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Report to the Chairman, Committee on Finance, U.S. Senate

April 2021

TAX CUTS AND JOBS ACT

Future Rulemaking Should Provide Greater Detail on Paperwork Burden and Economic Effects of International Business Provisions

A Century of Non-Partisan Fact-Based Work

GAO-21-277

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Highlights

Highlights of GAO-21-277, a report to the Chairman, Committee on Finance, U.S. Senate

April 2021

TAX CUTS AND JOBS ACT

Future Rulemaking Should Provide Greater Detail on Paperwork Burden and Economic Effects of International Business Provisions

Why GAO Did This Study

TCJA made sweeping changes to taxing U.S. corporations' international activities: (1) a transition tax on untaxed overseas earnings of foreign subsidiaries that accrued prior to 2017; (2) a tax on the net income earned by foreign subsidiaries exceeding a specified threshold of certain assets; (3) a deduction for income from certain foreign-derived sales of property or services exceeding a specified threshold of certain assets; and (4) a tax on certain payments made to a related foreign party referred to as base erosion payments.

GAO was asked to review IRS's implementation of TCJA and early effects of the law. This report: (1) describes how TCJA's international provisions may be affecting U.S.-based corporations' international business activities; and (2) assesses IRS's and Treasury's development of relevant regulations and guidance to implement the provisions. GAO interviewed representatives from eight companies' tax departments randomly selected from among the 100 largest U.S.-based companies and compared relevant regulations and guidance against procedural requirements.

What GAO Recommends

GAO makes three recommendations to Treasury and IRS: develop more specific paperwork burden estimates for future TCJA regulations; quantify anticipated benefits and costs of these regulations; and identify ways to obtain public comment for significant guidance when appropriate. Treasury and IRS generally agreed with the goals of the recommendations but described challenges. GAO believes the recommendations are valid.

View GAO-21-277. For more information, contact Jessica Lucas-Judy, (202) 512-6806, lucasjudyj@gao.gov

What GAO Found

GAO's interviews with officials representing eight selected U.S.-based companies revealed considerable uncertainty in how the international business provisions of Public Law 115-97—commonly known as the Tax Cuts and Jobs Act of 2017 (TCJA)—may be affecting business planning decisions. Some companies reported making specific changes, such as moving intellectual property back to the U.S. in response to a new deduction for income earned from certain foreign-derived sales of property or services attributed to assets located in the U.S. Preliminary studies on another provision taxing net income earned by foreign subsidiaries exceeding a specified threshold of certain assets hypothesized that this provision could encourage moving tangible property outside the U.S. Other business representatives emphasized the importance of nontax factors in business planning decisions, such as entering foreign markets where executives believe potential customers may be located.

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) proposed eight regulations and finalized six of them to implement four international provisions of TCJA between December 2017 and October 2020 (the most current information available at the time of GAO's review) and used guidance to supplement the regulations. The agency generally complied with legal requirements for issuing regulations and offered public comment opportunities for some guidance. However, Treasury and IRS did not fully address expectations set in government-wide guidance related to Paperwork Reduction Act (PRA) burden estimates, economic analysis requirements for regulations, and public comment on significant guidance:

- IRS generally did not provide specific estimates of the incremental paperwork burden of TCJA's international regulations and instead estimated the total burden for all business tax forms. The Office of Information and Regulatory Affairs' PRA guide says agencies should estimate the time and money required for an information collection. GAO's interviews with representatives of selected companies show why it is important for IRS to consider burden because representatives reported challenges, such as gathering required information from foreign subsidiaries.
- Anticipated economic benefits and costs of Treasury's and IRS's regulations were generally not quantified. An executive order requires agencies to provide such information to the extent feasible for regulations with the largest anticipated economic effects. As a result, Treasury and IRS made important decisions about regulations, such as whether to allow foreign military sales to be eligible for a U.S. deduction, without more specific information about the potential economic effects.
- IRS did not provide an opportunity for public comment before issuing revenue procedures related to TCJA's international provisions. The Office of Management and Budget identified ensuring public comment opportunities for significant guidance when appropriate as a leading practice that agencies should follow. The President recently directed a government-wide review of agency guidance processes.

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Abbreviations

APA	Administrative Procedure Act
BEAT	Base Erosion and Anti-Abuse Tax
CRA	Congressional Review Act
CFC	Controlled Foreign Corporation
COVID-19	Coronavirus Disease 2019
E.O.	Executive Order
FDII	Foreign-Derived Intangible Income
GILTI	Global Intangible Low-Taxed Income
IP	Intellectual Property
IRB	Internal Revenue Bulletin
IRS	Internal Revenue Service
MOA	Memorandum of Agreement
OIRA	Office of Information and Regulatory Affairs
OMB	Office of Management and Budget
NOL	Net Operating Loss
PRA	Paperwork Reduction Act
RFA	Regulatory Flexibility Act
TCJA	Tax Cuts and Jobs Act of 2017
Treasury	Department of the Treasury
USSH	United States Shareholder

U.S. GOVERNMENT ACCOUNTABILITY OFFICE
A Century of Non-Partisan Fact-Based Work
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April 28, 2021

The Honorable Ron Wyden
Chairman
Committee on Finance
United States Senate

Dear Chairman Wyden:

International business activities provide jobs for American workers and dividends for investors. They also contribute to the exchange of goods, services, and ideas between people in this country and those abroad. How to tax companies that operate in multiple countries has been a long-standing challenge for decision makers in this country and abroad. Public Law 115-97—commonly known as the Tax Cuts and Jobs Act of 2017 (TCJA)—changed the incentives for U.S.-based corporations to earn and hold business income abroad solely for tax purposes.[1]

You asked us to review the Internal Revenue Service's (IRS) implementation of the business and international provisions of TCJA and the early effect of those provisions. This report follows our February 2020 report reviewing IRS's initial implementation of TCJA's business provisions.[2] The objectives of this report are to: (1) describe how TCJA's international provisions may be affecting U.S.-based corporations' international business activities; and (2) assess the Department of the Treasury's (Treasury) and IRS's development of relevant regulations and guidance to implement TCJA's international provisions.

To address our first objective, we reviewed published information and testimonial evidence from domestic corporations that own foreign subsidiaries and partnerships, or otherwise do business abroad. We first identified the 100 largest U.S.-based, publicly traded companies based on

[1]To provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (hereafter, TCJA).

[2]GAO, *Tax Cuts and Jobs Act: Considerable Progress Made Implementing Business Provisions, but IRS Faces Administrative and Compliance Challenges*, GAO-20-103 (Washington, D.C.: Feb. 25, 2020).

their publicly recorded 2019 annual revenue.[3] For these companies, we performed a content analysis of the annual financial reports filed with the U.S. Securities and Exchange Commission for business fiscal years 2018 and 2019 and quarterly financial reports from the end of fiscal year 2019 to August 31, 2020.[4] We also searched academic research published since TCJA became law looking for mentions of the international provisions and identified 16 potentially relevant studies based on the title or information in the abstract. We interviewed tax experts with the Congressional Research Service. In addition, we also interviewed tax experts affiliated with the American Enterprise Institute and the Urban-Brookings Tax Policy Center selected to provide a range of perspectives.

To provide more specific examples of how TCJA's international provisions may have influenced business decisions, we randomly selected 20 companies from the list of the 100 largest U.S.-based, publicly traded companies and requested interviews with representatives familiar with the companies' tax affairs.[5] Representatives of eight companies agreed to participate in our study, all of which had foreign income.[6]

We used these interviews to collect information about the influence TCJA's international provisions may have had on business planning decisions and the extent to which Treasury's and IRS's regulations and guidance for the provisions were clear and sufficient. The views of the representatives from these companies are not generalizable to other companies. We supplemented the interviews by reviewing all 100 large

[3]We used Bloomberg Finance L.P. data—which summarizes financial data companies report—to select companies. This report will generally use the term corporations when describing taxpayers affected by the laws, regulations, and guidance that are the focus of this report. We will generally use the term companies to refer to selected entities whose representatives we interviewed. In the latter case, our focus was on obtaining perspective on the effect TCJA's international provisions may have had on business planning decisions rather than describing the legal structures which may be used to organize a particular firm's international business activities.

[4]For purposes of our review, we define the business fiscal year to be the same year as the calendar year if the start date occurs prior to the first week in July. For example, a company's fiscal year spanning February 1, 2018, to January 31, 2019, would be considered fiscal year 2018.

[5]We contacted 19 of the 20 companies. We did not contact the remaining company because its website and financial report for 2019 did not mention international activities.

[6]A ninth company responded to our request for interview, but its representatives stated they had minimal international exposure. Therefore, they did not participate in our study.

companies' financial reports, including the eight companies whose representatives we interviewed.

To assess Treasury's and IRS's development of relevant regulations and guidance to implement TCJA's international provisions, we reviewed proposed and final regulations related to TCJA's international provisions published in the *Federal Register* between December 22, 2017, when TCJA became law and October 30, 2020, the most current information available at the time of our review. We also reviewed relevant guidance published in IRS's Internal Revenue Bulletin (IRB) between those same dates. We compared regulations and guidance to procedural requirements and leading practices agencies must follow in issuing regulations and guidance. This includes developing specific estimates of paperwork burden, describing anticipated economic effects and quantifying those to the extent feasible, and providing public comment opportunities when appropriate on significant guidance documents. We also interviewed Treasury and IRS officials to obtain their views on these topics.[7]

We conducted this performance audit from January 2020 to April 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Tax Cuts and Jobs Act of 2017

TCJA made sweeping changes to federal tax law by creating, amending, or eliminating hundreds of sections of the Internal Revenue Code and changing how business income earned both domestically and abroad is taxed. The act, among other changes, reduced the top marginal tax rate on the net income of corporations from 35 to 21 percent.[8] This rate applies to the domestic and foreign income of the corporation that is subject to tax.

[7]We list the specific procedural requirements and leading practices below.

[8]Pub. L. No. 115-97, § 13001(a), 131 Stat. at 2096, *codified at* 26 U.S.C. § 11(b).

In regards to taxing international business income, TCJA generally moved the U.S. corporate tax system closer to what is often described as a territorial system. In its purest form, a territorial tax system would only tax U.S. corporations for income earned in the U.S. TCJA established a deduction for dividends received from a U.S.-based corporation's foreign subsidiaries, which is consistent with a more territorial system.[9] Pre-TCJA, the U.S. corporate tax system was closer to a worldwide system.

However, in practice, the pre- and post-TCJA tax systems contain elements of both territorial and worldwide systems. To mitigate potential double taxation, the pre-TCJA system provided a credit for foreign taxes paid.[10] In general, there also existed a deferral until foreign earnings by foreign subsidiaries were repatriated to the U.S. owners, subject to certain limitations.

