corrections to the 2017 Tax Act, it is unlikely a bill that addresses only a

single provision would move through the entire legislative process, and become law, as a “freestanding” measure. Instead, such a proposal in all likelihood would need to be attached to a larger legislative vehicle to move through the process and become law. Other tax provisions also might be added to this larger vehicle as well. See FAQ 12 for more on what might serve as a legislative vehicle, what the timing might be, and potential uncertainties associated with adding other measures (such as some technical corrections) to such a vehicle.

## More information

### FAQ 20: What if I want to find out about recent developments or have more questions?

New developments on technical corrections legislation will be reported in [\*\*\*TaxNewsFlash-Tax Reform\*\*\*](#). If you have more questions, please contact a member of KPMG’s Washington National Tax Federal Legislative and Regulatory Services group. See contact information on the next page.

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