

Technically Speaking: The Art of Tax Technical Corrections

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Because of, Gerson notes, the frequency of changes to the Internal Revenue Code, the accelerated legislative process in which the changes are typically enacted, and the inevitable complexity resulting from the changes, technical corrections legislation has become routine and increasingly important. Despite this increased profile, Gerson observes, little has been written about the technical correction process. This article describes the process in detail and hopefully will serve as useful guidance for anyone pursuing appropriate technical corrections.

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"The analysis of tax policy and tax legislation can be 'highly conjectural' and consequently more art than science."¹

I. Introduction

Changes to the Internal Revenue Code are being made at a remarkable pace. The President's Advisory Panel on Federal Tax Reform noted that "since 1986, there has been nearly constant tinkering — more than 100 different acts of Congress have made nearly 15,000 changes to the tax code."² Given the frequency of the changes, the accelerated legislative process in which the changes are typically enacted, and the inevitable complexity resulting from the changes,³ technical corrections legislation has become routine.⁴ Thus, technical corrections have taken on an

¹Joint Economic Committee, "A Guide to Tax Policy Analysis: Problems With Distributional Tax Tables" 1 (Jan. 2000) (footnote omitted).

²President's Advisory Panel on Federal Tax Reform, "Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System" 16 (Nov. 2005).

³See, e.g., Joseph J. Thorndike and Heidi Glenn, "Conversations: George K. Yin," *Tax Notes*, Jan. 23, 2006, p. 322, *Doc 2006-940*, *2006 TNT 15-3* ("as the tax law has gotten more voluminous and complex, it has fed upon itself with a greater number of changes needed simply to 'correct' it in some large or small way"); Angus and Nickerson, "The American Jobs Creation Act of 2004: How Did We Get There?" *83 Taxes* 25, 30 (May 2005) ("A technical corrections bill with respect to the Jobs Act was introduced last November, which is not surprising given the breadth of the legislation."); Larkins, "Extraterritorial Exclusion Replaces FSC Regime: Mirror Rules, Broader Spectrum," *12 J. Int'l Tax'n* 22, 24 (May 2001) ("Inconsistencies among a few terms create confusion, which is not surprising given the speed with which Congress drafted the legislation and the short time for review. Later technical corrections should refine and clarify the terms.") (footnote omitted); Shapiro and Lorence, "Taxpayer Relief Act of 1997: Sin in Haste, Repent at Leisure," *8 J. Int'l Tax'n* 441, 442 (Oct. 1997) ("The Taxpayer Relief Act of 1997 . . . is a most complex, highly technical document that was enacted in great haste. The lateness of the hour (on the eve of the Congressional summer recess) caused many key provisions . . . to be drafted under pressing circumstances. The interpretation of many provisions is likely resolved in the 'Blue Book,' a technical corrections act, guidance from Treasury, or, as a last resort, through litigation."); Sunley and Weiss, "The Revenue Estimating Process," *10 Am. J. Tax Pol'y* 261, 268 (Fall 1992) (hereinafter Sunley and Weiss) ("Given the complexity of the tax law and the limited time usually available to staff to draft final statutory language, mistakes in an enacted statute are not uncommon.");

⁴See *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001) ("Congress, with some regularity particularly in the tax area, makes technical corrections to legislation."); See also Donaldson, "The Easy Case Against Tax Simplification," *22 Va. Tax Rev.* 645, 670 n.106 (Spring 2003) ("technical correction

(Footnote continued on next page.)

increased importance in tax legislation.⁵ Despite that increased profile, however, little has been written about the technical correction process.⁶ This article describes the process in detail and, I hope, will serve as useful guidance for anyone pursuing appropriate technical corrections.

II. What Is a Technical Correction?

Despite the prevalence of technical corrections legislation, there does not appear to be a clear understanding of what exactly constitutes a technical correction.⁷ According to a publication of the Joint Committee on Taxation staff:

A technical correction [is] legislation that is designed to correct errors in existing law in order to fully implement the intended policies of previously enacted legislation. The principal factor in determining whether a provision is technical is the original intent of the underlying legislation. Once it is determined that the existing statute does not properly implement legislative intent, and that the proposed change conforms to and does not alter the intent, the provision is deemed to be technical.⁸

legislation is quite common"); Smith, "Business Purpose: The Assault Upon The Citadel," 53 *Tax Law.* 1, 15 (Fall 1999) ("it is a familiar feature of tax practice that legislation immediately spawns numerous ambiguities — circumstances not contemplated by the draftsmen — that require clarification through technical corrections, regulations, rulings and judicial decisions"). The frequency of technical corrections legislation is a relatively recent development. "Will There Be Technical Corrections This Decade?" 69 *J. Tax'n* 75 (1988).

⁵See, e.g., Auclair and Schwarz, "Section 199: How Will Recent Amendments And New Guidance Affect Your Deduction?" 58 *Tax Executive* 34, 34 (Jan.-Feb. 2006) ("Understanding . . . the amendments made by the Technical Corrections Act . . . is critical to properly calculating the deduction under section 199.").

⁶Willson and Halverson, "S Corporations," 1 *J. Partnership Tax'n* 363, 363 (Winter 1985) (hereinafter Willson and Halverson) ("Admittedly, the technical corrections section of any substantial piece of tax legislation is not likely to make any best-seller list.").

⁷See Ritterpusch, "Grassley Says Corrections Bill Delayed Due to Discord Over What Is 'Technical,'" *BNA Daily Report*, Nov. 16, 2006, p. G-1 (action on technical corrections bill postponed "because of disagreements over whether certain provisions under consideration were substantive or truly technical"); "Keep the Tax Cleanup Clean," *The New York Times*, July 8, 1987, p. A26 ("But [technical] correction is an art in itself. When does a technical fix become substantive change? The line is unclear."); "Washington Talk; Lobbyists Regroup for Tax Bills on Far Horizons," *The New York Times*, Oct. 1, 1986, p. B10 ("One [lobbyist] recalled the definition of technical corrections espoused by Senator Russell B. Long when he was chairman of the Senate Finance Committee: A technical correction is anything that a majority of the committee says it is.").

⁸Joint Committee on Taxation, "Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation" (JCX-1-05) 34, *Doc 2005-2081*, 2005 *TNT* 22-9 (Feb. 2, 2005) (hereinafter JCT Overview of Revenue Estimating).

A. Necessary to Carry Out Congressional Intent

As evidenced by the JCT's definition, a technical correction clarifies the operation of an existing tax statute rather than changes its substantive meaning.⁹ That definition effectively limits the type of provisions that can qualify as technical corrections to those that ensure that the statute at issue operates consistently with congressional intent.¹⁰

1. Particular factual circumstances contributing to questionable results. In support of a proposed technical correction, taxpayers frequently assert that although a statute generally is consistent with congressional intent, the statute produces questionable results in particular factual circumstances that may not have been considered during congressional deliberations. Thus, the argument is made that the proposed technical correction is appropriate because if Congress had considered those factual circumstances, it would have modified the statute to prevent the questionable results.

For example, as an incentive to repatriate foreign earnings and reinvest them in the United States, the American Jobs Creation Act of 2004 provided for a temporary reduction in the U.S. tax on repatriated dividends through an 85 percent deduction for cash dividends received by a corporate U.S. shareholder from a controlled foreign corporation for one year.¹¹ After enactment of the Jobs Act, many taxpayers suggested changes to the repatriation provision that they argued were technical corrections because their particular factual circumstances prevented them from taking advantage of (or maximizing) the benefit of the dividends received deduction.