Both before and after TCJA, U.S. corporations were and are taxed on certain types of passive and mobile income earned by foreign subsidiaries known as subpart F income.[11] Examples of subpart F income could include interest the corporation may earn on foreign bank deposits. The post-TCJA system sought to further limit profit shifting by U.S.-based corporations to countries with lower tax rates. This resulted in provisions that brought worldwide elements from the old system into the new system and are discussed below:

Treatment of deferred foreign income upon transition to participation exemption system of taxation (transition tax). TCJA imposed a one-time tax on previously untaxed earnings of foreign subsidiaries of U.S.-based corporations that had accrued between 1986 and 2017.[12] Under the pre-TCJA system, many corporations kept earnings from their foreign subsidiaries abroad, where U.S. taxes on those earnings could be deferred. TCJA deemed those earnings to have been repatriated to the U.S. Therefore, they were subject to U.S. taxation.

[9]Pub. L. No. 115-97, § 14101, 131 Stat. at 2189–2192, *codified at* 26 U.S.C. § 245A.

[10]26 U.S.C. § 901. TCJA amended but did not eliminate this credit.

[11]A U.S. corporation generally will be taxed on the subpart F income of a foreign subsidiary if it is a U.S. shareholder (USSH) and the foreign subsidiary is a controlled foreign corporation (CFC). A USSH is a U.S. person owning 10 percent or more of a foreign corporation. 26 U.S.C. § 951(b). A CFC is a foreign corporation that is more than 50 percent owned by USSHs. 26 U.S.C. § 953(c)(1).

[12]Pub. L. No. 115-97, § 14103, 131 Stat. at 2195–2208, *codified at* 26 U.S.C. § 965.

However, TCJA taxed the earnings differently than had they been repatriated prior to TCJA.

While the pre-TCJA top marginal tax rate was 35 percent, the transition tax rates were 15.5 percent on cash or cash equivalent assets earned from foreign subsidiaries of U.S.-based corporations and 8 percent for earnings that exceeded the aggregate foreign cash position. These lower tax rates were mitigated in that corporations could only claim a portion of the associated foreign tax credits for purposes of calculating transition taxes. Corporations could generally elect to pay the transition tax in installments over 8 years.[13]

The transition tax was part of a shift from the old system of deferring U.S taxes on foreign earnings (provided those earnings were kept abroad) to a new system that established a deduction for certain dividends received by U.S. corporations from foreign subsidiaries. As a hypothetical example, a U.S. corporation's profitable foreign subsidiary pays a dividend to the U.S. corporation. The deduction TCJA established can potentially have the effect of removing the foreign earnings from the U.S. corporation's taxable income. However, as discussed below other TCJA international provisions may tax U.S.-based corporations' income earned abroad or by their foreign subsidiaries.

Current-year inclusion of global intangible low-taxed income (GILTI) by U.S. shareholders and the corresponding deduction. GILTI generally is the net amount of income earned by the U.S. corporation's foreign subsidiaries in excess of 10 percent of tangible depreciable assets owned and used in a trade or business by those foreign subsidiaries.[14] As a hypothetical example, a U.S. corporation's foreign subsidiary owns a factory valued at $100 million and the subsidiary earns $15 million, resulting in GILTI of $5 million ($15 million minus 10 percent of $100

[13]Certain shareholders of S corporations are eligible to defer payment of the tax until there is a triggering event (such as a disposition by the S corporation of substantially all of its assets). 26 U.S.C. § 965(i). S corporations are corporations that have elected to pass corporate income, losses, deductions, and credits through to their shareholders for federal tax purposes.

[14]Pub. L. No. 115-97, § 14201, 131 Stat. at 2208–2213, *codified at* 26 U.S.C. § 951A. A U.S. corporation generally has GILTI inclusion with respect to a foreign subsidiary if it is a U.S. shareholder (as defined in section 951(b)) and the foreign subsidiary is a controlled foreign corporation (CFC). For purposes of GILTI, the net income of a CFC, also called net tested income, excludes certain types of income, such as subpart F income, related-party dividends, and foreign oil and gas extraction income.

million). GILTI is deemed income of the U.S. corporation and therefore is taxed in the U.S. at the 21 percent tax rate.

However, the effective rate on GILTI income is less than 21 percent for two reasons. First, corporations may be able to deduct 50 percent of their GILTI income for tax years beginning between December 31, 2017, and December 31, 2025 (and 37.5 percent thereafter). Second, corporate taxpayers may be able to claim foreign tax credits for up to 80 percent of the tax paid or accrued on the foreign earnings subject to the U.S.'s GILTI. The credit for foreign taxes means that GILTI generally only taxes U.S. corporations for foreign income taxed at less than approximately 13.1 percent by the foreign government.

In practice, though, GILTI can be more complex than this. For example, corporations calculate their foreign tax credit with respect to all of their GILTI, which takes into account the activities of all foreign subsidiaries. This means that foreign taxes paid by foreign subsidiaries in high tax countries may ultimately produce a credit that reduces the U.S. tax on GILTI resulting from income earned by foreign subsidiaries in low tax countries.

Deduction for foreign-derived intangible income (FDII). FDII generally is income earned in the U.S. from certain foreign-derived sales of property or services.[15] FDII works similarly to GILTI, but applies to income earned by U.S. corporations, not their foreign subsidiaries. Tangible depreciable assets in the U.S. are deemed to have a return of 10 percent. Therefore, deemed intangible income is income in excess of that 10 percent.

Foreign-derived income is generally income derived from sales of property to foreign persons for foreign use or services provided with respect to persons or property located outside the U.S.[16] As a hypothetical example, a U.S. corporation owns a factory in the U.S. valued at $100 million and it earns $15 million in income—of which 100 percent are from foreign sales—resulting in FDII of $5 million ($15 million minus 10 percent of $100 million).[17] U.S. corporations can deduct 37.5 percent of FDII for tax years beginning between December 31, 2017, and

[15]Pub. L. No. 115-97, § 14202, 131 Stat. at 2213–2216, *codified at* 26 U.S.C. § 250.

[16]Deduction eligible income excludes certain types of income including subpart F and GILTI.

[17]In this example, "valued" means the amount of depreciable basis.

December 31, 2025 (and 21.875 percent thereafter). The FDII deduction, like the GILTI deduction, results in such income being effectively taxed at a lower rate than other income.

Base erosion and anti-abuse tax (BEAT). Base erosion payments are amounts paid or accrued by a U.S. taxpayer to a related foreign party, for which the U.S. taxpayer is able to claim a deduction on its taxes.[18] Examples of base erosion payments include payments by a U.S. parent corporation to a related foreign affiliate for services, royalty payments, and interest payments.[19]

The tax is imposed on corporations with gross receipts that average at least $500 million annually over the 3 preceding years and have base erosion payments exceeding a specified level.[20] BEAT imposes a minimum tax equal to 10 percent of a taxpayer's modified taxable income. Modified taxable income is the taxpayer's taxable income plus base erosion tax benefits and certain net operating loss deductions.[21] BEAT only applies to the extent the 10 percent tax exceeds the corporation's regular tax liability.

Procedural Requirements for Regulations and Guidance

Treasury and IRS issue many regulations and other forms of taxpayer guidance to help taxpayers understand and comply with tax rules and obligations. All federal regulations are published in the *Federal Register*, which is the daily newspaper of the federal government. Separately, Treasury and IRS publish tax regulations and guidance in the weekly IRB. Congresses and Presidents have required agencies, including IRS, to comply with multiple procedural and analytical requirements prior to

[18]Pub. L. No. 115-97, § 14401, 131 Stat. at 2226–2234, *codified at* 26 U.S.C. § 59A.

[19]Base erosion payments subject to withholding for tax purposes are generally disregarded from this calculation of base erosion payments.

[20]The base erosion percentage is calculated as the tax benefits from base erosion payments divided by the total allowable amount of certain deductible payments. Corporations are subject to BEAT if their base erosion payments are greater than 3 percent of those deductible payments (2 percent for certain banks and securities dealers). Regulated investment companies, real estate investment trusts, and S corporations are not subject to BEAT.

[21]The 10 percent rate applies to tax years beginning between January 1, 2019, and December 31, 2025. For tax years beginning between January 1, 2018, and December 31, 2018, the rate was 5 percent. For tax years beginning after December 31, 2025, the rate is set under current law to be 12.5 percent. These rates are 1 percentage point higher for certain banks and securities dealers.

issuing certain regulations and guidance. For regulations, these legal authorities include the Administrative Procedure Act (APA), the Congressional Review Act (CRA), the Regulatory Flexibility Act (RFA), and the Paperwork Reduction Act (PRA); economic analysis requirements established by executive order; and leading practices for guidance.

APA. Agencies are generally required to publish a notice of proposed rulemaking in the *Federal Register* and take comments from the public concerning the proposed regulation.[22] Agencies also must respond to significant comments by addressing concerns raised when publishing final rules.

CRA. CRA was intended to ensure Congress had an opportunity to review and possibly disapprove regulations before they take effect. Agencies are required to submit regulations to Congress and to the Comptroller General of the United States before they take effect.[23] A category of regulations called major rules may not take effect until 60 days after submission to Congress or publication in the *Federal Register*, whichever is later, unless the agency determines there is good cause for not delaying the effective date. Generally, major rules are those with an annual effect on the economy of $100 million or more.[24]

RFA. RFA was intended to address concerns that small entities may be disproportionately affected by federal regulations. The law defined small entities as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Agencies must consider the impact of their regulations on small entities and, if necessary, prepare regulatory flexibility analyses that include alternatives that would minimize

[22]5 U.S.C. § 553(b), (c). The terms rule and regulation are often used interchangeably. This report will generally use the term regulation.

[23]5 U.S.C. § 801(a)(1)(A).

[24]CRA defines a "major" rule as one that the Office of Management and Budget's Office of Information and Regulatory Affairs determines has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. 5 U.S.C. § 804(2).

the regulation's economic burdens or increase its benefits to affected small entities.[25]

PRA. PRA's primary goal is to minimize the burden of information collections on the public and maximize their utility for federal agencies.[26] PRA imposes procedural requirements for agencies to follow when they collect information from the public (e.g., information that IRS collects from a tax form).[27] The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) reviews agencies' proposed information collections.

