

# Ernst & Young Tax Educators' Symposium 2006

## The Tax Legislative Process

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1

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# The Tax Legislative Process

(From the Taxpayer's Perspective)

2

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# Determine Whether a Statutory Change to the Internal Revenue Code is the Proper Remedy

Before seeking a legislative solution, the taxpayer should first consider exhausting all administrative remedies. Seeking a private letter ruling, revenue ruling, or other administrative guidance may be the quickest way to achieve the taxpayer's goal.

Example: Wireless Telecommunications Equipment

# Identify the Desired Statutory Change with Precision

- There may be several ways to achieve a taxpayer's desired legislative goal. The revenue cost of a change to the tax code is always an important consideration in deciding which approach to take. The taxpayer should generally try to address the problem in as narrow a manner as possible -- without proposing a statutory change that is so narrow that it will impact only the taxpayer. (This is what's known as a "rifle shot.")

# Coalition vs. Single Taxpayer Effort

- Determine whether the legislative issue lends itself to a “coalition” effort. Coalitions of companies – particularly coalitions that cross industry boundaries – add significant political weight to an issue and bring a wider array of political and constituent relationships to the table.

# Consider Obtaining an Economic Analysis of the Revenue Cost of the Statutory Change

- An outside revenue estimate will help guide the decision on how narrowly to craft the proposed statutory change.
- The first question any Congressional staffer will ask is “What does the provision cost?” The Joint Committee on Taxation is responsible for preparing official revenue estimates, but this process often takes many months. Obtaining an outside revenue estimate at the beginning of the process not only will aid in drafting the provision, but will also help staff to assess the “political” viability of the provision.

# Prepare Draft Statutory Language and Supporting Advocacy Materials

- Standard advocacy materials include:
  - Draft statutory text (Legislative Counsel)
  - Introductory statement (for insertion in the Congressional Record by the bill sponsor)
  - Background memorandum (providing the factual background and technical arguments for the provision)
  - The proverbial “One-Pager”
  - Frequently asked questions

# Evaluate Constituent Relationships with Members of Congress

- When seeking a champion for a proposed tax change, examine the taxpayer's business locations to determine the Senators and Representatives with whom it has constituent relationships.
- It is always preferable to find sponsors who serve on the House and Senate tax-writing committees.
  - Example: H.R. 1868, FET Repeal

# Schedule meetings with Committee staff

- Before approaching specific Members of Congress about introducing a proposed tax change, it is generally advisable to first meet with the professional staff of the House Ways and Means Committee and Senate Finance Committee to gauge their response to the provision.
- The second question a Congressional staffer will ask is what the Committee staff thinks of the provision.

# Approach Target Sponsors by First Meeting with their Tax Legislative Assistants

- Meet first with tax legislative assistant for the Members of Congress who have been targeted as potential sponsors to discuss the proposed tax change and explain why it is necessary.
- The staff will want to conduct their own “due diligence” on the provision before you meet with the Member. Don’t expect a quick answer.

# Meet with the Sponsor

- After a Member's tax legislative assistant has completed his/her due diligence and has recommended that the Member should sponsor the proposed tax change, meet next with the Member of Congress. This affords the Congressman/Senator an opportunity to ask questions and learn the technical details relating to the issue (which will make the Member a better advocate for the provision).

# Determine Whether the Provision Should Be Introduced as a “Stand-Alone” Bill

- “Stand-alone” tax bills are very rarely considered by Congress. Rather, Congress generally considers tax legislation once or twice per year (often as part of the budget reconciliation process). Each tax bill may contain hundreds of different provisions.
- It isn’t always advisable for the taxpayer’s proposed tax change to actually be introduced in bill form. This depends to some extent on the breadth and cost of the proposed change. The broader the bill and the higher the cost, the more important it becomes to introduce a stand-alone bill and to obtain cosponsors.

# Have the Bill Drafted and Introduced

- Work with the sponsor's staff to have the bill drafted by House/Senate Legislative Counsel. Once the language has been perfected, the bill can be introduced.
- Ask the sponsor to send a letter to the Joint Committee on Taxation requesting an estimate of the revenue cost of the proposed tax change.

# Meet with Staff of the Joint Committee on Taxation

- Once a revenue estimate on the provision has been requested, meet with appropriate members of the Joint Committee on Taxation ("JCT") staff. The JCT staff is comprised of tax attorneys, accountants and economists with expertise in specific issue areas. The purpose of the meeting is to explain the proposed tax change to the staff and provide technical background information and policy justifications for the provision. If an outside revenue estimate was performed, it may also be helpful to include the economist who prepared the estimate in the meeting.

# “Dear Colleague” Letter

- Ask the sponsor of the bill to send a “Dear Colleague” letter to all Members of the House/Senate soliciting cosponsors for the legislation. A “Dear Colleague” letter briefly explains the legislation, provides background information and policy justifications for the change, and requests Members to join as cosponsors.

# Schedule Advocacy Meetings

- Meet with Members' staff to request that their Members sign onto the bill as cosponsors. In order to best position the proposed tax change for inclusion in a broader tax bill, it is generally helpful (although not absolutely necessary) to try to get a majority of the members of the House and Senate tax-writing committees to join as cosponsors.
- Unless the provision is very broad in application and has a high revenue cost, it generally isn't viewed as being necessary to seek cosponsors from members who do not serve on the tax-writing committees.