Several of the suggested changes involved sympathetic situations. For example, taxpayers that historically had paid current U.S. tax on unrepatriated foreign earnings under subpart F could not take advantage of the repatriation provision because of the provision's treatment of previously taxed income.¹² Nevertheless, technical corrections were not made in response to those

⁹See, e.g., *Federal National Mortgage Assoc. v. United States*, 56 Fed. Cl. 228, 234, *Doc 2003-8570*, 2003 *TNT* 120-20 (2003) (subsequent history irrelevant) ("Congress turns to technical corrections when it wishes to clarify existing law or repair a scrivener's error, rather than to change the substantive meaning of the statute."); *id.* at 237 ("a technical correction that merely restores the rule Congress intended to enact cannot be construed as a fundamental change in the operation of the statute").

¹⁰152 *Cong. Rec.* S10713 (daily ed. Sept. 29, 2006) (statement of Sen. Charles Grassley, R-Iowa) ("Technical [c]orrections measures are routine for major tax acts, and are necessary to ensure that the provisions of the acts are working consistently with Congressional intent. . .").

¹¹Section 965, as enacted by P.L. 108-357, section 422, 118 Stat. 1418, 1514. See generally H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 312-314 (2004) (hereinafter 2004 Jobs Act Conference Report); JCT, "General Explanation of Tax Legislation Enacted in the 108th Congress" (JCS-5-05) 307-311, *Doc 2005-11832*, 2005 *TNT* 108-16 (May 2005) (hereinafter 2005 Blue Book).

¹²See Lee A. Sheppard, "Repatriation Provision Not Beneficial to All Comers," *Tax Notes*, Dec. 6, 2004, p. 1323, *Doc* (Footnote continued on next page.)

suggested changes. Presumably, the rationale for that result was that although the application of the mechanical rules of the repatriation provision to particular factual circumstances produced arguably questionable results, the mechanical rules did in fact operate as Congress intended.

2. Elections as technical corrections. If a tax statute as enacted is self-executing such that it operates automatically when applicable, a proposed technical correction providing for an election out of the operation of the statute is generally considered inconsistent with the intent of the original legislation. Therefore, such a proposal generally cannot qualify as a technical correction. Nevertheless, proposed corrections implementing an election have been enacted in limited but particularly compelling circumstances.

For example, as an incentive to rebuild and reinvest in lower Manhattan after the September 11, 2001, terrorist attacks, the Job Creation and Worker Assistance Act of 2002 provided for accelerated five-year depreciation for qualifying leasehold improvements within the New York Liberty Zone.¹³ However, despite being intended as a benefit, the accelerated depreciation negatively affected some taxpayers with respect to their alternative minimum tax liability, so the Working Families Tax Relief Act of 2004 added a provision allowing taxpayers to elect out of the accelerated depreciation.¹⁴

In another example, a technical correction allowed for an election out of the retroactive application of a provision that, although intended to be beneficial to all taxpayers, had negative tax consequences in some circumstances. Before enactment of the Jobs Act, dividends from so-called 10/50 companies were subject to different rules for foreign tax credit limitation purposes based on the year in which the underlying earnings and profits was accumulated, with some dividends being subject to a generally beneficial look-through rule.¹⁵ As a result of the Jobs Act, the look-through rule was applied on a retroactive basis to all dividends from 10/50 companies, regardless of the year in which the underlying E&P was accumulated.¹⁶

2004-22597, 2004 TNT 228-2; Sheppard, "More Bugs in the Repatriation Statute," *Tax Notes*, Mar. 28, 2005, p. 1497, *Doc* 2005-6163, 2005 TNT 59-2.

¹³Section 1400L(c), as enacted by P.L. 107-147, section 301, 116 Stat. 21, 36; see generally JCT, "General Explanation of Tax Legislation Enacted in the 107th Congress" (JCS-1-03) 228-229, *Doc* 2003-2529, 2003 TNT 24-31 (Jan. 24, 2003).

¹⁴Section 1400L(c)(5), as enacted by P.L. 108-311, section 403(c)(5), 118 Stat. 1166, 1187. See H.R. Conf. Rep. No. 696, 108th Cong., 2d Sess. 91 (2004); 2005 Blue Book, *supra* note 11, at 159.

¹⁵A 10/50 company is a foreign company in which a U.S. corporate taxpayer owns 10 percent or more of the voting stock interest but less than a greater than 50 percent voting stock interest required for the company to be treated as a controlled foreign corporation. Sections 902, 904(d)(4).

¹⁶Section 904(d)(4), as enacted by P.L. 108-357, section 403, 118 Stat. 1418, 1492-1494; see also 2004 Jobs Act Conference Report, *supra* note 11, at 385-386; 2005 Blue Book, *supra* note 11, at 270-271.

Although the adoption of the look-through rule was intended to be a pro-taxpayer "simplification" measure,¹⁷ it became apparent that the provision was not beneficial to all taxpayers, because in some cases its application resulted in a retroactive increase in tax liability.¹⁸ As a result, a technical correction was requested to allow taxpayers to elect out of the retroactive application of the provision.¹⁹ The provision would still apply, however, to periods after the enactment of the Jobs Act.

The requested technical correction was included in the Tax Technical Corrections Act of 2005 and was later enacted as part of the Gulf Opportunity Zone (GO Zone) Act of 2005.²⁰ Presumably, the rationale for including this correction was that the original provision was intended to be pro-taxpayer and not have any negative impact, particularly on a retroactive basis.²¹ Therefore, if a taxpayer wanted to elect out of the retroactive application of the provision, that election would be consistent with congressional intent behind enactment of the original provision.

In summary, a proposal providing for an election generally cannot qualify as a technical correction. Nevertheless, it may qualify as a technical correction if there are particularly compelling circumstances.²² Therefore, careful consideration should be given as to whether it is necessary to request that a technical correction take the form of an election and whether other nonelective alternatives are feasible.

¹⁷2005 Blue Book, *supra* note 11, at 270.

¹⁸Letter to taxwriters from Michael L. Schler, *Doc* 2005-2058, 2005 TNT 22-32 (Feb. 3, 2005).

¹⁹*Id.*

²⁰P.L. 109-135, section 403(l), 119 Stat. 2577, 2625-2626. See also JCT, "Technical Explanation of the Revenue Provisions of H.R. 4440, the 'Gulf Opportunity Zone Act of 2005,' as Passed by the House of Representatives and Senate" (JCS-88-05) 82, *Doc* 2005-25442, 2005 TNT 242-8 (Dec. 16, 2005) (hereinafter 2005 GO Zone Technical Explanation). Regulations have been issued to provide guidance to taxpayers wishing to make an election to defer the effective date of the 10/50 look-through rules. Temp. reg. section 1.904-7T(f)(9).

²¹Schmidt and Lady, "10/50 Look-Through Treatment Transition Rules: Timely Elections May Be Key to Preserving Tax Attributes," 35 *Tax Mgmt. Int'l J.* 466, 466 (Sept. 8, 2006) ("Because the retroactivity of the Jobs Act provisions could be harmful to taxpayers in some limited circumstances, Congress subsequently passed . . . a technical correction to the Jobs Act that generally allows taxpayers to delay the effective date of the look-through rules to the 10/50 company's first taxable year beginning after December 31, 2004."). See also Schmidt and Lady, "Elimination of Separate Treatment of Dividends From 10/50 Companies: The Time Has Finally Come," 35 *Tax Mgmt. Int'l J.* 502, 516 (Oct. 13, 2006).

²²See also *Reed v. United States*, 743 F.2d 481, 484 (7th Cir. 1984) (noting that the Technical Corrections Act of 1979 provided for an election out of the retroactive application of an estate tax provision).