Agencies are expected to submit supporting information to OIRA, which is posted on reginfo.gov, including specific, objectively supported estimates of the burden associated with each collection. A PRA guide posted on digital.gov (and whose content is maintained by OIRA) identifies practices agencies should follow, including how to obtain approval from OIRA to collect information from the public, how to estimate the time and money (i.e., burden) the public may be required to spend to complete the agency's information collection, and how to obtain comments from the public regarding the necessity of the information collection and accuracy of the agency's burden estimates. OIRA states that these guidelines are a good starting point for agencies to make the best estimates of burden for their collection.[28]

Regulatory Economic Analyses. Executive Order (E.O.) 12866 contains a requirement, among other requirements, that agencies only propose or adopt a regulation upon a reasoned determination that the benefits of the intended regulation justify its costs.[29] E.O. 12866 instructs agencies to select regulatory approaches that maximize net benefits—including economic, distributive, and equity effects—unless a statute requires

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[25]5 U.S.C. §§ 603, 604.

[26]GAO, *Paperwork Reduction Act: Agencies Could Better Leverage Review Processes and Public Outreach to Improve Burden Estimates*, GAO-18-381 (Washington, D.C.: July 11, 2018).

[27]44 U.S.C. § 3507.

[28]Available from https://pra.digital.gov/ (accessed February 24, 2021).

[29]Executive Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (Oct. 4, 1993).

another regulatory approach.[30] It requires economic analyses to be performed and reported on for significant proposed and final regulations.[31] For a subset of significant regulations referred to as economically significant, additional requirements apply. Agencies are expected to quantify benefits and costs to the extent feasible and to assess the benefits and costs of potentially effective and reasonably feasible alternatives, and explain why the planned regulatory action is preferable.

While E.O. 12866 is a government-wide executive order, we found in our prior work that certain tax regulations had long been exempt from the requirements of E.O. 12866 due to an agreement Treasury and OIRA had originally made in the 1980s.[32] Our findings contributed to policy changes, which made many of the tax regulations related to TCJA's international provisions subject to E.O. 12866 requirements.

In April 2017, the President signed E.O. 13789, which among other requirements directed the Secretary of the Treasury and the Director of OMB to review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in E.O. 12866.[33] In April 2018, Treasury and OIRA signed a Memorandum of Agreement which made tax regulations subject to the analytical requirements listed above, with a 12-month

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[30]E.O. 12866, § 1(a).

[31]A regulatory action is "significant" if it is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more or adversely affects the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) creates a serious inconsistency or otherwise interferes with another agency's actions taken or planned; (3) materially alters the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues. A rule that meets the first criteria is referred to as "economically significant" and further assessments of the rule's costs and benefits are required. E.O. 12866, § 3(f).

[32]GAO, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance*, GAO-16-720 (Washington, D.C.: Sept. 6, 2016).

[33]E.O. 13789, *Identifying and Reducing Tax Regulatory Burdens,* 82 Fed. Reg. 19317 (Apr. 21, 2017).

transition period for the additional analysis for economically significant regulations.[34]

Guidance. Guidance is intended to help agencies clarify regulatory text or statutes, to respond to the questions of affected parties in a timely way, and to inform the public about complex policy implementation topics.[35] Guidance differs from regulations in that it is not legally binding. Tax regulations are often referred to as guidance by IRS. However, this report will use the government-wide definitions and distinguish between final regulations published in the *Federal Register*—which impose legally binding requirements on taxpayers—and guidance IRS publishes in the IRB, such as notices and revenue procedures.[36]

IRS defines a notice as a public pronouncement that may contain guidance involving substantive interpretations of the Internal Revenue Code or other provisions of the law. It defines a revenue procedure as an official statement of a procedure that affects the rights or duties of taxpayers or other members of the public—under the Internal Revenue Code, related statutes, tax treaties, and regulations—and that should be a matter of public knowledge.

Certain procedural requirements and leading practices apply to guidance documents federal agencies publish, such as obtaining public comments. We will describe those when we discuss our findings related to IRS guidance for TCJA's international provisions.

[34]Department of the Treasury and the Office of Management and Budget, *Memorandum of Agreement: Review of Tax Regulations under Executive Order 12866* (Washington, D.C.: Apr. 11, 2018).

[35]GAO, *Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, GAO-15-368 (Washington, D.C.: Apr. 16, 2015).

[36]IRS also publishes proposed and final regulations in the IRB.

Considerable Uncertainty Exists Regarding How TCJA's International Provisions Influence Business Planning Decisions

Interviews with representatives of eight selected companies and related relevant information showed that the effects of TCJA's international provisions on business planning decisions varied considerably. The reported effects varied from one company to another and also depended on which of the international provisions was the subject of discussion. However, one common theme was that TCJA's international provisions are one of many factors influencing business planning decisions.

Transition tax. Representatives of two companies we spoke with stated that the transition tax did not have implications on their business decisions because it was a one-time tax.

In discussing the transition tax, representatives of several companies said they believed that taken together the transition tax and a deduction for certain dividends received by U.S. corporations from foreign subsidiaries had improved their liquidity. In this context, greater liquidity means more cash on hand than before, as illustrated in the below examples:

- Representatives of one company said this allowed them to purchase equipment that can help their company grow more easily. Further, the representatives stated that they preferred using their company's money to finance these equipment purchases rather than take on additional debt.
- In addition to the examples that selected companies' representatives shared in our interviews, we found other examples in our review of the 100 largest U.S.-based, publicly traded companies' financial statements. For example, one company stated in its annual financial report that, after these policy changes imposed by TCJA, it was able to access its international financial assets more easily. The company further stated that as a result of these changes provided by TCJA it repatriated the majority of its cash held internationally at the end of 2017.

We found in our literature review that some of the authors expect only modest gains to the growth or efficiency of the U.S. economy.[37] For example, they hypothesize that some of the repatriated funds may be

[37]Christine A. Davis, M.D., Esq., "Is the Tax Cuts and Jobs Act GILTI of Anti-Simplification?" *Virginia Tax Review,* vol. 38, no. 3 (2019): pp. 315-384. W. G. Gale et al, *Effects of the Tax Cuts and Jobs Act: a Preliminary Analysis* (Washington, D.C.: The Urban-Brookings Tax Policy Center, 2018). Dhammika Dharmapala, "The Consequences of the Tax Cut and Jobs Act's International Provisions: Lessons from Existing Research," *National Tax Journal,* vol. 71, no. 4 (2018): pp. 707-728.

distributed to shareholders rather than being used for new investment, such as the equipment purchase example described above.

Current-year inclusion of global intangible low-taxed income by U.S. shareholders and the corresponding deduction. A complex set of considerations related to GILTI as explained below will determine the potential effect of the provision on selected companies' planning decisions:

- Representatives from companies that deliver physical goods or services to customers told us that decisions to open a store or warehouse would be driven by where there is demand for their products or services, rather than considerations related to GILTI. As a result, representatives of one company said their company operates in foreign jurisdictions with relatively high tax rates. That company's representatives and representatives of other companies reported that because of the way GILTI and the foreign tax credits were calculated, their companies still owed U.S. tax under GILTI even when operating in high tax jurisdictions. Treasury and IRS have published proposed and final regulations that address income subject to a high rate of foreign tax and the implications for GILTI and other U.S. tax provisions.[38]
- Other companies' representatives we spoke with also reported that GILTI had the effect of increasing U.S. taxes paid now and will further increase U.S. taxes paid in the future. One company's representatives stated that their company presently pays much more in GILTI than they anticipated. The representatives further noted that under current law GILTI is scheduled to change in a way that could result in additional tax liability beginning in 2026. This is because the amount of GILTI a corporation may deduct from its net income is scheduled to decline from 50 percent to 37.5 percent. Holding all else constant, reducing this deduction could increase a corporation's taxable income.

[38]85 Fed. Reg. 44620 (July 23, 2020); 85 Fed. Reg. 44650 (July 23, 2020).

- Studies we reviewed related to GILTI identified additional considerations.[39] Since the starting point for calculating GILTI is the tangible depreciable assets owned by foreign subsidiaries, an incentive potentially exists for U.S.-based corporations to locate more of these assets abroad. Holding all else constant, the more tangible assets a corporation's foreign subsidiaries hold means more income may be earned before the U.S. corporation incurs a tax liability under GILTI. However, some researchers also note that nontax costs may be involved in moving assets, which could potentially discourage companies from moving assets.[40]

Deduction for foreign-derived intangible income (FDII). The deduction for FDII encouraged some of the companies whose representatives we spoke with to restructure certain holdings, but had less influence on others:

- Representatives of one company said they moved some intellectual property (IP) into the U.S. from abroad as a result of the FDII deduction. As noted above, the FDII deduction established a lower effective tax rate for income U.S. corporations earn from certain foreign-derived sales of property or services. The FDII deduction potentially creates an incentive for companies to move intangible assets from other countries to the U.S.
- Representatives from other companies stated that the FDII deduction causes U.S.-based companies to think differently about their business structures moving forward. However in contrast to the example described above, their companies had not moved intangible assets. Several countervailing incentives they identified were the locations of key personnel and manufacturing plants as well as potential taxes they could be required to pay to a foreign country if they moved IP. And as we have seen above in regards to GILTI, moving assets to try to benefit from the FDII deduction has potential implications for a

[39]Kartikeya Singh and Aparna Mathur, "The Impact of GILTI and FDII on the Investment Location Choice of U.S. Multinationals," *Columbia Journal of Tax Law*, Vol. 10 No. 2 (2019): pp. 199-224. Kimberly Clausing, *Options for International Tax Policy after the TCJA* (Washington, D.C.: Center for American Progress, 2020). Dhammika Dharmapala, "The Consequences of the Tax Cut and Jobs Act's International Provisions: Lessons from Existing Research," *National Tax Journal,* vol. 71, no. 4 (2018): pp. 707-728. Benjamin Harris and Adam Looney, *The Tax Cuts and Jobs Act: A Missed Opportunity to Establish a Sustainable Tax Code* (Washington, D.C.: Urban-Brookings Tax Policy Center, 2018). W. G. Gale et al, *Effects of the Tax Cuts and Jobs Act: a Preliminary Analysis* (Washington, D.C.: Urban-Brookings Tax Policy Center, 2018).

[40]Singh and Mathur, "The Impact of GILTI and FDII."

company's GILTI tax liability. Similar to the GILTI discussion above, this means that the different incentives related to the FDII deduction also have complex implications.

- Our discussions also found that representatives from some of the selected companies had not considered moving their IP from one country to another. For example, one company's representatives explained that their IP has always been located in the U.S. because the company had been founded in this country.

