TaxNewsFlash

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KPMG report: Possible implications of election on tax policy; preliminary observations

Yesterday, November 8, was election day in the United States. Based on election results thus far, Republican Donald Trump has won the presidency and Republicans have kept control of both the House and the Senate in the next Congress.

This report provides some preliminary observations regarding the implications of yesterday's election on tax legislation in 2017 and the "lame duck" session. At the end of this report is an invitation and information about participating in a live-streaming event, on November 15—*After the election: Tax overhaul in 2017 ? – A competitive imperative for American business.*

Election results

Presidential race

As of this morning, Donald Trump and Mike Pence have won 279 electors—a majority. The Democratic candidate, Hillary Clinton, conceded the election early this morning.

Under the U.S. Constitution, the presidential election turns on the vote of the electors to the electoral college, rather than the popular vote (which, as of this morning, remained close). Electors are scheduled to meet in their states and vote for president and vice president on December 19, 2016. The president of the Senate and the archivist of the United States are supposed to receive the results of those votes within nine days of these meetings—i.e., by December 28, 2016. The new Congress then is expected to meet in joint session on January 6, 2017, to count the electoral votes. A few weeks later, on January 20, 2017, the new president is scheduled to be sworn in and to take office.

U.S. House

The current (pre-election) House consists of 247 Republicans and 188 Democrats. Based on the election results so far, it appears that in the next Congress (the 115th Congress), there will be at least 236 Republicans and at least 191 Democrats. The Republicans will therefore remain in control of the House, but by a slightly smaller margin than in the current Congress (the 114th Congress).

U.S. Senate

The current (pre-election) Senate consists of 54 Republicans and 46 Democrats. Based on the election results, it appears that, in the next Congress, there will be at least 51 Republicans and at least 47 Democrats.

Two races remain undecided, although the Republicans have an advantage in both. Thus, the Republicans will maintain their majority in the Senate in 2017, but by a narrower margin.

Under current Senate rules, 60 votes are generally needed to avoid a filibuster. Thus, some level of bipartisan agreement is necessary for passage of most important legislation. For legislation considered under special "reconciliation" procedures, however, only a majority vote in the Senate is needed to avoid a filibuster; as explained below, the reconciliation procedures could be relevant for tax legislation.

Organizing the next Congress

The 114th Congress will end when the current House and Senate adjourn. The 115th Congress is scheduled to convene on January 3, 2017. Any tax bills that were introduced in the 114th Congress, but that have not yet become law expire and would have to be reintroduced in the 115th Congress to move forward in the legislative process—bills do not "carry over" to the next Congress.

Even though the new Congress does not begin until early next year, Republicans and Democrats are expected to hold orientations for incoming members in what remains of this year (i.e., during the "lame duck" session). In addition, the Republicans and Democrats who will serve in the next House and Senate are expected to meet in 2016 to elect their party leaders for the 115th Congress.

Note, however, that the new House must vote to elect its speaker, so that vote will be taken when the new House convenes in January. Because designating the speaker typically requires a majority vote of the House, as a practical matter, substantially all of the House Republicans may need to vote in favor of the Republican party leader for that person to become speaker because the minority party—in this case the Democrats—typically are expected to vote for their leader.

In the Senate, it is expected that Senator McConnell (R-KY) will continue as majority leader, while Sen. Schumer (D-NY) is expected to step into the role of minority leader. Sen. Reid (D-NV), the current minority leader, did not run for re-election.

Leadership of tax-writing committees

Chairs, ranking members, and membership of the committees for the new Congress have yet to be determined. However, the current chairmen and ranking members of the tax-writing committees are expected to continue to serve in those roles in the next Congress. Thus, it is expected that Rep. Brady (R-TX) will continue as chairman and Rep. Levin (D-MI) will continue as ranking member of the Committee on Ways and Means. Likewise, it is expected that Sen. Hatch (R-UT) will continue as chairman and Sen. Wyden (D-OR) will continue as ranking member of the Senate Finance Committee.

With regard to the tax agenda, Chairman Brady—with input from the broader House Republican caucus—has developed what is called the tax reform "blueprint," which was released earlier this year. The Ways and Means Committee staff continues to seek input on, and to flesh out the technical details of, the blueprint. It may well be that the blueprint will be the starting point for House Republicans' tax reform efforts in the next Congress. Read information on the blueprint, in *TaxNewsFlash:* House Republican tax reform "blueprint" – initial observations.

On the Senate side, Chairman Hatch has been working on a corporate integration proposal, likely involving a dividend paid deduction. Read *TaxNewsFlash:* Senate Finance hearing on corporate integration, Finance Committee hearing on debt vs. equity, corporate integration, and CRS report on corporate tax integration for more information on this topic. (Senator Hatch has indicated that he may release his proposal after the elections.

Sen. Wyden also has been focused on tax reform. He has released proposals relating to promoting savings for retirement and paying for education; simplifying cost recovery rules; simplifying energy tax incentives; changing the taxation of financial derivatives; and changing the treating of incentives for "large" retirement savings accounts.