B. Revenue Neutral

Because technical corrections are necessary to ensure that a tax statute operates as Congress originally intended, generally there is no revenue gain or loss associated with a technical correction.²³ The reason is that the revenue impact of a technical correction has already been included in the JCT's revenue estimate of the provision in the original legislation to which the technical correction relates.²⁴ As a result, a provision that gives rise to a revenue gain or loss is generally not considered a technical correction.²⁵

C. Generally Retroactive

1. General rule of retroactivity. A technical correction generally takes retroactive effect as if included in the original legislation to which the correction relates. Courts have sanctioned the retroactive application of technical corrections,²⁶ and in at least one instance, a court has allowed that application to overturn the terms of a closing agreement that a taxpayer had previously entered into with the IRS.²⁷ Also, the American Bar Association has adopted a resolution endorsing the retroactive application of technical corrections.²⁸

²³See, e.g., 152 Cong. Rec. S10713 (daily ed. Sept. 29, 2006) (statement of Grassley) ("Because these measures carry out Congressional intent, no revenue gain or loss is scored from them."). See also Schatz, "Millions Sought From 'Technical' Tax Changes," *CQ Today* (July 20, 2005) (hereinafter Schatz I) ("As [technical corrections] bills are intended to allow all of the benefits Congress meant to convey under the original law, the [JCT's] initial cost estimates of the law would still apply. . . ."); Schatz, "Technical Tax Changes Could Prove Lucrative for Broad Array of Businesses," *CQ Today* (July 21, 2005) (hereinafter Schatz II) ("as the legislation is designed to ensure the tax law is being applied as Congress originally intended, initial cost estimates of the law by the [JCT] would still apply — meaning the effect of the technical correction legislation on the Treasury would be zero").

²⁴JCT Overview of Revenue Estimating, *supra* note 8, at 34 ("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."). See also Sunley and Weiss, *supra* note 3, at 268.

²⁵It should be noted that although the JCT determines that technical corrections do not have a revenue impact for purposes of the legislative process, those corrections do in fact have an impact for purposes of the budget process. JCT Overview of Revenue Estimating, *supra* note 8, at 34. See also Sunley and Weiss, *supra* note 3, at 268-269.

²⁶See, e.g., *United States v. Carlton*, 512 U.S. 26 (1994); *Wiggins v. Commissioner*, 904 F.2d 311 (5th Cir. 1990).

²⁷*Bethlehem Steel Corp. v. United States*, 270 F.3d 135, *Doc 2001-27661*, 2001 TNT 214-52 (3d Cir. 2001).

²⁸Letter to Treasury Department from Anthony R. Palermo, American Bar Association Section of Taxation, *Doc 92-2477*, 92 TNT 64-29 (Mar. 24, 1992) ("Technical corrections required to correct a mistake or oversight in prior legislation may be made effective as of the effective date of the legislation to which the correction relates when the mistake or oversight is patent and the technical correction is enacted reasonably promptly."). Although the ABA resolution requires a technical correction to be enacted promptly in order to have retroactive effect, courts have

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2. Prospective technical corrections. Although technical corrections are generally applied retroactively, there are limited instances in which they have been applied on a prospective basis because of administrative considerations. For example, the Small Business Jobs Protection Act of 1996²⁹ contained a technical correction to the luxury automobile excise tax that was applied on a prospective basis "to alleviate the difficulties that both taxpayers and the Treasury would experience in administering a retroactive refund."³⁰

Similarly, the recently introduced Tax Technical Corrections Act of 2006 (H.R. 6264, S. 4026) contains a prospective technical correction regarding the treatment of dividends made by interest charge-domestic international sales corporations (IC-DISCs)³¹ "to alleviate the difficulties that both taxpayers and the Treasury Department would experience in administering the provision [on a retroactive basis]."³²

D. Not Always Favorable to Taxpayers

Technical corrections carry out congressional intent of the original underlying legislation. They therefore may be unfavorable to taxpayers. For example, the Tax Increase Prevention and Reconciliation Act of 2005 (P.L. 109-222) included temporary enactment of the CFC look-through rule, which provides an exception from subpart F income for some payments between related CFCs.³³ Although this exception was intended to be favorable to

demonstrated greater flexibility with respect to the timing of technical corrections. See *Wiggins*, 904 F.2d at 315.

²⁹P.L. 104-188, section 1703(c), 110 Stat. 1755, 1875.

³⁰JCT, "General Explanation of Tax Legislation Enacted in the 104th Congress" (JCS-12-96) 293, *Doc 96-32501*, 96 TNT 246-1 through 96 TNT 246-13 and 96 TNT 247-20 (Dec. 18, 1996). See also S. Rep. No. 281, 104th Cong., 2d Sess. 162 (1996) (same); H. Rep. No. 586, 104th Cong., 2d Sess. 159 (1996) (same); H. Rep. No. 353, 103d Cong., 1st Sess. 209 (1993) (same).

³¹H.R. 6264, 109th Cong., section 7 (2006); S. 4026, 109th Cong., section 7 (2006).

³²JCT, "Description of the Tax Technical Corrections Act of 2006" (JCX-48-06) 10, *Doc 2006-20443*, 2006 TNT 191-13 (Oct. 2, 2006) (hereinafter 2006 Technical Explanation). Presence of a prospective provision in a technical corrections bill may generate requests that other provisions in that bill be enacted on a prospective basis as well. See letter to taxwriters from Susan P. Serota, ABA Tax Section, *Doc 2006-22295*, 2006 TNT 212-21 (Oct. 31, 2006) (asserting that a technical correction to the section 470 anti-SILO provision be applied on a prospective basis in light of the prospective technical correction to the IC-DISC provision).

³³Section 954(c)(6), as enacted by P.L. 109-222, section 103(b), 120 Stat. 345, 346. See H. Rep. No. 304, 109th Cong., 1st Sess. 45-46 (2005); H.R. Conf. Rep. No. 455, 109th Cong., 2d Sess. 73-74 (2006). See also Yoder, "New Subpart F Related CFC Look-Thru Exception," 35 *Tax Mgmt. Int'l J.* 415 (Aug. 11, 2006); Joseph M. Calianno and Martin J. Collins, "The CFC Look-Through Rule: Congress Changes Landscape of Subpart F," *Tax Notes*, July 10, 2006, p. 155, *Doc 2006-12281*, 2006 TNT 132-22. The CFC look-through rule originally passed both the House and Senate as part of the Jobs Act but was dropped in conference because of revenue constraints. S. 1637, 108th Cong., section 222 (2003); S. Rep. 192, 108th Cong., 1st Sess. 38-39 (2003); H.R. 4520, 108th Cong., section 311 (2004); 1 H. Rep. No. 548, 108th Cong., 2d Sess. 202-203 (2004); 2004 Jobs Act Conference Report, *supra* note 11, at 395-396; Yoder, "Subpart F Related

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taxpayers, it was soon determined that the rule could potentially be used in a number of transactions to improperly strip income from the U.S. income tax base.³⁴ As a result, a series of technical corrections was proposed to ensure that the CFC look-through rule could not be abused in such a manner.³⁵ Several of those corrections were recently enacted as part of the Tax Relief and Health Care Act of 2006 (P.L. 109-432).³⁶

III. Identification and Evaluation

A. Identification

Technical corrections are proposed by taxpayers, practitioners, and bar and trade associations, as well as staff members of the taxwriting committees, the JCT, and the Treasury Department (including the IRS).³⁷

In particular, the JCT has taken on an increased role in identifying proposed technical corrections. At the end of each Congress, the JCT publishes a "general explanation of tax legislation" (known as the Blue Book because of its blue cover) that contains a comprehensive analysis and explanation of the tax legislation enacted during that Congress.³⁸ Thus, the Blue Book is "intended to provide a single, comprehensive source of legislative history for

major tax acts. . . ."³⁹ Beginning with the Blue Book accompanying the Tax Reform Act of 1986, the JCT expanded the use of the Blue Book to identify proposed technical corrections.⁴⁰ Thus, the Blue Book has been referred to as the "herald of technical corrections."⁴¹

B. Evaluation

Once technical corrections have been proposed, the process by which they have been evaluated in recent years has been described as follows:

Technical corrections are derived from a deliberative and consultative process among the Congressional and Administration tax staffs. That means the Republican and Democratic staffs of the House Ways and Means and Senate Finance Committees are involved, as is the staff of the Treasury Department. All of this work is performed with the participation and guidance of the non-partisan staff of the Joint Committee on Taxation. A technical [correction] enters the list only if all staffs agree it is appropriate.⁴²

Thus, technical corrections are unique in that they represent bicameral, nonpartisan legislation that is developed with significant congressional and Treasury staff involvement.