Base erosion and anti-abuse tax (BEAT). Representatives we interviewed reported closely monitoring their companies' tax positions as they applied to BEAT. This is because the design of BEAT differs from GILTI and FDII in that the tax only applies to corporations that have base erosion payments exceeding the specified level described earlier. Therefore, there exists an incentive to stay below the specified threshold. For example:

- Representatives of one company said should they approach the BEAT threshold, they would discontinue use of certain bonus depreciation rules to avoid triggering BEAT. Bonus depreciation refers to an income tax deduction that allows a taxpayer to accelerate the recovery of the cost or other basis of certain property, such as transportation equipment.[41] In addition to adjusting a company's depreciation schedule, affected taxpayers may elect to waive eligible deductions entirely to avoid triggering BEAT, according to Treasury and IRS regulations.[42] Doing this may have further implications for a company's tax affairs thereby illustrating how tax planning to avoid BEAT may interact with other tax provisions.
- In addition, our review of the 100 largest companies' financial statements found at least one example of a company—which was not selected for an interview—reporting that it is undertaking restructuring actions to mitigate BEAT's effect.

CARES Act. The CARES Act, enacted in March 2020, did not amend the four international provisions discussed above, but it did change the net operating loss (NOL) deduction, which has potential interactions with

[41] 26 U.S.C. § 168.

[42] 85 Fed. Reg. 64346, 64349–64353 (Oct. 9, 2020).

TCJA's international provisions.[43] The CARES Act permits NOLs for tax years beginning in 2018 through 2020 to be carried back up to 5 years.[44] None of the eight companies interviewed expected to employ NOLs in 2018 through 2020.

In our review of the 100 largest companies' financial statements, at least one company stated in a 2020 quarterly financial filing that it anticipated its projected tax benefit related to the CARES Act NOLs carry back would interact with its anticipated GILTI expense by partially offsetting the other. The company's report did not provide a more specific explanation.

Treasury's Regulations and Guidance Related to TCJA's International Provisions Lack Important Information about Potential Effects

Regulations Address All Four International Provisions but Lack Specific Information on Paperwork Burden and Economic Effects

Between December 22, 2017, when TCJA became law and October 30, 2020, Treasury and IRS proposed eight regulations and finalized six of them related to TCJA's international provisions (see table 1).[45]

43Pub. L. No. 116-136, § 2303, 134 Stat. 281, 352–356 (2020). For more information on the CARES Act and the changes to NOLs, see GAO, *COVID-19: Urgent Actions Needed to Better Ensure an Effective Federal Response,* GAO-21-191 (Washington D.C.: Nov. 30, 2020).

44Prior to the passage of TCJA, NOLs could be carried back for up to 2 years, but TCJA eliminated the carryback of NOLs.

45Treasury and IRS continue rulemaking related to TCJA's international provisions. In November 2020, for example, they proposed a regulation addressing several topics, including clarifying rules related to FDII. 85 Fed. Reg. 72078 (Nov. 12, 2020).

Table 1: Proposed and Final Regulations Related to the International Provisions of the Tax Cuts and Jobs Act of 2017 Published between December 22, 2017, and October 30, 2020

Regulation Title (Relevant International Provision)	*Federal Register* Publication Date	*Federal Register* Citation
Proposed Regulations		
Guidance Regarding the Transition Tax Under Section 965 and Related Provisions (Transition Tax)	8/9/2018	83 Fed. Reg. 39514
Guidance Related to Section 951A (Global Intangible Low-Taxed Income) (GILTI)	10/10/2018	83 Fed. Reg. 51072
Base Erosion and Anti-Abuse Tax (BEAT)	12/21/2018	83 Fed. Reg. 65956
Deduction for Foreign-Derived Intangible Income and Global Intangible Low-Taxed Income (FDII and GILTI)	3/6/2019	84 Fed. Reg. 8188
Guidance Under Section 958 (Rules for Determining Stock Ownership) and Section 951A (Global Intangible Low-Taxed Income) (GILTI)	6/21/2019	84 Fed. Reg. 29114
Additional Rules Regarding Base Erosion and Anti-Abuse Tax (BEAT)	12/6/2019	84 Fed. Reg. 67046
Guidance Involving Hybrid Arrangements and the Allocation of Deductions Attributable to Certain Disqualified Payments Under Section 951A (Global Intangible Low-Taxed Income) (GILTI)	4/8/2020	85 Fed. Reg. 19858
Guidance Under Section 954(b)(4) Regarding Income Subject to a High Rate of Foreign Tax (GILTI)	7/23/2020	85 Fed. Reg. 44650
Final Regulations		
Regulations Regarding the Transition Tax Under Section 965 and Related Provisions (Transition Tax)	2/5/2019	84 Fed. Reg. 1838
Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits (GILTI)	6/21/2019	84 Fed. Reg. 29288
Base Erosion and Anti-Abuse Tax (BEAT)	12/6/2019	84 Fed. Reg. 66968
Deduction for Foreign-Derived Intangible Income and Global Intangible Low-Taxed Income (FDII and GILTI)	7/15/2020	85 Fed. Reg. 43042
Guidance under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax (GILTI)	7/23/2020	85 Fed. Reg. 44620
Base Erosion and Anti-Abuse Tax (BEAT)	10/9/2020	85 Fed. Reg. 64346

Source: The *Federal Register*. | GAO-21-277

These 14 regulatory actions generally addressed certain procedural requirements agencies must follow pursuant to the Administrative Procedure Act (APA), the Congressional Review Act (CRA), the Regulatory Flexibility Act (RFA), the Paperwork Reduction Act (PRA), and economic analysis requirements, as described below. These statutes and an executive order include requirements that apply at the proposed rule stage and the final rule stage of the rulemaking process, with the exception of CRA, which imposes requirements applicable to the issuance and effective dates of final regulations.

APA Notice and Public Comment Compliance

Proposed regulations preceded all six of the final regulations, thereby satisfying the APA's requirements that agencies generally provide the public with an opportunity to comment on proposed regulations. Treasury and IRS received comments from the public on the proposed regulations and these comments may be viewed on regulations.gov. The preambles included with the final regulations summarize comments received and explain any changes Treasury and IRS may have made to the regulation in response.[46]

For example, Treasury and IRS reported in the July 2020 final regulation on FDII and GILTI that they had changed documentation requirements in response to comments from taxpayers saying they do not have ready access to the documents Treasury and IRS had initially planned to require. As a result, Treasury and IRS say the final regulation "provides a reasonable balance" between the compliance burden for taxpayers, and the administrative burden of ensuring transactions are consistent with the intent and purpose of the statute.[47]

Figure 1 shows that Treasury and IRS finalized regulations related to the transition tax, BEAT, and FDII by the end of our analysis in October 2020, while activity related to two proposed regulations concerning GILTI continued. For example, on December 6, 2019, Treasury and IRS issued both a final regulation on BEAT and also an additional proposed regulation on that same provision. Treasury and IRS said in this proposed regulation that additional regulations were needed on BEAT to clarify certain aspects of the final regulation issued on the same day, among other things.

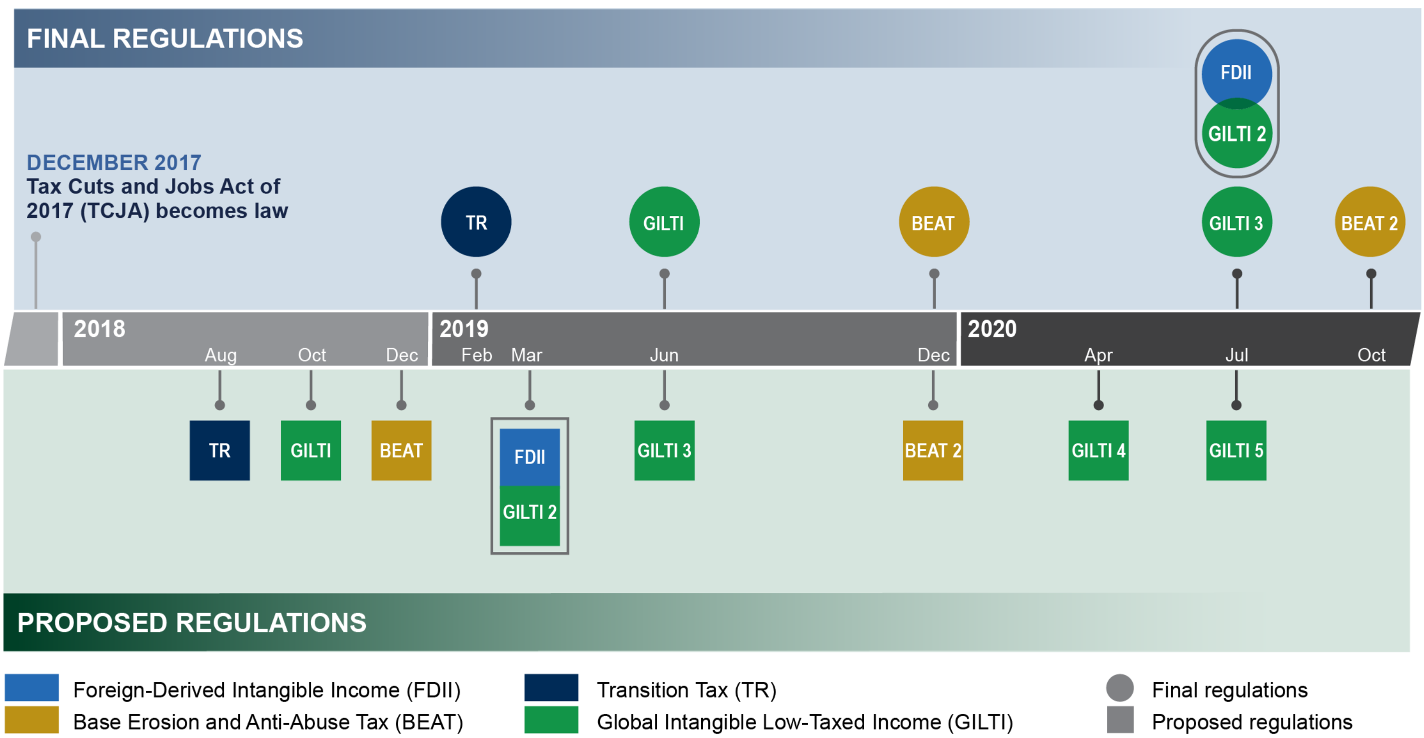
For instance, they clarified how a taxpayer determines gross receipts for calculating the base erosion percentage and how BEAT applies to

[46]The preamble section of regulations contain explanatory information on how agencies comply with administrative laws and executive orders and the agencies' response to public comments.

[47]85 Fed. Reg. 43042, 43073 (July 15, 2020).

partnerships.[48] In October 2020, Treasury and IRS finalized this second regulation on BEAT and left open the possibility of potential future guidance regarding qualified derivative payment reporting requirements.[49]

Figure 1: Proposed and Final Regulations Related to the International Provisions of the Tax Cuts and Jobs Act of 2017 Published between December 22, 2017, and October 30, 2020



Note: The regulations are labeled by which of the TCJA international provisions they implement and are not the official regulation titles published in the *Federal Register*. The titles and *Federal Register* citations for the relevant regulations are listed in table 1 of GAO-21-277. A number following a regulation label indicates an additional regulation implementing that international provision. For example, GILTI 2 represents the second regulation that implements the GILTI provision.