# Meet with Treasury Tax Policy Officials

Meet with the appropriate individuals in the Office of Tax Policy at the Department of Treasury to discuss the technical background and policy justifications for the provision. While the Treasury Department generally does not actively support proposed tax changes beyond those revenue proposals included in the Administration's annual budget, it will often oppose specific proposals on policy grounds, so it's important to know Treasury's position.

# Other Advocacy Activities Prior to Committee Markup

- Consider asking the bill's sponsor and cosponsors to join on letters to the Ways and Means and Finance Committee Chairmen encouraging them to include the provision in their "Chairman's Mark" for the next tax bill that is to be considered by their respective committees.
- Encourage the sponsor to seek Committee hearings on the subject area and other similar opportunities to build support for the provision.

# The Committee “Markup” Process

- The actual consideration of tax legislation in the Congress begins with a Committee “markup,” i.e., the process of going through a bill section-by-section for amendment.
- Under the Constitution, tax bills must arise in the House of Representatives. Under House rules, tax bills can only arise in the Committee on Ways and Means.
- In recent years, tax bills have been considered as part of the overall budget reconciliation process. This precedent was established in 2001 when the Federal budget enjoyed large projected surpluses, but the precedent has been maintained ever since even though the budget is now deeply in deficit.

# The Import of Using the Budget Reconciliation Process for Consideration of Tax Bills

- All action in the Senate proceeds by means of “unanimous consent” agreements. If a Senator does not consent to the consideration of specific legislation, he may “filibuster” the bill. Senate rules require 60 votes to break off a filibuster. The practical effect is that 60 votes are required to pass tax legislation in the Senate.
- Tax bills have been considered under the rubric of budget reconciliation because this process places strict time limits on debate in the Senate (20 hours) and requires only 51 votes for passage.

# Traditional Calendar of Congressional Budget Activities

- 1<sup>st</sup> Monday in February – President's Budget is Submitted to Congress
- March 1<sup>st</sup> – Committees submit "views and estimates" to the Budget Committees
- March – House and Senate Budget Committees develop respective budget resolutions, which set targets for deficit reduction and/or place limits on revenue cost of tax bills. House Budget Committee reports in mid-March; full House votes on resolution roughly one week later.
- April 1<sup>st</sup> – Deadline for Senate Budget Committee to report its budget resolution. Full Senate acts on budget resolution roughly one week later.
- April 1-15 – House-Senate conferees develop conference report on budget resolution; each chamber then votes on the resolution conference report.
- April 15-May – Authorizing committees develop reconciliation legislation and report legislation to their respective budget committees. Budget committees package reconciliation language and report bills to the floors of their respective chambers. After passage in each chamber, House-Senate conferees develop conference report on reconciliation and bring to floors for vote.
- June – September 30 – Consideration of individual appropriations legislation

# The Chairman's "Mark"

- Markup of legislation by the tax-writing committees begins with a Chairman's "Mark," i.e., a statutory draft of the bill to be considered, prepared by the Chairman's staff in consultation with the staff of the Joint Committee on Taxation. The markup must be announced and the Chairman's Mark provided to Committee members 24 hours in advance of the markup.
- The taxpayer's goal should be to try to persuade the Committee staff to include the proposed tax change in the Chairman's Mark. In recent years, this has been a very difficult task, particularly in the Ways and Means Committee.

# The Committee Markup Process

- The markup process begins with a section-by-section summary explanation of the Chairman's Mark, which is usually presented by the Chief of Staff of the Joint Committee on Taxation. During the explanation, Committee members are given the opportunity to ask questions and make comments about the merits (or lack thereof) of specific provisions.
- After the explanation is completed, the bill is open for amendment. The markup process proceeds through the bill section-by-section until all Members have had an opportunity to offer amendments.

# The Amendment Process

- If the taxpayer's proposed tax change is not included in the Chairman's mark (and sometimes isn't known until the Mark becomes public 24 hours before the markup), the next step would be to request the sponsor to offer an amendment during markup to include the provision.
- If the sponsor agrees to offer the amendment, it is important to touch base with cosponsors to let them know what to expect and to request their support.

# Other Opportunities

- In the House, tax bills generally are considered under a “closed” rule, i.e., no amendments are permitted to be offered on the House floor during consideration of the bill.
- After the bill passes the House, the Senate Finance Committee generally marks up its own version. This would be the next opportunity for inclusion of the proposed tax change.
- If the taxpayer is not successful in getting its proposed tax change included in a tax bill as reported by the Senate Finance Committee, a Senate floor amendment would be the next option. In the Senate, tax bills are amendable on the Senate floor (even bills proceeding under the budget reconciliation process).

# Be Patient

- On average, it probably takes 5-7 years for a proposed tax change with merit to make it through the political process from the time that it is first conceived to the time it is first enacted. If at first you don't succeed, try, try again.

- Some closing thoughts ...

# Questions?



Thank you for your participation and  
feedback!