IV. Pursuing a Technical Correction

A. Understanding Legislative History

In determining whether it might be appropriate to pursue a technical correction, a full analysis of the legislative history of the original legislation to which the proposed technical correction relates should be conducted.⁴³ That analysis should include all publicly available materials, including related bills, committee and conference reports, floor statements, and JCT materials.

Particular attention should be paid to any information supporting the proposed technical correction (for example, that the correction would allow the statute to

CFC Look-Through Exception Provided in Tax Bills Passed by Senate and House," 4 *J. of Tax'n of Global Trans.* 3 (Fall 2004); Dustin Stamper, "Finance Committee to Take Hard Look at Territorial Tax System," *Tax Notes*, Feb. 21, 2005, p. 891, *Doc 2005-2976*, 2005 *TNT* 29-3 (noting CFC look-through rule dropped in conference because of revenue restrictions); Morrison, "International Tax Reform Prospects in 2005 or 2006," 34 *Tax Mgmt. Int'l J.* 195 (Mar. 11, 2005) (same).

³⁴Sheppard, "Check-the-Box Rules Not Sacred, Says Hicks," *Tax Notes*, June 12, 2006, p. 1204, *Doc 2006-10706*, 2006 *TNT* 107-8.

³⁵The proposed technical corrections were originally included in H.R. 5970, the Estate Tax and Extension of Tax Relief Act of 2006, which was not enacted. H.R. 5970, 109th Cong., section 255(a) (2006); see also JCT, "Technical Explanation of H.R. 5970, the 'Estate Tax and Extension of Tax Relief Act of 2006' (ETETRA), as Introduced in the House on July 28, 2006," (JCX 33-06) 97-98, *Doc 2006-14332*, 2006 *TNT* 147-16 (July 28, 2006); Yoder, "Technical Corrections in House Bill to the Section 954(c)(6) Look-Thru Exception," 35 *Tax Mgmt. Int'l J.* 528 (Oct. 13, 2006). The proposed technical corrections, with some modifications, were later included in the Tax Technical Corrections Act of 2006. H.R. 6264, 109th Cong., section 2(a) (2006); S. 4026, 109th Cong., section 2(a) (2006); 2006 Technical Explanation, *supra* note 32, at 2-3; see also Lisa M. Nadal, "Technical Corrections Act Would Change CFC Look-Through Rule," *Tax Notes*, Oct. 9, 2006, p. 112, *Doc 2006-20741*, 2006 *TNT* 193-3; Sheppard, "Looking Through the New Look-Thru Rule," *Tax Notes*, Oct. 23, 2006, p. 295, *Doc 2006-21492*, 2006 *TNT* 205-11.

³⁶P.L. 109-432, section 426(a); see JCT, "Technical Explanation of H.R. 6408, the 'Tax Relief and Health Care Act of 2006,' as Introduced in the House on December 7, 2006" (JCX-50-06) 118-119, *Doc 2006-24589*, 2006 *TNT* 236-13 (Dec. 7, 2006).

³⁷One commentator has suggested that the process by which the IRS proposes technical corrections is ineffective. George Guttman, "Process for Noncontroversial Code Changes Is Not Working," *Tax Notes*, Jan. 9, 1995, p. 142, 95 *TNT* 6-7.

³⁸JCT, "Background Information Relating to the Joint Committee on Taxation" (JCX-2-05), *Doc 2005-3020*, 2005 *TNT* 30-10 (Feb. 2005) ("After the close of each Congress, the JCT staff

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generally publishes a 'Blue Book' which compiles the legislative history for each piece of legislation enacted during that Congress.").

³⁹Livingston, "What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of 'Subsequent' Tax Legislative History," 11 *Am. J. Tax Pol'y* 91, 98 (Spring 1994).

⁴⁰*Id.* at 100 ("the Blue Book took on one assertive role by providing notice of anticipated technical corrections to the 1986 Act. After describing the Congressional intent . . . in each affected area, the document added a footnote stating that '(a) technical correction may be necessary so that the statute reflects this intent.'") (footnotes omitted).

⁴¹*Id.* at 119.

⁴²152 *Cong. Rec.* S10713 (daily ed. Sept. 29, 2006) (statement of Grassley). See also JCT Overview of Revenue Estimating, *supra* note 8, at 34 n.28 ("The determination involves the House Ways and Means Committee and Senate Finance Committee tax staffs, the Joint Committee staff, and the Treasury staff. The IRS staff may also be involved.").

⁴³JCT Overview of Revenue Estimating, *supra* note 8, at 34. ("The principal factor in determining whether a provision is technical is the original intent of the underlying legislation.")

operate as intended), as well as any information suggesting that the proposed technical correction is not appropriate (for example, if the correction was contained in either the House's or Senate's version of a bill that was rejected in conference). Further, because a technical correction generally cannot have any revenue impact, it is particularly important to understand the JCT's revenue estimate of the provision in the original legislation to which a proposed technical correction relates.⁴⁴

It is only with a full understanding of the original legislation's legislative history that a case in support of a proposed technical correction can be properly built.

B. Considering Alternatives

Although the tax legislative process is historically slow, pursuit of a technical correction may be viewed as the best course of action in some instances, particularly if other time-sensitive provisions are accelerating the process. Nevertheless, it is important to consider whether a technical correction is necessary and whether other non-statutory, regulatory, or even administrative alternatives would accomplish the same objective. Other legislative alternatives also should be evaluated.

1. The JCT technical explanation. Introduced technical corrections bills are often accompanied by a technical explanation prepared by the JCT.⁴⁵ The technical explanation is comparable in form to a committee report. Although the technical explanation may simply restate or summarize the legislative text of a particular technical correction, in some cases the explanation may contain a more detailed analysis of the original legislation or a proposed correction to that legislation. Thus, the technical explanation itself may represent an alternative (or supplement) to a proposed technical correction if a detailed analysis could adequately address a taxpayer's concern. In addition to serving as an alternative to a legislative correction, the technical explanation may also be important in situations in which no regulatory guidance is issued, as it may represent the only detailed explanation of provisions contained in the original legislation or in related technical corrections to that legislation.

For example, as described above, the repatriation provision enacted as part of the Jobs Act provided for an 85 percent dividends received deduction for some cash dividends from abroad. One of the more controversial provisions in the proposed Tax Technical Corrections Act of 2004 would have granted Treasury explicit regulatory authority to prevent the application of the dividends received deduction in the case of a dividend that was

effectively funded by a U.S. shareholder.⁴⁶ In light of concerns raised by taxpayers regarding the scope of Treasury's regulatory authority, the technical explanation accompanying the Tax Technical Corrections Act of 2005 (H.R. 3376, S. 1447) contained a more detailed analysis of the proposed technical correction, including examples of internal financing transactions that would not be treated as effectively funding a repatriated dividend.⁴⁷ In response to further requests for proposed technical corrections,⁴⁸ the analysis was expanded in the technical explanation to the GO Zone Act to include additional examples of permissible internal financing transactions.⁴⁹ The inclusion of language in the technical explanations to address those taxpayer concerns was particularly important because it was not anticipated that Treasury would issue regulations because of the short-term nature of the repatriation provision.⁵⁰

Although the precedential value of a technical explanation on a stand-alone basis is unclear, the language of a technical explanation often is incorporated into the accompanying conference report to an enacted technical corrections bill, or a JCT Blue Book, or is otherwise adopted as legislative history. For example, although a conference report did not accompany the GO Zone Act (which included the Tax Technical Corrections Act of 2005), floor statements in both the House and Senate indicated that the accompanying technical explanation

⁴⁶H.R. 5395, 108th Cong., section 2(a)(7)(B); S. 3019, 108th Cong., section 2(a)(7)(B); JCT, "Description of the Tax Technical Corrections Act of 2004" (JCX-70-04) 3, *Doc 2004-22341*, 2004 *TNT* 225-12 (Nov. 19, 2004).