Source: The *Federal Register*. | GAO-21-277

CRA Compliance

Congress did not always receive copies of final regulations related to TCJA's international provisions before their stated effective date. Treasury and IRS officials said they had tried to fully comply with CRA,

[48] 84 Fed. Reg. 67046 (Dec. 6, 2019).

[49] 85 Fed. Reg. 64346.

but reported challenges related to mailing paper copies of regulations during the Coronavirus Disease 2019 (COVID-19) pandemic.

CRA was enacted to better ensure that Congress has an opportunity to review and possibly disapprove a subset of regulations before they become effective.[50] Specifically, major rules do not take effect until 60 days after submission to Congress or publication in the *Federal Register*, whichever is later, unless the agency determines there is good cause for not delaying the effective date.[51] All of these final regulations related to TCJA's international provisions were designated by OIRA to be major rules under CRA. CRA requires the Comptroller General of the United States to report to Congress on agency compliance with certain procedural steps for each major rule submitted to us.[52] This report will briefly summarize what our prior reports (referred to as major rule reports) said regarding Treasury's and IRS's efforts to comply with the delay requirements:

- For the June 2019 final regulation on guidance related to GILTI and foreign tax credits and the December 2019 final regulation on BEAT, Treasury and IRS invoked the good cause exception for not delaying the effective date.[53] For example, IRS stated that the statutory requirements related to BEAT were already in effect and its regulation could help taxpayers calculate their tax liabilities among other things. Therefore, IRS stated that a 60-day delay in the effective date would be unnecessary and contrary to the public interest.[54]
- The February 2019 final regulation on the transition tax went into effect the same day it was published in the *Federal Register*.

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[50]GAO, *Federal Rulemaking: OMB Should Work with Agencies to Improve Congressional Review Act Compliance during and at the End of Presidents' Terms*, GAO-18-183 (Washington, D.C.: Mar. 13, 2018).

[51]5 U.S.C. § 801(a)(3)(A). Major rules are generally those with an annual effect on the economy of $100 million or more which is similar to how E.O. 12866 defines economically significant regulations. 5 U.S.C. § 804(2).

[52]5 U.S.C. § 801(a)(2).

[53]GAO, *Department of the Treasury, Internal Revenue Service: Base Erosion and Anti-Abuse Tax*, B-331672 (Washington, D.C.: Dec. 19, 2019); and *Department of the Treasury, Internal Revenue Service: Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits*, B-331167 (Washington, D.C.: July 8, 2019).

[54]B-331672.

However, we reported that Treasury and IRS did not invoke the good cause exception described above.[55] After we issued our major rule report, Treasury and IRS published a correction to the final regulation claiming good cause for not delaying the effective date.[56] Treasury and IRS noted the transition tax was already in effect. In effect, Treasury and IRS amended the regulation to address the CRA delay requirements.

- For the remaining three final regulations, the CRA requirement that both Houses of Congress receive a copy of major rules 60 days before they take effect is relevant. For example, Treasury and IRS published a final regulation on FDII and GILTI on July 15, 2020, with a stated effective date of September 14, 2020. However, our major rule report stated that the *Congressional Record* does not document receipt by either House of Congress of the final regulation on FDII and GILTI.[57] Our major rule reports on the remaining two final regulations—guidance under GILTI and income subject to a high rate of foreign tax among other topics and another regulation on BEAT—stated that the *Congressional Record* showed receipt by the Senate, but not by the House of Representatives.[58]

In regards to the three final regulations that were not received by one or both Houses of Congress, IRS officials said they had mailed copies of these regulations to Congress prior to publishing them in the *Federal Register*. Further, Treasury officials said that the COVID-19 pandemic has made physical delivery of regulations challenging.

CRA makes agencies responsible for ensuring copies of their regulations reach Congress within the required time frame. We have already

[55]GAO, *Department of the Treasury, Internal Revenue Service: Regulations Regarding the Transition Tax Under Section 965 and Related Provisions*, B-330821 (Washington, D.C.: Mar. 11, 2019).

[56]84 Fed. Reg. 14261 (Apr. 10, 2019).

[57]GAO, *Department of the Treasury, Internal Revenue Service: Deduction for Foreign-Derived Intangible Income and Global Intangible Low-Taxed Income*, B-332369 (Washington, D.C.: Oct. 5, 2020).

[58]GAO, *Department of the Treasury, Internal Revenue Service: Base Erosion and Anti-Abuse Tax*, B-332605 (Washington, D.C.: Oct. 26, 2020); and *Department of the Treasury, Internal Revenue Service: Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax*, B-332384 (Washington, D.C.: Aug. 6, 2020).

informed relevant congressional leaders of potential noncompliance with CRA requirements for certain regulations by sending our major rule reports to the Chairmen and Ranking Members of the Senate Committee on Finance and the House Committee on Ways and Means, the respective committees of jurisdiction.

RFA Compliance

Treasury and IRS complied with RFA by certifying that all 14 of the proposed and final regulations would have no significant impact on small entities. Regulatory flexibility analyses are not required for proposed or final rules if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[59] Therefore, Treasury did not need to prepare an initial regulatory flexibility analysis. Invoking this exception, Treasury explained in its December 2019 final regulation on BEAT that the regulation primarily affected groups of corporations with average annual gross receipts of at least $500 million and that had payments to foreign-related parties.[60]

For other regulations related to TCJA's international provisions, Treasury reported that its certification prompted comments from some members of the public. Treasury said in its final February 2019 regulation on the transition tax that it and IRS had "received a number of comments asserting that a substantial number of small entities would be affected by the proposed regulations."[61]

Treasury responded to these comments by explaining why it does not believe an initial regulatory flexibility analysis was required. Specifically, Treasury stated that the economic burden on what it described as small U.S.-parented multinational enterprises is below the threshold where RFA would require an analysis. Treasury's certification of no significant impact on a substantial number of small entities for the regulations we reviewed is similar to what we found in our prior work. In that report, we found that only two of more than 200 tax regulations issued between 2013 and 2015 included a regulatory flexibility analysis.[62]

[59]5 U.S.C. § 605(b).

[60]84 Fed. Reg. 66968, 67016 (Dec. 6, 2019).

[61]84 Fed. Reg. 1838, 1873 (Feb. 5, 2019).

[62]GAO-16-720.

PRA Compliance

Treasury and IRS complied with certain PRA requirements established in law, but they did not develop specific estimates of anticipated paperwork burden for regulations implementing TCJA's international provisions, which the OIRA guide to PRA establishes as an expectation for agencies.[63] Treasury and IRS stated in the *Federal Register* that all 14 regulatory actions related to TCJA's international provisions would require new information collections from the public. For example, IRS established four new tax forms and a sub-form related to the international provisions we reviewed.[64] These international provisions may also affect the information taxpayers report on other tax forms, such as the *U.S. Corporation Income Tax Return*. Treasury officials referred our questions about PRA to IRS officials and therefore our analysis will focus on IRS's actions.

Among other things, PRA requires agencies to (1) justify, or describe the necessity of, information collected from the public; (2) provide estimates of the burden they will impose (i.e., the time and costs required to comply with the collection); and (3) publish notices in the *Federal Register* and otherwise consult with the public to obtain input.[65]

Information showing how an agency is addressing these PRA requirements may be found in several different locations. Proposed and final regulations published in the *Federal Register* may explain planned information collections. Reginfo.gov compiles information agencies submit to OIRA requesting that office's permission to collect information from the public. The forms agencies publish also contain an identification

[63]IRS also refers to additional information collections affecting other types of taxpayers, such as individuals, who are outside the scope of our report.

[64]Department of the Treasury: Internal Revenue Service, *Instructions for Form 965: Inclusion of Deferred Foreign Income Upon Transition to Participation Exemption System* (Rev. January 2020), (Washington, D.C.: Jan. 17, 2020); Department of the Treasury: Internal Revenue Service, *Instructions for Form 8991: Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts* (Rev. February 2020), (Washington, D.C.: Feb. 28, 2020); Department of the Treasury: Internal Revenue Service, *Instructions for Form 8992: U.S. Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI)* (Rev. January 2020), (Washington, D.C.: Feb. 6, 2020); and Department of the Treasury: Internal Revenue Service, *Instructions for Form 8993: Section 250 Deduction for Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI)* (Rev. January 2020), (Washington, D.C.: Jan. 23, 2020).

[65]44 U.S.C. §§ 3506-3507.

number allowing members of the public to search for information on reginfo.gov about how the agency addressed PRA requirements.

PRA Requirement to Justify Information Collected. The PRA guide instructs agencies to explain to OIRA the circumstances that make the collection of information necessary and explain how, by whom, and for what purpose the information will be used as part of the process for obtaining OIRA approval. In January 2020, OIRA uploaded to reginfo.gov a supporting statement from IRS stating that the Internal Revenue Code requires businesses to prepare and file income tax returns and related forms such as ones related to TCJA's international provisions. IRS says it uses the data to verify that the items reported on the forms are correct and also for general statistics. OIRA approved IRS's request. IRS is authorized to collect this information through December 31, 2021.[66] IRS also explained to taxpayers why it is requiring them to complete forms related to TCJA's international provisions. The instructions for the four forms contained the following statement: "We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax."

PRA Requirement to Provide Specific Estimates of Burden. IRS generally did not provide estimates in the published regulations of how much time and money corporate taxpayers may be required to spend on information collections related to GILTI, FDII, and BEAT.[67] The June 2019 final regulation on GILTI contains the following statement: "The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the

[66]OIRA's authorization gives IRS permission to collect information related to the transition tax, GILTI, FDII, and BEAT as well as other information collected on business tax forms. The transition tax was subsequently added as will be discussed below.

[67]Taxpayer burden does not include the money taxpayers may be required to pay in taxes to the government.

regulations."[68] We found similar statements in regulations related to FDII and BEAT.

PRA requires IRS to provide taxpayers "of an estimate, to the extent practicable, of the burden of the collection."[69] The PRA guide says agencies should estimate the time and money required to complete an information collection. IRS said it estimates the total burden of all business tax forms together. In other words, estimates of how much time and money it may take to complete paperwork related to GILTI, FDII, and BEAT have been folded into a larger estimate of the time and money it takes business to complete the *Corporation Income Tax Return* and related business tax forms. In 2014, IRS announced that it would estimate the aggregate burden for all business tax forms, which marked a departure from its prior approach of estimating the burden individual forms imposed.[70] IRS said it decided to change its approach because officials determined companies were using tax preparation and filing software. Therefore in IRS's view, it no longer made sense to estimate how much time and money it took to complete each business tax form because taxpayers' activities are no longer as directly associated with particular forms.