The new administration

President-elect Trump will need to nominate a Treasury secretary. The U.S. Constitution provides that the president may appoint "officers of the United States" with the "advice and consent" of the Senate. Under current Senate rules, only a majority vote is needed to confirm the appointment of a cabinet official.

In his campaign, Donald Trump advocated among the following tax proposals:

- Lowering individual and business rates dramatically
- Repealing the estate tax, but changing the rules for taxing certain capital gains on death
- Allowing certain manufacturing firms to elect to expense capital investment and lose the deductibility of interest expense
- Taxing carried interest as ordinary income

- Providing for mandatory repatriation of untaxed foreign earnings of U.S. multinational corporations at a 10% rate
- Eliminating unspecified "tax expenditures" (but not the research credit).

Read *TaxNewsFlash:* Tax proposals of Republican and Democratic presidential candidates for more tax policy proposals that were included in Donald Trump's official campaign web site.

2017 and outlook for tax legislation

With Republicans controlling the White House, the House, and the Senate, the prospects for enactment of significant tax legislation have increased significantly. Trump's campaign platform bears some similarities to proposals advocated by many Republicans (including the blueprint), particularly with regard to lowering the rate structure. The blueprint could end up being the starting point for discussions.

It remains to be seen how the Trump Administration will work with Congress, but there are areas of agreement, particularly with regard to taxes. Further, both the administration and the Congress can be expected to use macroeconomic scoring, which takes into account the expected impact of tax law changes on GDP in determining the revenue effects of such legislation.

The big question may end up being to what extent Democrats in the Senate participate in putting together significant tax legislation. Because it typically takes 60 votes to avoid a filibuster, at least some Democrats may need to support legislation unless special budget reconciliation rules are used that only require a majority. The reconciliation rules, however, include a requirement that the legislation not create a deficit outside the 10-year budget window. This procedure was used to enact the "Bush tax cuts," which is why those cuts were enacted initially only for a 10-year period.

Prior to the election, some House Republicans had indicated that they might use budget reconciliation as a vehicle to pass legislation in the next Congress, if Republicans continued to control the House and Senate. Thus, given the election results, it is quite possible that Republicans might use these procedures to move tax and healthcare-related legislation. If so, Democrats might not play a significant role in putting together such legislation. Further, phase-outs and other mechanisms may need to be used to comply with reconciliation requirements.

The "Lame Duck" session

The 114th Congress has been in recess for the election; however, it is expected to return for a short "lame duck" session that will end before the next Congress convenes in early January.

One of the issues the 114th Congress will need to address when it returns is government funding. The current continuing resolution expires December 9. Resolving government funding issues could be contentious. In addition, as indicated above, organizational activities relating to the next Congress may be ongoing during the lame duck session.

Many tax professionals are interested in whether the lame duck session will act to extend any of the tax incentives that are scheduled to expire at the end of 2016, perhaps as part of government funding legislation. As indicated in KPMG report: Tax incentives scheduled to expire at end of 2016 some members—particularly in the Senate—have indicated that they will push for at least certain renewable energy incentives to be extended during the lame duck session. Further, if there is an opportunity to extend these provisions, this could very will lead to other tax provisions, such as other expiring provisions and technical corrections, also being addressed.

Nonetheless, it is not clear whether any tax legislation will be addressed during the lame duck session. Some members might not view extenders as "must pass" legislation, given that the incentives that expire at the end of 2016 are "not dead yet" and could be resuscitated in 2017 retroactive to the beginning of that year. It has become fairly common for Congress to wait until temporary incentives have already expired to extend those incentives. Further, some key House Republicans have expressed opposition to addressing extenders during the lame duck session. For example, Ways and Means Committee Chairman Kevin Brady (R-TX) has suggested that action (if any) on extenders be addressed next year (perhaps in the context of tax reform). The increased likelihood that significant tax legislation may be addressed in 2017 also may make it more likely that decisions on expiring provisions be addressed at that time.

Thus, the fate of expiring provisions and other tax legislation in the lame duck remains unclear.

For more information, contact a member of the Federal Legislative and Regulatory Services group in KPMG's Washington National Tax:

John Gimigliano | +1 (202) 533-4022 | jgimigliano@kpmg.com

Carol Kulish | + 1 (202) 533-5829 | ckulish@kpmg.com

Tom Stout | +1 (202) 533-4148 | tstoutjr@kpmg.com

Jennifer Bonar Gray | + 1 (202) 533-3489 | jennifergray@kpmg.com

Web-streaming post-election event

After the election: Tax overhaul in 2017 ? – A competitive imperative for American business

Sponsored by Bloomberg BNA and KPMG LLP

Tuesday | November 15 | 11:15 am to 3:30 pm ET

Speakers at this live web-streaming event will include:

- Ways & Means Chairman Kevin Brady
- Senior Capitol Hill staff
- Corporate tax leaders and advisers
- Bloomberg reporters
- KPMG tax professionals

Read the full agenda and speakers

- Register to attend online via live streaming
- Register to attend in person at The National Press Club

Direct comments, including requests for subscriptions, to Washington National Tax. For more information, contact KPMG's Federal Tax Legislative and Regulatory Services Group at + 1 202.533.4366, 1801 K Street NW, Washington, DC 20006-1301.