⁴⁷JCT, "Description of the Tax Technical Corrections Act of 2005" (JCX-55-05) 7-8, *Doc 2005-15580*, 2005 *TNT* 140-20 (July 21, 2005).

⁴⁸House Committee on Ways and Means, 109th Cong., 1st Sess., Written Comments on H.R. 3376, the "Tax Technical Corrections Act of 2005," 109th Cong., 1st Sess., (WMCP 109-6) 34-36, 56-58 (Aug. 31, 2005).

⁴⁹2005 GO Zone Technical Explanation, *supra* note 20, at 84-85.

⁵⁰*Id.* at 85. ("In light of the timing of this bill and the fact the Code section 965 will expire for many affected taxpayers at the end of 2005, it is understood that the Treasury Department in all likelihood will not issue regulations under this authority. If no such regulations are issued, it would be expected that generally applicable tax principles would be invoked to reach results consistent with the principles and examples described above.") See also Urse, Ocasal, and Lubkin, "Section 965 Dividend Repatriation (Part 2): Tips, Tasks and Traps," 16 *J. Int'l Tax'n* 26, 30 (Dec. 2005) (noting that because it was unclear "when the grant of regulatory authority . . . might be exercised," that the technical explanation language was "the best indication of what future anti-abuse rules in this area may encompass"); Price-WaterhouseCoopers, "President Signs Hurricane Relief, Technical Corrections Legislation," 17 *J. Int'l Tax'n* 13, 13 (Mar. 2006) ("This new language suggests that there is a real likelihood that further IRS guidance may not be forthcoming and that the technical explanation may be viewed as providing important guidance on grey areas under the new law. Thus, in analyzing to what extent dividends may qualify under Section 965, companies should consider adhering closely to the guidance in the JCT explanation.")

⁴⁴See generally JCT Overview of Revenue Estimating, *supra* note 8; Thomas F. Field, "Transparency in Revenue Estimating," *Tax Notes*, Jan. 17, 2005, p. 329, *Doc 2004-24018*, 2005 *TNT* 12-32; Judy Xanthopoulos, "A Closer Look at Revenue Estimating," *Tax Notes*, Jan. 10, 2005, p. 217, *Doc 2004-24017*, 2005 *TNT* 7-33; Joint Committee on Taxation, "Methodology and Issues in the Revenue Estimating Process" (JCX-2-95), *Doc 95-1118*, 95 *TNT* 15-15 (Jan. 23, 1995).

⁴⁵See, e.g., 2006 Technical Explanation, *supra* note 32.

was indicative of legislative intent.⁵¹ That technical explanation was later incorporated into a JCT Blue Book.⁵²

2. Regulatory or other administrative guidance. Interpretation of a tax statute that arguably does not reflect congressional intent may appropriately be addressed by regulatory or other administrative guidance rather than a technical correction. Therefore, regulatory or administrative guidance may be particularly attractive alternatives to a technical correction in light of Treasury's broad regulatory authority, which is often supplemented by explicit statutory grants of regulatory authority for specific matters,⁵³ and its ability to issue other administrative guidance, such as revenue rulings or notices, in appropriate cases. In response to some proposed technical corrections, Congress has directed Treasury to consider whether the subject of the proposal was appropriate for regulatory or other administrative guidance.⁵⁴

Several technical corrections that taxpayers proposed for the Jobs Act were addressed through regulatory or other administrative guidance. For example, to prevent the inappropriate use of foreign tax credits as a result of so-called foreign tax credit generating schemes, section 901(k) denies foreign tax credits for withholding taxes on dividends when a taxpayer has not met a required holding period for the dividend-paying stock (or has an obligation to make related payments with respect to a position in substantially similar or related property).⁵⁵

⁵¹151 *Cong. Rec.* H11940 (daily ed. Dec. 16, 2005) (statement of Rep. Jim McCrery, R-La.) ("Members of the other body have placed a document prepared by the Joint Committee on Taxation in the Congressional Record that explains the legislative intent with respect to H.R. 4440, as amended. The Joint Committee will also make this explanation public. This document expresses our understanding of the bill now before us and it will be a useful reference in understanding the legislation before us."); 151 *Cong. Rec.* S14028 (daily ed. Dec. 19, 2005) (statement of Grassley) ("Mr. President, I wish to submit for the record the Joint Committee's technical explanation of the Gulf Opportunity Zone Act of 2005. This explanation is of the Senate amendment to H.R. 4440."). See also 2005 GO Zone Technical Explanation, *supra* note 20, at 1.

⁵²JCT, "General Explanation of Tax Legislation Enacted in the 109th Congress" (JCS-01-07) 237-256, *Doc 2007-1447*, 2007 *TNT 13-16* (Jan. 17, 2007).

⁵³In situations in which staff does not believe a technical correction is appropriate and Treasury expresses concern regarding whether it has the requisite regulatory authority, consideration should be given to whether the grant of such specific regulatory authority by statute could qualify as a technical correction.

⁵⁴Letter to Treasury from taxwriters, *Doc 2005-15592*, 2005 *TNT 140-31* (July 22, 2005) (hereinafter 2005 Congressional Letter) (asking Treasury to consider issuing guidance on the treatment of online software under section 199).

⁵⁵H.R. Conf. Rep. No. 220, 105th Cong., 1st Sess. 569-570 (1997); JCT, "General Explanation of Tax Legislation Enacted in 1997" (JCS-23-97) 246-249, *Doc 97-33838*, 97 *TNT 245-64* (Dec. 23, 1997).

The Jobs Act added section 901(l) to extend the principles of section 901(k) to items of income or gain other than dividends.⁵⁶

After enactment of the Jobs Act, it was determined that the provision was overly broad because it would disallow foreign tax credits resulting from some ordinary-course, back-to-back computer program licensing arrangements.⁵⁷ A technical correction was requested to exempt those ordinary business transactions from the foreign tax credit disallowance of section 901(l). However, because Treasury was granted regulatory authority to exempt transactions from the application of section 901(l),⁵⁸ the IRS issued a notice exempting those back-to-back computer program licensing arrangements.⁵⁹

In another example, the section 7874 "anti-inversion" legislation enacted as part of the Jobs Act was intended to impose negative tax consequences on transactions in which a U.S. parent corporation of a multinational corporate group is replaced by a foreign parent corporation without significant change in the ultimate ownership of the group.⁶⁰ Several taxpayers and commentators criticized the anti-inversion provision as overly broad because it could apply to some internal restructuring transactions, such as the transfer of a wholly owned domestic corporation to a wholly owned foreign corporation without a change in the parent corporation of the group.⁶¹

A technical correction was sought to address that issue. However, because the Senate version of the anti-inversion legislation included an exception for internal restructurings that was rejected in conference,⁶² a technical correction was not granted. Treasury, however, determined that based on the legislative history of the provision, it had sufficient regulatory authority to issue temporary regulations exempting some internal restructurings from the anti-inversion provision.⁶³

⁵⁶P.L. 108-357, section 832(a), 118 Stat. 1418, 1587-1588. See 2004 Jobs Act Conference Report, *supra* note 11, at 620-621; 2005 Blue Book, *supra* note 11, at 382-384.