A December 2019 proposed regulation and an October 2020 final regulation on BEAT illustrate an opportunity for Treasury and IRS to take additional steps identified in the PRA guide. Treasury and IRS stated in the proposed regulation that there would be an information collection related to an election to waive deductions. Treasury's Office of Tax Analysis estimated that between 3,500 and 4,500 taxpayers would be expected to file a new tax form related to BEAT. [71] Therefore, Treasury and IRS fulfilled an expectation set in the PRA guide that agencies estimate the number of respondents. In the final regulation, Treasury and IRS said they had received a comment in response to the proposed regulation stating that the documentation requirements were "onerous." In response, Treasury and IRS said they have an

[68]84 Fed. Reg. 29288, 29332 (June 21, 2019).

[69]44 U.S.C. §3506(c)(1)(B)(iii)(III).

[70]79 Fed. Reg. 16859 (Mar. 26, 2014).

[71]84 Fed. Reg. 67046, 67053.

interest in obtaining information regarding the deductions being waived and the item or property to which the deduction relates, including sufficient information to identify the item on the taxpayer's books and records. Treasury and IRS said they removed the adjective "detailed" from the documentation requirements to address the commenter's concern.[72] This example illustrates an opportunity for IRS to take an additional step identified in the PRA guide and estimate the time and money resulting from the information collection.

Further, IRS demonstrated that it can develop burden estimates related to some of the individual TCJA provisions that provide both number of affected taxpayers and the estimated time and money to complete an information collection. When IRS began implementing TCJA's international provisions, it initially developed more specific estimates for the transition tax proposed and final regulations issued in August 2018 and February 2019, respectively. IRS estimated in the final regulation that, "the collection of information provided by these final regulations [is] that 100,000 respondents will require 5 hours per response for a total reporting burden of 500,000 hours. A valuation of the burden hours at $95/hour ($2017) leads to a PRA-based estimate of the reporting costs to taxpayers of $47,500,000. This is a one-time paperwork burden."[73] In December 2018, IRS informed OIRA that it was including the burden for the form related to the transition tax in its estimate of the total business tax form burden. Further, IRS estimated the number of respondents, estimated average annual burden in hours, and average cost per respondent for a portion of the BEAT regulations concerning exceptions to base erosion payments. For another regulation on GILTI and high rates of foreign tax, IRS estimated the hours it would take taxpayers to address an information collection in one section of that regulation concerning a high-tax election.

Our interviews of representatives from selected companies show why it is important for IRS to consider how much time and money it may take taxpayers to complete information collections related to TCJA's international provisions. Representatives reported a

[72]85 Fed. Reg. 64346, 64351.

[73]83 Fed. Reg. 39514, 39540 (Aug. 9, 2018); 84 Fed. Reg. 1838, 1871. IRS said this estimate did not include burden estimates for forms associated with the statute.

variety of challenges, including collecting new information from foreign subsidiaries not previously required, hiring additional personnel and consultants, and finding tax preparation and filing software that calculated the required information.

PRA requirement for publication of notices and obtaining public input. IRS published notices and provided opportunities for the public to provide feedback about information collections related to TCJA's international provisions. In accordance with PRA statutory requirements, IRS published 60- and 30-day notices in the *Federal Register* for its planned information collection for the corporate income tax return and related business tax forms such as those related to TCJA's international provisions.[74] And as noted above, IRS received and addressed public comments it received in response to proposed regulations related to documentation requirements for TCJA's international provisions. IRS also told us that when it posts draft tax forms on irs.gov the website explains how feedback on those forms may be provided. Officials shared with us examples of emails they had received from representatives of companies and others suggesting specific changes to forms related to TCJA's international provisions. Therefore, IRS took steps consistent with the practice the PRA guide identified regarding public notice and comment opportunities.

E.O. 12866 Economic Analysis Compliance

Treasury and IRS analyzed the anticipated economic effects of the regulations related to TCJA's international provisions as required by E.O. 12866, but they generally did not quantify the anticipated benefits and costs, which E.O. 12866 directs agencies to do to the extent feasible.

Any regulation that is determined to be significant by OIRA must be submitted to OIRA for review along with an analysis of the benefits and costs of that regulation. E.O. 12866 requires agencies to provide additional information for regulations determined to be economically significant by OIRA. Specifically, agencies should quantify benefits and costs of economically significant regulations to the extent possible and assess potentially effective and reasonably feasible alternatives to the planned regulation.

[74]84 Fed. Reg. 51718 (Sept. 30, 2019); 84 Fed. Reg. 69825 (Dec. 19, 2019).

Four of the eight proposed regulations and all six of the final regulations addressed in this report were deemed by OIRA to be economically significant. Under the Memorandum of Agreement (MOA), a tax regulation is subject to this requirement if it may have an annual nonrevenue effect on the economy of $100 million or more.[75] We summarize below what Treasury and IRS said regarding anticipated benefits, anticipated costs, the extent to which both benefits and costs were quantified, and alternatives for the final regulations related to TCJA's international provisions:

Anticipated benefits. Treasury and IRS stated that taxpayers would benefit from the greater certainty and clarity that the six final regulations provide. This is consistent with the E.O. 12866 requirement that agencies assess benefits. For example, in the June 2019 final regulation providing guidance on how to determine the amount of GILTI in the gross income of certain U.S. shareholders of foreign corporations, Treasury and IRS stated that in the absence of a regulation similarly situated taxpayers might interpret the statute differently. This could result in inefficient patterns of economic activity as some taxpayers pursue income generating activities while other taxpayers forgo otherwise worthwhile investments because of uncertainty about GILTI.[76] Representatives of some companies we interviewed stated that Treasury and IRS's regulations and guidance helped to clarify the law.

Anticipated costs. We described above how IRS stated that for the purposes of PRA all of the final and proposed regulations contained new information collections or affected existing ones. Information collections are examples of one potential cost regulations may place on regulated entities. However, costs related to paperwork are not the only potential costs arising from a tax regulation. In our prior work, we noted that taxes may change

[75]The memorandum of agreement was signed in April 2018 and had a 1-year transition period before the analytical requirements for economically significant regulations took effect.

[76]84 Fed. Reg. 29288, 29324.

the economic decisions that people make, such as where to invest.[77]

In the case of TCJA's international provisions regulations, Treasury and IRS believe their regulations and guidance are needed to help taxpayers navigate the new international tax regime. Further, Treasury and IRS discuss many examples of how they considered what the law says and comments from stakeholders and then decided how to design the final regulations.

Treasury's and IRS's decisions can potentially result in costs to the economy, such as creating incentives or disincentives for making particular investment decisions. For example, Treasury and IRS stated in a June 2019 final regulation on GILTI that the relevant statutory provision does not contain any specific rules on the treatment of domestic entities, including domestic partnerships and their partners that directly or indirectly own stock of a controlled foreign corporation (CFC).[78] Treasury and IRS had proposed that a domestic partnership that is a U.S. shareholder of a CFC determines its GILTI inclusion amount.[79]

However, Treasury and IRS said they decided to re-evaluate their proposal after receiving a number of comments pointing to administrative and procedural complexities. Treasury and IRS then discuss three potential approaches and discuss the potential costs related to each approach. For example, they reject one approach because they are concerned that it would encourage taxpayers to reorganize to obtain a specific GILTI amount. Treasury and IRS believe that letting tax considerations rather than market signals determine business structures will lead to higher compliance costs and inappropriate investment. Treasury and IRS believe the approach they selected is more likely to result in market forces determining business structure rather than tax law.[80] This illustrates an example of Treasury and IRS seeking to

[77]GAO, *Understanding the Tax Reform Debate: Background, Criteria, and Questions*, GAO-05-1009SP (Washington, D.C.: Sept. 1, 2005).

[78]84 Fed. Reg. 29288, 29325.

[79]To make this example more understandable for a nontechnical audience we will omit the more complex details.

[80]84 Fed. Reg. 29288, 29325–29326.

minimize the economic costs of their regulations related to TCJA's international provisions.

Quantification of benefits and costs. E.O. 12866 also requires a quantification of potential benefits and costs for economically significant regulations, to the extent feasible. Treasury and IRS generally did not do this for the regulations implementing TCJA's international provisions. While Treasury and IRS did present some quantitative estimates, such as number of companies that might be affected by FDII, they did not describe the benefits or costs in quantitative terms.

Our review of the regulations and discussions with Treasury officials found they do not believe that quantification of benefits and costs at this time is feasible. One reason is the novelty of TCJA's international provisions. Treasury and IRS had little experience administering the new international provisions at the time they were writing the regulations.

A related challenge is that Treasury officials had little data to work with to make estimates. Treasury officials told us that they may receive the first relevant data from IRS in the spring of 2021, although officials cautioned that this time frame was uncertain and it takes time to clean up the data so they are ready for analysis.

Our prior work on benefit-cost analyses provides perspective on the challenge Treasury officials face regarding limited data. In September 2014, we reported that agency officials across the government said that obtaining sufficient or quality data was the primary challenge to benefit-cost analysis.[81] In that report we described how three agencies had re-evaluated their benefit-cost analyses after rulemaking.[82] For example, one agency found that the costs it had initially estimated for regulations were between two and 19 times lower than actual costs, which led this agency to consider how to improve its regulatory analysis process. Officials at other agencies reviewed in our September 2014 report cited

[81]GAO, *Federal Rulemaking: Agencies Included Key Elements of Cost-Benefit Analysis, but Explanations of Regulations' Significance Could Be More Transparent,* GAO-14-714 (Washington, D.C.: Sept. 11, 2014).

[82]The three agencies were the Department of Labor, the Environmental Protection Agency, and the Nuclear Regulatory Commission.

reasons for not revisiting their analyses, such as lack of resources. Further, officials said that they need to balance the resources needed to revisit their benefit-cost analyses with the benefits of potential information gained. We found that such retrospective reviews are consistent with the principles in E.O.s 12866 and 13563 and can promote better decision-making when resources permit and relevant data become available.[83]

Consideration of alternatives. E.O. 12866 also requires agencies to consider the costs and benefits of potentially effective and reasonably feasible alternatives for economically significant regulations. For each of the economically significant final regulations we reviewed, Treasury and IRS included discussions of various alternatives to certain regulatory decisions. For example in the final FDII regulations from July 2020, Treasury and IRS note that the statute does not specify whether or not foreign military sales made pursuant to the Arms Export Control Act are eligible for the deduction under FDII.[84] These sales are technically made by corporations to the U.S. government which then sells or provides the equipment or other military item to foreign governments.

