What’s Next For Tax Legislation?

Marc J. Gerson, member, Miller & Chevalier, Washington, D.C. and former Majority Tax Counsel for the House Ways and Means Committee, practices in the area of federal income taxation, with a focus on federal tax policy and strategic advice for representing clients before Congress, Treasury, and the IRS. In the aftermath of the major tax legislation passed during the 2010 lame duck Congress, Gerson sat down with CCH this past week to discuss his predictions for future tax legislation in the 112th Congress.

CCH: What do you think the prospects are for tax legislation from the newly-elected Congress?

Gerson: “A number of factors will influence the tax agenda in this session. One, obviously, is the significant bill enacted at the end of last year in the lame duck session. The *Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010* addressed a number of pending items, including the tax extenders package, the Bush tax cuts, and the estate tax for two years. Thus, there is reduced pressure on ‘maintenance of the tax code’-types of items because a lot were taken care of in December. However, it’s important for folks to realize that the two-year extension of the extenders package (i.e., for the research and development credit, the controlled foreign corporation look-through rule, and certain accelerated depreciation rules) was for provisions that expired at the end of 2009. So, it was essentially a retroactive extension for 2010 and then an extension for 2011. Those provisions, as they had been over the last couple of years, are facing expiration once again at the end of the year.”

“There may be an effort to get the extenders package done, on a timely basis, before expiration at the end of the year. I think it would be useful because taxpayers need some degree of certainty so that they can do their planning and make investment decisions for next year. And, also because, in recent years, taxpayers have seen some impact on financial information reporting issues if the provisions expire, even though they are eventually extended retroactively. The tax extenders package, because it faces expiration once again, is something that could see some activity in the near future.”

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“Beyond that, I think the tax legislative agenda will depend on what the current political climate demands. You could see stimulus or other kinds of economic incentives on the table. After initial “big picture” votes on health care reform repeal, you could see targeted changes to the tax provisions from the health care legislation. You could see legislation on the energy front, but I in general I think the tax agenda for 2011 is really uncertain.”

CCH: If any new tax benefits are proposed in tax legislation in the 112th Congress, what if any revenue raising provisions do you foresee Congress using to offset their costs?

Gerson: “One of the big tax legislative issues in the 112th Congress is what is going to happen on the revenue offset front. Certainly, during the last Congress, there were taxpayers who were almost not as concerned with the tax relief or incentives being proposed as they were with what the corresponding revenue offsets were going to be. You saw provisions such as codification of the economic substance doctrine, international tax changes and other offsets enacted that have significantly impacted taxpayers. Now, particularly with the Republicans taking control of the House, the inclination will be that tax relief should not be offset by tax increases, but spending cuts. While you could see upcoming tax relief legislation with bipartisan support, it will not be clear as to how it will move forward, given the different philosophies on offsets lining up the House Republicans in favor of spending decreases versus what may be proposed in the Senate and by the Administration.”

CCH: President Obama has indicated a willingness to discuss comprehensive reform of the tax code during 2011. House Ways and Means Committee Chairman Dave Camp, R-Mich., has publicly stated that Congress needs to concentrate on comprehensive tax reform as well. Is comprehensive tax reform a realistic probability for the 112th Congress?

Gerson: “Although I think it is unlikely to result in actual legislation, you will see really substantive tax reform discussions in the next year and certainly in the next two years. You’ve the seen the new Chairman of the Ways and Means Committee, Mr. Camp, come out and say he’s interested in tax reform. He has a history of being interested in the topic. When he was chairman of the Subcommittee on Select Revenue Measures in 2005-2006, he held a number of hearings on fundamental corporate and international tax reform, so it’s a subject he’s well-versed in. And, you’ve seen the Administration express an interest in tax reform. I think we’ll be able to see if tax reform is a priority of the Administration in short order. We’ll see if it’s

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mentioned in the State of the Union Address or whether it is part of February's release of the President's FY 2012 budget proposals."

"We are likely to see hearings and discussions on tax reform, a lot of it using the reports of the President's Economic Recovery Advisory Board and the National Commission on Fiscal Responsibility and Reform as spring boards for Congressional consideration and discussion. The Senate Finance Committee began an expectedly large set of hearings on tax reform late in the last Congress. They started on "lessons learned" from the 1986 Act. It's envisioned that they may have around 10 hearings on tax topics. Even though the politics may not lend itself to a true tax reform legislative effort, I think you will see a lot of discussion, perhaps laying the foundation for a future fundamental reform effort."

CCH: Can you discuss the anticipated direction of tax reform discussions in the 112th Congress?

Gerson: "The classic tax reform exercise is that you broaden the base until you get rid of specialized deductions and credits. Because of that, you are able to lower the rate. That's an exercise you saw in the reports of the President's Economic Recovery Advisory Board and the National Commission on Fiscal Responsibility and Reform, to some degree. The question in that exercise is: What are the deductions and credits that are viewed as nonessential? Which ones should be eliminated in order to fund the reduction in the corporate rate, for example? Obviously, those impact taxpayers very differently because some benefit from certain deductions more than others. In the ideal world, that's the kind of exercise one goes through. But, I think that, from the practical and political perspective, if you go down that road and people say, "We certainly need to keep the charitable contribution deduction We certainly need to keep the deduction for mortgage interest" and, you have other people saying, "We certainly need to keep this deduction," it's very hard to materially change the code to get a significant reduction in the corporate rate."

CCH: As you noted, the bill enacted during the lame duck session extended the traditional "extenders" package for two years through 2011. What do you think the future holds for the "extenders" package? Is there a chance it will be extended on a permanent basis at some point in the future?

Gerson: "With regard to extenders, when the extenders bill originally passed the House of Representatives earlier in 2010, there was a provision at the end of the bill that basically called for the Joint Committee on Taxation to do a report or study on the individual provisions within the extenders package…. It was supposed to evaluate each individual provision, what it was intended to do, who it was intended to benefit, and its efficiency. I think a lot of people believed that if that provision had been enacted, the JCT report would have been a mechanism for a full-scale evaluation of the extenders package on the merits of the individual provisions. From that, one could say, 'This is something that is working and should be made permanent,' or 'These are items that, through inertia, have been extended every year, but there isn't as much support for them.'"

"That provision was not included in the final bill enacted during the lame duck session, but I think that type of exercise concerning the individual evaluation of the provisions of the extenders package is something that will happen, although perhaps not formalized in that process. The popular theory is that one part of tax reform will be to go through such an exercise with the extenders package. It's not helpful to taxpayers, and it's not helpful to the Congress, the IRS or to Treasury to constantly have provisions that are facing expiration."

CCH: Based upon your experience in the legislative process, how do you think the 112th Congress will handle the logjammed, but nevertheless significant, technical corrections to enacted legislation?

Gerson: "The need for technical corrections is an inevitable result of the legislative process. They do take a substantial amount of time to push through the process. Everyone on the Hill: both sides of the Ways and Means Committee, both sides of the Senate Finance Committee and the Joint Committee on Taxation, as well as the IRS, and the Treasury Department all have to agree to a technical correction. Once enacted, they are retroactive."

"The House had a technical corrections bill that was introduced in 2009, but there hasn't been one that has moved for a significant period of time….Part of the timing depends upon whether there are individual technical corrections that are particularly time-sensitive. There are situations where there is the ability, absent enactment of an introduced correction provision, to give taxpayers their needed comfort level on an item. Our firm encourages taxpayers who are interested in technical corrections to talk to their advisors because there are ways, not only on the Hill, but also through Treasury and the IRS, to gain some certainty while technical corrections are pending."