⁵⁷These ordinary business transactions typically involve situations in which a software company enters into a master license agreement with a computer equipment manufacturer, which then enters into a sublicense with one its foreign affiliates for purposes of reproducing and distributing the underlying software.

⁵⁸Section 901(l)(3), as enacted by P.L. 108-357, section 832(a), 118 Stat. 1418, 1588.

⁵⁹Notice 2005-90, 2005-2 C.B. 1163, *Doc 2005-24196*, 2005 *TNT 230-4*.

⁶⁰See 2004 Jobs Act Conference Report, *supra* note 11, at 565-567; 2005 Blue Book, *supra* note 11 at 341-345.

⁶¹See, e.g., Patrick W. Martin, "Oops — the Accidental Inversion: The Scope of Section 7874 to Certain In-Bound International Transactions Not Intended by Congress to Be a 'Corporate Inversion,'" *Doc 2005-12671*, 2005 *TNT 115-37* (June 9, 2005).

⁶²2004 Jobs Act Conference Report, *supra* note 11, at 571.

⁶³Temp. reg. section 1.7874-1T. One commentator has questioned the IRS's authority to issue these regulations in light of the fact that Congress rejected the proposed technical correction. Dubert, "Section 7874 Temporary Regulations: Treasury and IRS Wave Taxpayers Through the Stoplight," 17 *J. Int'l Tax'n* 12, 14 (July 2006).

In another example, the Jobs Act created a manufacturing deduction for income attributable to some U.S. production activities.⁶⁴ The measure provides a deduction equal to a percentage of revenues attributable to the "lease, rental, license, sale, exchange or other disposition" of specified property.⁶⁵

The computer software industry argued that a technical correction was necessary because the IRS issued interim guidance providing that although delivery of software through physical delivery or Internet download would qualify under the "lease, rental, license, sale, exchange or other disposition" requirement, the provision of software through online remote access would not qualify.⁶⁶ The computer software industry argued that a technical correction was needed to ensure that revenues attributable to providing access to computer software should qualify for the deduction regardless of the method of distribution of the software.⁶⁷

Congress did not include the requested technical correction in legislation because of the belief that the issue could be resolved administratively.⁶⁸ In that regard, simultaneous to the introduction of the Tax Technical Corrections Act of 2005, the chair of the House Ways and Means Committee and the chair and ranking minority member of the Senate Finance Committee sent a letter asking Treasury "to consider further the treatment of online access to computer software."⁶⁹

Despite the congressional letter, the IRS initially issued proposed regulations consistent with their interim guidance such that revenues attributable to the provision of online software did not qualify for the deduction.⁷⁰ The preamble to those regulations, however, solicited taxpayer comments on the issue.⁷¹ As a result of further

comments, the IRS issued temporary and proposed regulations providing exceptions under which gross receipts from online computer software qualify for the domestic manufacturing deduction.⁷²

As noted above, Treasury staff is involved in the evaluation of proposed technical corrections. Therefore, meetings with Treasury staff should be used to discuss not only a proposed technical correction but also the feasibility of addressing the issue through a regulatory alternative or other administrative guidance.

3. Clerical corrections. Technical corrections bills typically contain a large number of clerical corrections.⁷³ However, because these corrections are typically limited to ministerial items such as typographical amendments or the correction of code section cross-references, technical corrections typically proposed by taxpayers will not qualify as clerical corrections.⁷⁴

4. Substantive legislation. As previously discussed, a proposal generally must be revenue neutral to qualify as a technical correction. However, if a proposal has an independent revenue impact (and therefore does not qualify as a technical correction) but is appropriate from a policy perspective, consideration should be given to pursuing the provision as a substantive legislative proposal independent of the technical corrections process. In that regard, a technical corrections bill often is viewed as a potential vehicle for substantive changes to the underlying legislation.⁷⁵

C. Meetings With Staff

Once a case for a proposed technical correction has been developed, appropriate materials should be prepared for meetings with staff. Although a one-page

⁶⁴Section 199, as enacted by P.L. 108-357, section 102, 118 Stat. 1418, 1424-1429. See generally H.R. Conf. Rep. No. 755, 108th Cong., 2d Sess. 265-275 (2004); 2005 Blue Book, *supra* note 11 at 170-177.

⁶⁵Section 199(c)(4)(A)(i), as enacted by P.L. 108-357, section 102, 118 Stat. 1418, 1425.

⁶⁶Notice 2005-14, 2005-1 C.B. 498, 508, section 3.04(7)(d), *Doc 2005-1241*, 2005 TNT 13-7; Schatz I, *supra* note 23 ("In January, the IRS ruled that if a customer buys, rents or licenses software off the shelf or downloads it from the Internet, the software company can claim the deduction. Yet the IRS ruled that fees paid by customers who remotely access online software applications do not qualify.")

⁶⁷*Id.* ("Software firms . . . have complained that the IRS is not interpreting the manufacturing deduction broadly enough and want the law clarified.")

⁶⁸Schatz II, *supra* note 23 ("Tax writers did not include a provision sought by software companies . . . that would ensure the new deduction applies to Internet-based software applications.")

⁶⁹2005 Congressional Letter, *supra* note 54. Schatz II, *supra* note 23 (noting that the letter was a "prod to the IRS . . . suggest[ing] it was Congress' intent to provide Internet-based software with the tax benefit.")

⁷⁰Prop. reg. section 1.199-3(h)(6)(i).

⁷¹70 Fed. Reg. 67220, 67239 (Nov. 4, 2005) ("Comments are requested concerning whether gross receipts derived from the provision of certain types of online software should qualify under section 199 as being derived from a lease, rental, license,

(Footnote continued in next column.)

sale, exchange, or other disposition of the software and, if so, how to distinguish between such types of online software.")

⁷²Temp. reg. section 1.199-3T(i)(6); prop. reg. section 1.199-3(i)(6). See Crystal Tandon, "Domestic Production Regs Issued; Software Guidance Added," *Tax Notes*, May 29, 2006, p. 983, *Doc 2006-10078*, 2006 TNT 101-1.

⁷³JCT Overview of Revenue Estimating, *supra* note 8, at 28 n.34 (technical corrections can be "merely clerical"); *Federal National Mortgage Assoc.*, *supra* note 9, at 234 ("Congress turns to technical corrections when it wishes to . . . repair a scrivener's error.")

⁷⁴It should be noted that clerical corrections typically do not require discussion in the technical explanation typically prepared by the JCT in connection with a technical corrections bill.

⁷⁵Lobbyists in particular may view a technical corrections bill as an opportunity to seek substantive changes, often to the frustration of those seeking enactment of the bill on a timely basis. "Keep the Tax Cleanup Clean," *The New York Times*, July 8, 1987, p. A26 ("With loophole lobbyists waiting to enlarge [errors made in the underlying legislation], the trick will be to keep the cleanup bill clean."); *Id.* ("The [technical] 'corrections' [that lobbyists] want would repeal reform they opposed in the first place."); "Lobbyists Regroup for Tax Bills on Far Horizons," *The New York Times*, Oct. 1, 1986, p. B10 (The chair of the Senate Finance Committee "insists that the bill will consist only of technical fixes. But most lobbyists see the opportunity for more.")

summary of the issue and the proposed technical correction is useful for staff meetings, a more detailed memorandum should also be prepared, including (when appropriate): a full legal analysis supporting the proposed technical correction, including an analysis of relevant legislative history and copies of cited materials; proposed statutory language and accompanying legislative history for the proposed technical correction; and similar materials for any alternatives to the proposed technical correction.⁷⁶

Once the materials are prepared, meetings should be scheduled with Republican and Democratic staffs of the Ways and Means and Finance committees, as well as staff from the JCT and Treasury. For particularly widely applicable or controversial issues, it may be possible to schedule group meetings with multiple staff members. Consideration should also be given to the strategic ordering of staff meetings; for example, when it's unclear whether a proposed technical correction will have a revenue impact, it would be advisable to first meet with the JCT staff. Further, it is often advisable to provide staff members with some advance information regarding the proposed technical correction, such as the one-page summary described above.