Treasury and IRS describe four options they consider including not addressing the issue, clarifying that such sales are ineligible for a deduction under FDII, allowing any sale to a U.S. intermediary who then resells for foreign use to be eligible, or specifically allowing sales under the Arms Export Control Act to be eligible for the FDII deduction. After describing economic considerations for each option, Treasury and IRS write that they adopted the final option because they believe this will reduce compliance costs and increase foreign military sales. However, Treasury and IRS said they did not have the data to be able to quantify the costs and benefits of each alternative.

As described above, our prior work shows how agencies used retrospective reviews to address this challenge.

[83]E.O. 13563 reaffirmed E.O. 12866 and contained a section regarding retrospective analyses of existing rules.

[84]85 Fed. Reg. 43042, 43074-43075.

IRS Took Varying Approaches for Inviting Public Input on Guidance Addressing TCJA's International Provisions

IRS published guidance documents related to TCJA's international provisions and, for some of these notices, subsequently invited the public to provide comments that IRS used to develop regulations. However, for other guidance that was not part of the development of regulations—its revenue procedures—IRS did not provide public comment opportunities prior to finalization, which OMB has identified as a leading practice for significant guidance. In 2007, OMB identified good guidance practices in a bulletin published in the *Federal Register*.[85] Executive agencies were expected to develop procedures consistent with these leading practices, including having procedures for public comments on significant guidance documents when appropriate.[86]

IRS published 10 guidance documents in the Internal Revenue Bulletin (IRB) between December 2017 and October 2020 to inform taxpayers of planned regulations related to TCJA's international provisions or to announce changes in IRS procedures related to these international provisions. Specifically, IRS published three revenue procedures and seven notices, as shown in table 2.

[85]72 Fed. Reg. 3432 (Jan. 25, 2007). When President Trump issued E.O. 13891, the Acting Administrator of OIRA published a memorandum which stated that many of the practices specified by E.O. 13891 and explained in the memorandum are identical to practices discussed in the 2007 good guidance bulletin. However where they apply, E.O. 13891 and the Acting Administrator's 2019 memorandum were intended to supersede the 2007 bulletin. These leading practices do not apply to agency actions that promulgate or are expected to lead to the promulgation of a final rule, including advance notices of proposed rulemaking.

[86]The bulletin stated that a significant guidance document is "(as defined in Executive Order 12866, as further amended, section 3(h)) a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended." The bulletin directed agencies to provide opportunities for public comment prior to finalizing economically significant guidance and encouraged this practice for significant guidance.

Table 2: IRS Guidance Related to the International Provisions of the Tax Cuts and Jobs Act of 2017 Published in the Internal Revenue Bulletin between December 22, 2017, and October 30, 2020

Guidance Document	Publication Date
Notices	
2018-07: Guidance Under Section 965	January 22, 2018
2018-13: Additional Guidance Under Section 965 and Guidance Under Sections 863 and 6038 in Connection with the Repeal of Section 958(b)(4)	February 5, 2018
2018-26: Additional Guidance Under Section 965; Guidance Under Sections 62, 962, and 6081 in Connection With Section 965; and Penalty Relief Under Sections 6654 and 6655 in Connection with Section 965 and Repeal of Section 958(b)(4)	April 16, 2018
2018-67: Request for Comments Regarding the Calculation of Unrelated Business Taxable Income under § 512(a)(6) for Exempt Organizations with More than One Unrelated Trade or Business; Interim and Transition Rules for Aggregating Certain Income in the Nature of Investments; and the Treatment of Global Intangible Low-Taxed Income Inclusions for Purposes of the Unrelated Business Income Tax	September 4, 2018
2018-78: Additional Guidance Under Section 965	October 15, 2018
2019-46: Domestic Partnerships and S Corporations Filing Under Proposed GILTI Regulations	September 9, 2019
2020-69: S Corporation Guidance under Section 958 (Rules for Determining Stock Ownership) and Guidance Regarding the Treatment of Qualified Improvement Property under the Alternative Depreciation System for Purposes of the QBAI Rules for FDII and GILTI	September 21, 2020
Revenue Procedures	
2018-17: [No title]	February 26, 2018
2018-47: [No title]	September 24, 2018
2020-24: [No title]	April 27, 2020

Source: IRS. | GAO-21-277

Note: The Internal Revenue Bulletin is published weekly and the November 2, 2020, edition was the final edition analyzed for this report.

Notices. IRS informed taxpayers in six of the seven notices that it was planning regulations related to TCJA's international provisions. Five of these notices invited the public to comment on topics a taxpayer wanted IRS to address in forthcoming regulations.[87]

And as described above, IRS issued proposed regulations which then provided an opportunity for the public to comment on specific aspects of the proposed regulation. IRS published its first such notice on the transition tax a month after the President signed TCJA into law thereby demonstrating how IRS used guidance to rapidly disseminate information to taxpayers. IRS also provided information on its web page about these notices. For example, IRS posted information on irs.gov to help taxpayers determine how much transition tax they may owe.

Revenue Procedures. IRS announced changes in procedures related to TCJA's international provisions. These changes had the effect of potentially altering corporations' tax planning strategies and the amount certain taxpayers could be required to pay in taxes. IRS did not invite public comment on these as described below:

- IRS modified the circumstances in February 2018 under which it grants approval of requests by certain foreign corporations for changes in annual accounting periods.[88] IRS said the modification was to prevent avoidance of the transition tax through changes in taxable periods.
- IRS provided excise tax relief for certain regulated investment companies in September 2018 related to GILTI and the transition tax.[89] IRS said it had received requests from taxpayers to provide this relief because these taxpayers reported administrative challenges in gathering the required information.
- IRS provided guidance concerning several topics related to the CARES Act net operating losses (NOL) provisions in April 2020 which included how certain choices (or elections) taxpayers could make interacted with TCJA's international provisions.[90] IRS guidance included how taxpayers could potentially choose to exclude a tax year

[87]Notice 2019-46 published in September 2019 did not request public comments. Notice 2018-67 requested comments on a portion of the notice pertaining to an interim regulation on another topic, but did not request comments on the section of the notice addressing GILTI.

[88]Rev. Proc. 2018-17, 2018-9 I.R.B. 384.

[89]Rev. Proc. 2018-47, 2018-39 I.R.B. 518.

[90]Rev. Proc. 2020-24, 2020-18 I.R.B. 750.

in which they paid the transition tax from the period for carrying back NOLs.

While IRS generally used the notices we reviewed to invite public comments on planned regulations, the revenue procedures we reviewed were used for announcing changes in IRS procedures. Both notices and revenue procedures had potential implications for the amount of taxes taxpayers could be required to pay. IRS included some mechanisms for interacting with the public on revenue procedures, although it did not specifically invite comments.

For example, IRS provided the phone number of the officials who drafted the revenue procedure so a taxpayer with questions or comments could potentially contact the responsible official. Further, according to IRS, it developed the revenue procedure that provided excise tax relief for regulated investment companies in response to feedback IRS had received from taxpayers seeking such relief. In general, however, notices marked the beginning of a dialogue between IRS and taxpayers on the shape of future regulations, while revenue procedures announced changes in IRS procedures.

IRS officials said notice and comment is not required for certain types of guidance documents. They referred to E.O. 13891, which was signed by President Trump in October 2019 and revoked by President Biden on January 20, 2021.[91] During the time it was in effect, E.O. 13891 contained a requirement that agencies establish processes for public notice and comment on guidance documents that OIRA determined were significant. IRS officials said they interpreted a section of E.O. 13891 along with the 2018 MOA between Treasury and OIRA regarding review of tax regulations as exempting certain guidance from OIRA review, which would include the determination of significance and potential need for public comment. However, two of three revenue procedures related to TCJA's international provisions were published before E.O. 13891 was signed.

At the time OMB published the bulletin on good guidance practices, tax regulations were generally exempt from OIRA review, which would include the determination of significance. Similarly, the bulletin on good guidance practices said guidance documents related to the

[91] 84 Fed. Reg. 55235 (Oct. 9, 2019); 86 Fed. Reg. 7049 (Jan. 20, 2021).

“administration or collection of taxes, tax credits, or duties” were exempt from the public comment requirements.

However, circumstances have changed since the bulletin was published in 2007. As noted above, tax regulations became subject in 2018 to the analytical requirements E.O. 12866 had long established for other agencies’ regulations. Likewise, the 2018 MOA between Treasury and OIRA resulted in guidance documents that are precursors to regulations being subject to OIRA review and potential public comment opportunities.

On January 20, 2021, President Biden sent a memorandum to the heads of executive departments and agencies directing “the Director of OMB, in consultation with representatives of executive departments and agencies (agencies), as appropriate and as soon as practicable, to begin a process with the goal of producing a set of recommendations for improving and modernizing regulatory review.” Among other requirements, these recommendations should “identify reforms that will promote the efficiency, transparency, and inclusiveness of the interagency review process, and determine an appropriate approach with respect to the review of guidance documents.”[92] This provides an opportunity for IRS to re-examine the processes for obtaining public comment on future IRS guidance regarding TCJA’s international provisions or other guidance with potentially large implications for taxpayers.

As IRS worked with Treasury to develop regulations and guidance to implement TCJA’s international provisions, IRS demonstrated its willingness to listen to taxpayers and consider potential changes to regulations. Offering comment opportunities for guidance documents that affect the amount of tax companies pay would provide IRS potentially important information that only affected taxpayers can provide.

Conclusions

TCJA made important changes in how the U.S. taxes international business income. Through regulations and other guidance to taxpayers, IRS explained how to comply with TCJA’s international provisions, including the documentation that would be required to support a corporation’s tax return. Treasury and IRS’s economic analyses emphasized the benefits their regulations provided to taxpayers in terms of greater certainty and representatives we interviewed appreciated the work officials did to get information out to taxpayers. However as

[92]The Executive Office of the President, *Memorandum for the Heads of Executive Departments and Agencies: Modernizing Regulatory Review* (Washington, D.C.: Jan. 20, 2021).

important as greater certainty is for taxpayers, it is not the only relevant consideration in assessing the potential benefits and costs of a regulation and how to design a regulation. Developing quantitative estimates of the anticipated benefits and costs of regulations—or conducting retrospective analyses if data and resources permit—and providing more specific estimates of the paperwork burden would help in designing potential future regulations related to TCJA's international provisions.