D. A Continual Process

It is important to appreciate that technical corrections are a continual process. Technical corrections bills are often introduced as stand-alone bills in multiple Congresses as additional provisions are added until they are incorporated in other tax legislation for purposes of enactment.⁷⁷ For example, the Tax Technical Corrections Act of 2004 was introduced in the 108th Congress as H.R. 5395 and S. 3019. A second version of that legislation with additional technical corrections was introduced as the Tax Technical Corrections Act of 2005, H.R. 3376 and S. 1447, in the 109th Congress. A third version, with even

more additional technical corrections, was then incorporated into, and later enacted as part of, the GO Zone Act.⁷⁸

The timing of the introduction and enactment of technical corrections bills is of course subject to the vagaries of the legislative process, including the existence of time-sensitive corrections, other legislative priorities, and the availability of an appropriate legislative vehicle.⁷⁹ It should also be noted that once a technical corrections bill is introduced, it tends to move through the legislative process as a single complete package. As a result, individual provisions in an introduced bill are typically not enacted on an ad hoc basis, but rather an entire technical corrections package will be enacted together once it has been completely vetted.⁸⁰

For example, the Tax Technical Corrections Bill of 2004 was introduced in the 108th Congress without any expectation that the bill would be enacted on a timely basis. The bill was introduced at that time, however, to provide guidance on time-sensitive issues raised by the Jobs Act.⁸¹ The bill was also introduced, as are all technical corrections bills, to provide notice and to solicit public comments.⁸²

⁷⁸Similarly, the Working Families Tax Relief Act of 2004, P.L. 108-311, 118 Stat. 1166, incorporated legislation originally introduced as the Tax Technical Corrections Act of 2002 and later introduced as the Tax Technical Corrections Act of 2003. See H.R. 5713, 107th Cong. (2002); S. 1353, 107th Cong. (2002); H.R. 3654, 108th Cong. (2003); S. 1984, 108th Cong. (2003); see also 2005 Blue Book, *supra* note 11, at 155-163.

⁷⁹Under the Senate's so-called Byrd rule, technical corrections generally cannot be included as part of a revenue reconciliation bill because such corrections by definition do not have a revenue impact. Stamper, "Taxwriters Making Tough Choices on Reconciliation Tax Bills," *Tax Notes*, Nov. 7, 2005, p. 714 ("Sixty votes would be needed to attach the technical corrections bill because the so-called Byrd rule does not allow provisions without revenue implications to move in a reconciliation bill. Technical corrections by their definition do not affect revenue. . . .").

⁸⁰Ritterpusch, "Initial Notice on New Lookthrough Rule to Address Some Basic Issues, Hicks Says," *BNA Daily Report for Executives*, Dec. 18, 2006, p. G-10 (noting that specific technical corrections were not enacted because they were part of a broader technical corrections package that "had other issues and was not ready").

⁸¹Senate Finance Committee press release (Nov. 19, 2004) ("Grassley and Baucus said they wanted to introduce the bill in the 108th Congress to provide guidance for time-sensitive technical corrections, such as those affecting companies that plan to invest their foreign earnings in the United States before the end of this calendar year and those affecting employee benefit plans.").

⁸²See 152 Cong. Rec. S10713 (daily ed. Sept. 29, 2006) (statement of Grassley) ("By filing this bill, we hope interested parties and practitioners will comment and provide direction on further edits, additions, or deletions."); see also House Ways and Means Committee press release, *Doc 2005-15823*, 2005 TNT 142-21 (July 26, 2005); Senate Finance Committee press release, *Doc 2005-15868*, 2005 TNT 142-25 (July 25, 2005). These comments are typically made public. Senate Finance Committee press release, *Doc 2005-16898*, 2005 TNT 152-24 (Aug. 9, 2005).

⁷⁶A factual description of the taxpayer, including any circumstances related to the proposed technical correction, may also be useful in some instances.

⁷⁷Technical corrections bills are typically not enacted on a stand-alone basis because of other legislative priorities or procedural hurdles. See, e.g., Wesley Elmore and Dustin Stamper, "House, Senate Forge Ahead on Dissimilar Tax Packages," *Doc 2005-23338*, 2005 TNT 221-1 (Nov. 17, 2005) ("Congressional leadership typically does not carve time out from busy floor schedules for stand-alone technical corrections bills"); Stamper, "Senate Finance Staffers Predict Katrina Tax Bill Soon, Tech Corrections Next Year," *Doc 2005-22096*, 2005 TNT 210-2 (Nov. 1, 2005) (staff member stating belief that a technical corrections bill could not pass in the Senate by unanimous consent). The extended legislative process for technical corrections bills hopefully helps to ensure that the proposed technical corrections do not need further refinement in future legislation. *But see* Willson and Halverson, *supra* note 6, at 363 n.3 ("Isn't there a lesson for Congress when technical corrections are needed for a Technical Corrections Act?").

The enactment of the Tax Technical Corrections Act of 2005 as part of the GO Zone Act also evidences the fact that technical corrections are a continual process. Although it consisted primarily of technical corrections to recently enacted legislation such as the Jobs Act, it also contained technical corrections to legislation originally enacted as far back as 1987.⁸³ Further, during enactment of the GO Zone Act, Finance Committee Chair Chuck Grassley, R-Iowa, acknowledged that additional technical corrections were still under consideration:

The Senate Finance Committee and the Committee on Ways and Means, in consultation with the Joint Committee on Taxation and the Department of the Treasury, are continuing to assess proposals for other technical corrections which may be needed to achieve congressional intent.⁸⁴

The multiple technical corrections to the straddle rules enacted as part of the Jobs Act also serve as evidence that technical corrections are a continual process. The Jobs Act contained several modifications to the straddle rules, including provisions that allowed for the identification of offsetting positions in a straddle (the identification rule) and provisions regarding the treatment of loss from a position in an identified straddle (the loss treatment rule).⁸⁵ After enactment of the Jobs Act, practitioners insisted that technical corrections were needed for both the identification rule and the loss treatment rule.⁸⁶ Although the requested technical correction to the identification rule was included as part of the Tax Technical Corrections Act of 2005,⁸⁷ the requested technical correction to the loss treatment rule was not included until the Tax Technical Corrections Act of 2006.⁸⁸

Thus, it is often appropriate to continue to pursue a proposed correction (assuming the provision qualifies as a technical correction) despite the omission of the correction in a recently introduced or enacted technical corrections bill.

E. A Means of Providing Interim Guidance

As noted above, technical corrections bills may be introduced to provide time-sensitive guidance in advance of enacted legislation. In many instances, lawmakers have supplemented an introduced technical corrections bill with an accompanying letter to Treasury

requesting that guidance consistent with the introduced bill be issued in advance of the bill's enactment.⁸⁹ Those requests, which typically are made by the chairs and ranking minority members of the Ways and Means and Finance committees, are routinely granted.⁹⁰

For example, the Tax Technical Corrections Act of 2004 was introduced to provide guidance on time-sensitive issues raised by the Jobs Act, including the repatriation provision. Under section 965(d), a taxpayer is not allowed a foreign tax credit for the portion of each dividend that qualifies for the 85 percent dividends received deduction (that is, the foreign tax credit for 85 percent of the foreign taxes paid or deemed paid on a qualifying dividend is disallowed). Under the section 78 gross-up, however, an amount equal to the foreign taxes deemed paid is generally included in income as a dividend if a corporation chooses the benefits of the foreign tax credit.⁹¹ The Tax Technical Corrections Act of 2004 included a provision clarifying that foreign taxes that were not allowed to be credited by reason of section 965(d) do not give rise to income inclusions under section 78. After introduction of the Tax Technical Corrections Act of 2004, lawmakers sent a letter to Treasury requesting, in part, that guidance consistent with that technical correction be issued.⁹² In response to the request, Treasury issued two notices providing that section 78 did not apply to any foreign tax that is not allowable as a foreign tax credit by reason of section 965(d).⁹³

⁸⁹Such a request (and the granting of such a request) is appropriate in light of the fact that, as discussed in greater detail *supra*, technical corrections generally apply on a retroactive basis to the date of the enactment of the original underlying legislation to which such corrections relate. In the absence of such a request, the IRS has issued private letter rulings that do not reflect a proposed technical correction, with the understanding that if a proposed technical correction is enacted, the IRS may modify its prior ruling. *See, e.g.*, LTR 8851040 (Sept. 26, 1988); LTR 8852032 (Sept. 29, 1988); LTR 8852027 (Sept. 29, 1988). Further, the IRS has on occasion revised a private letter ruling on enactment of a technical correction. LTR 7934071 (May 24, 1979).

⁹⁰*See, e.g.*, Notice 97-59, 1997-2 C.B. 309, *Doc 97-29520*, 97 *TNT* 208-12 (the IRS granted a congressional request that technical corrections to capital gains provisions be followed in advance of enactment). It should be noted, however, that in at least one instance, Treasury rejected the request of a single member of Congress to apply a proposed technical correction as if it had been enacted. 1990 IRS NSAR 9405 (Nov. 28, 1990). More generally, although it has been the practice of Treasury to grant such requests, it is not compelled to do so.

⁹¹Morrison, "New Section 965 Contains Traps for the Unwary," 33 *Tax Mgmt. Int'l J.* 717 (Dec. 10, 2004).

⁹²Letter to Treasury from Grassley and Baucus, *Doc 2005-5629*, 2005 *TNT* 52-29 (Mar. 18, 2005).

⁹³Notice 2005-38, 2005-1 C.B. 1100, 1116, section 9.01, *Doc 2005-10171*, 2005 *TNT* 90-11; Notice 2005-64, 2005-2 C.B. 471, 476, section 4.02, *Doc 2005-17558*, 2005 *TNT* 161-1. Similarly, in light of the many proposed technical corrections to the section 199 domestic manufacturing deduction contained in the Tax Technical Corrections Act of 2005, lawmakers sent a letter to Treasury that resulted in the promulgation of regulations consistent with such technical corrections. *See* 2005 Congressional Letter, *supra* note 54; REG-105847-05, 2005-2 C.B. 987, 989 ("On

(Footnote continued on next page.)

⁸³JCT Overview of Revenue Estimating, *supra* note 8, at 34 ("Technical corrections occurring many years after the enactment of the original legislation receive the same treatment as technical corrections for recent legislation.")

⁸⁴151 *Cong. Rec.* S13703 (daily ed. Dec. 16, 2005) (statement of Grassley).

⁸⁵P.L. 108-357, section 888, 118 Stat. 1418, 1642-1643. *See* 2004 Jobs Act Conference Report, *supra* note 11, at 754-758.

⁸⁶*See, e.g.*, Sheppard, "Tax Officials Discuss Financial Products at NYSBA Meeting," *Tax Notes*, Jan. 30, 2006, p. 446, *Doc 2006-1567*, 2006 *TNT* 18-6.

⁸⁷2005 Go Zone Technical Explanation, *supra* note 20, at 89.

⁸⁸H.R. 6264, 109th Cong., section 6(c) (2006); S. 4026, 109th Cong., section 6(c) (2006); 2006 Technical Explanation, *supra* note 32, at 8-10; Sheppard, "Bar Group Assesses Technical Correction for Unbalanced Straddle Rules," *Tax Notes*, Nov. 20, 2006, p. 719, *Doc 2006-22883*, 2006 *TNT* 218-3.

In another example, section 470 was enacted as part of the Jobs Act to address concerns associated with abusive leasing transactions known as sale-in, lease-out transactions.⁹⁴ After enactment of the Jobs Act, however, it was determined that section 470 could have unintended consequences because it applied not only to abusive SILO transactions but also possibly to some nonabusive transactions involving partnerships.⁹⁵ As a result, the IRS granted a one-year moratorium on applying section 470

to affected partnerships to allow Congress to develop an appropriate technical correction.⁹⁶ Given the complexity of the issue, however, Congress requested and received an additional year of the moratorium to continue its work in developing such a correction.⁹⁷ Although a correction was later proposed as part of the Tax Technical Corrections Act of 2006,⁹⁸ the proposal was criticized⁹⁹ and as a result, the moratorium was recently extended for an additional year.¹⁰⁰

V. Conclusion

Technical corrections are unique in that they represent bicameral, nonpartisan legislation that is developed with significant congressional and Treasury staff involvement. By understanding the nature of technical corrections and the process by which they are evaluated, taxpayers and practitioners can effectively pursue appropriate technical corrections.

July 21, 2005, the Chairman and Ranking Member of the Senate Finance Committee and the Chairman of the House Ways and Means Committee introduced the Tax Technical Corrections Act of 2005, H.R. 3376 and S. 1447, 109th Cong. (2005). In a letter on the same date to the Treasury Department (the Congressional Letter), they provided clarification for several issues so that appropriate regulatory guidance may be issued reflecting their intention. These proposed regulations reflect the intent expressed in the Congressional Letter with respect to section 199.”).

⁹⁴P.L. 108-357, section 848, 118 Stat. 1418, 1602-1606. See 2004 Jobs Act Conference Report, *supra* note 11, at 654-663; 2005 Blue Book, *supra* note 11, at 418-426.

⁹⁵See, e.g., Harvey, Sowell, and Browne, “Section 470 and Pass-Thru Entities: A Problem in Need of a Solution,” 7 *Bus. Entities* 12 (Nov.-Dec. 2005); Tobin, “The Trouble With New Section 470,” 34 *Tax Mgmt. Int’l J.* 451 (Aug. 12, 2005).

⁹⁶Notice 2005-29, 2005-1 C.B. 796, *Doc* 2005-4961, 2005 *TNT* 47-6.

⁹⁷Letter to Treasury from taxwriters, *Doc* 2005-25186, 2005 *TNT* 240-14 (Dec. 15, 2005); Notice 2006-2, 2006-2 IRB 278, *Doc* 2005-25450, 2005 *TNT* 242-11. See also Notice 2007-4, 2007-2 IRB 260, 261, *Doc* 2006-24878, 2006 *TNT* 240-4 (“Notice 2006-2 was issued subsequent to receipt by the Treasury Department of a letter from the Chairmen and Ranking Members of both the Senate Finance Committee and the House Ways and Means Committee requesting that the Treasury Department consider extending the transition relief provided in Notice 2005-29.”).

⁹⁸H.R. 6264, 109th Cong., section 6(b) (2006); S. 4026, 109th Cong., section 6(b) (2006); 2006 Technical Explanation, *supra* note 32, at 6-8. See Elmore, “Before Adjourning, Taxwriters Introduce Technical Corrections,” *Tax Notes*, Oct. 9, 2006, p. 111.

⁹⁹Joseph DiSciullo, “Anti-SILO Revisions Inadequate, ABA Tax Section Warns,” *Tax Notes*, Nov. 13, 2006, p. 647.

¹⁰⁰Notice 2007-4, 2007-2 IRB 260, *Doc* 2006-24878, 2006 *TNT* 240-4.

SUBMISSIONS TO TAX NOTES

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