IRS guidance, such as notices and revenue procedures, supplement the regulations Treasury and IRS issued and help taxpayers comply with the new international provisions. IRS generally used notices to inform taxpayers of planned regulations related to TCJA's international provisions and to begin a dialogue about the topics those regulations should address. The three revenue procedures issued to implement TCJA's international provisions announced changes to IRS's procedures. The process used to issue these revenue procedures differed from the generally open posture Treasury and IRS took towards input in the regulatory process and was inconsistent with a leading practice OMB had previously identified for offering the public an opportunity to comment on significant guidance. The administration's call for agencies to review the guidance process provides an opportunity for IRS to re-examine the processes for obtaining public comment on future IRS guidance regarding TCJA's international provisions or other guidance with potentially large implications for taxpayers.

Recommendations for Executive Action

We are making a total of three recommendations, including one to Treasury and two to IRS. Specifically:

The Secretary of the Treasury, in consultation with IRS, should ensure that relevant data are used to develop quantitative estimates of the benefits and costs for future regulations related to TCJA's international provisions, or any reviews Treasury or IRS may conduct for regulations already issued. (Recommendation 1)

The Commissioner of IRS should use future regulatory activity and renewals of PRA authorizations to develop more specific paperwork burden estimates related to TCJA's international provisions. (Recommendation 2)

The Commissioner of IRS should, in light of the government wide regulatory review, identify ways to provide public comment opportunities for significant guidance documents when appropriate. (Recommendation 3)

Agency Comments and Our Evaluation

We provided a draft of this report to Treasury and IRS for review and comment. The Deputy Assistant Secretary for Tax Policy provided written comments for both Treasury and IRS (which are reproduced in appendix I and summarized below). In a subsequent email, an official from IRS's Office of Chief Counsel stated that Treasury and IRS generally agree with the goals of the recommendations, subject to the constraints Treasury and IRS set forth in the management response and enclosure. IRS also provided technical comments, which we incorporated as appropriate.

In its letter, Treasury stated that Treasury and IRS are committed to complying with all applicable procedural and analytical requirements when issuing regulations as well as sub-regulatory guidance.

Regarding our first recommendation to ensure that IRS uses relevant data to develop quantitative estimates of the benefits and costs of future regulations related to TCJA's international provisions, or any reviews Treasury or IRS may conduct for regulations already issued, Treasury stated that the regulatory review process is currently under review by OMB in consultation with executive agencies.

While this is true, the economic analysis requirements established by E.O. 12866 remain in effect. Further, we believe that our recommendation will put Treasury and IRS in a stronger place to respond to potential future changes in the regulatory review process. This is because quantification, if done accurately and reliably, allows an agency to provide a more precise description of the anticipated economic effects of a regulation.

Regarding our second recommendation to use future regulatory activity and renewals of PRA authorizations to develop more specific paperwork burden estimates related to TCJA's international provisions, Treasury stated that Treasury and IRS take the requirements of PRA seriously. Treasury said that it was not practical for IRS to estimate reliably the incremental burden, if any, created by a regulation separate from the governing statute and related information collection.

Our report notes an instance in which IRS estimated how much time and money it would take taxpayers to respond to an information collection established by its regulation. In this example related to the transition tax, IRS stated that its estimate did not include burden estimates related to forms associated with the statute. We believe this shows one potential approach IRS could take for potential future regulations related to GILTI, FDII, BEAT, or subsequent international tax provisions.

Further, Treasury stated that IRS can and does provide specific burden estimates for important legislative and regulatory changes. We agree that such a capability is useful and our report describes the instances we identified of such analyses for TCJA's international provisions. In its letter, Treasury refers to analyzing the most important changes. We recognize that IRS may not be able to analyze how every regulatory change may affect paperwork burden. However, we believe IRS should seek to analyze how the potentially most burdensome regulations related to TCJA's international provisions may affect paperwork burden.

Regarding our third recommendation to identify ways to provide public comment opportunities for significant guidance documents when appropriate, Treasury stated that Treasury and IRS recognize the value of public comment for all levels of tax guidance and seek to provide opportunities for comments when appropriate.

Treasury said that as the implementation of TCJA demonstrates, it is not always appropriate or feasible to provide such opportunities when balanced against the immediate needs of taxpayers for greater clarity and the requirements of tax administration. We agree that there may potentially be situations in which Treasury and IRS must quickly publish guidance. Our report recognizes officials' efforts to do so for TCJA's international provisions. However, we would encourage Treasury and IRS to limit the instances in which they publish guidance without seeking public comments.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the relevant congressional committees, the Secretary of the Treasury, the Commissioner of the IRS, and other interested parties. In addition, this report is available at no charge on the GAO website at https://www.gao.gov.

If you or your staff members have any questions about this report, please contact me at (202) 512-6806 or lucasjudyj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

Sincerely yours,

Jessica Lucas-Judy
Director, Tax Issues
Strategic Issues

Appendix I: Comments from the Department of the Treasury

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

April 13, 2021

Ms. Jessica Lucas-Judy
Director, Tax Issues
Strategic Issues
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Ms. Lucas-Judy,

Thank you for the opportunity to review and provide comments on the draft report entitled *Tax Cuts and Jobs Act; Future Rulemaking Should Provide Greater Detail on Paperwork Burden and Economic Effects of International Business Provisions* (GAO - 21-277). This report follows GAO's prior report concerning TCJA (GAO-20-103). The report contains three recommendations focused on Treasury and IRS's rulemaking and sub-regulatory guidance processes. One recommendation is directed to Treasury and the remaining two to the IRS. Because of the significant overlap of these recommendations, Treasury consulted with the IRS and Treasury is responding for both.

The Tax Cuts and Jobs Act (TCJA) was one of the most sweeping set of tax changes in over 30 years. The report notes that GAO did extensive research on the effect of the statute on U.S.-based corporations, including reviewing testimony, the annual financial reports of the 100 largest U.S. companies, review of academic research, discussions with tax experts, and interviews with representatives of eight companies. The report reflects GAO's conclusion that the impacts of the international statutory provisions of TCJA on taxpayer behavior remains unknown, with the TCJA being one of many, diverse factors that drive taxpayers' international economic decisions.

One of the most significant efforts since passage of TCJA has been Treasury and the IRS's development of the regulations and guidance necessary to effectively implement the new law. This effort has included 65 proposed regulations and 59 final regulations. It has also included 90 guidance documents published in the Internal Revenue Bulletin. The report accurately reflects that Treasury and the IRS are committed to complying with all applicable procedural and analytical requirements when issuing regulations as well as sub-regulatory guidance.

Treasury and the IRS take the requirements of the Paperwork Reduction Act seriously. When a collection of information is required, the PRA directs agencies to provide an estimate, "to the extent practicable, of the burden of the collection." 44 U.S.C. §3506(c)(1)(B)(iii)(III). Since 2014, the IRS has used econometric models to estimate the burden to business entities, reported under OMB Control Number 1545-0123. The IRS methodology considers the end to end taxpayer experience to estimate the burden incurred by business entities, including tax planning, recordkeeping and filing activities. IRS estimates include the burden imposed by the underlying statute, Treasury and IRS regulations, as well as filing activities. In most cases, it is not practicable, or even possible, for the IRS to reliably estimate the incremental burden, if any, created by a regulation separately from the governing statute and related information collection. Both statute-driven and regulation-driven compliance burdens are included in the IRS's holistic approach to burden estimation.

Executive Order 12866 requires agencies, when issuing regulations, to analyze the economic effects of the regulatory action and, to the extent feasible, quantify the anticipated costs and benefits of the regulation. Generally, Treasury and IRS regulations were historically exempted from E.O. 12866 pursuant to a Memorandum of Agreement between Treasury and OMB. A new E.O. 12866 review process was established beginning in April 2018 when the MOA was revised. The report reflects that the TCJA regulations issued by Treasury and IRS after the effective date of the revised MOA fully complied with the requirements of E.O. 12866.

Treasury and IRS agree with GAO that the regulatory review processes are always subject to improvement. As the report notes, on January 20, 2021, President Biden directed OMB, in consultation with representatives of executive agencies, to modernize the regulatory review process. Treasury and the IRS are committed to complying with any applicable regulatory review and resulting processes.

We appreciate GAO's recognition of the complexity of the TCJA and the resulting challenges faced by Treasury and the IRS to implement Congress's intent and provide clarity to U.S. taxpayers. Implementation of TCJA has required an immense effort ranging from updating forms and publications, reprogramming IRS systems, training IRS employees, and providing education and outreach to taxpayers, with significant work remaining.

Responses to your specific recommendations are enclosed. If you have any questions, please contact me, or a member of your staff may contact Emily Lesniak, Senior Level Counsel, Office of Chief Counsel, Procedure and Administration at (202) 317-5409.

Sincerely,

Mark J. Mazur

Mark J. Mazur
Deputy Assistant Secretary for Tax Policy
Office of Tax Policy
U.S. Department of the Treasury

Enclosure

Enclosure

GAO Recommendation and the IRS Responses to Draft Report Tax Cuts and Jobs Act: Future Rulemaking Should Provide Greater Detail on Paperwork Burden and Economic Effects of International Business Provisions (GAO-21-277).

Recommendation 1:
The Secretary of the Treasury, in consultation with IRS, should ensure that relevant data are used to develop quantitative estimates of the benefits and costs for future regulations related to TCJA's international provisions, or any reviews Treasury or IRS may conduct for regulations already issued.

Comment:
As GAO notes, the regulatory review process is currently under review by OMB in consultation with executive agencies. Treasury and the IRS will continue to comply with any applicable review and analysis requirements for regulatory actions that result from that review.

Recommendation 2:
The Commissioner of IRS should use future regulatory activity and renewals of PRA authorizations to develop more specific paperwork burden estimates related to TCJA's international provisions.

Comment:
Since 2014, the IRS has used an econometric model to estimate the burden to business entities reported under OMB Control Number 1545-0123. The IRS methodology considers the end-to-end taxpayer experience to estimate the burden incurred by business entities, including tax planning, recordkeeping and filing activities. Using the RAAS burden methodology, IRS *can -and does- provide specific burden estimates for highly impactful legislative and regulatory changes. This information is provided in the supporting statement attached to the PRA reporting updates for the impacted taxpayer segments.* Even with a robust model, it is generally not practicable for the IRS to estimate incremental burden created by a regulation separately from the governing statute or resulting filing activity.

Recommendation 3:
The Commissioner of IRS should, in light of the government wide regulatory review, identify ways to provide public comment opportunities for significant guidance documents when appropriate.

Comment:

Treasury and the IRS recognize the value of public comment for all levels of tax guidance and seeks to provide opportunities for comments when appropriate. As the implementation of TCJA demonstrates, it is not always appropriate or feasible to provide such opportunities when balanced against the immediate needs of taxpayers for greater clarity and the requirements of tax administration generally.

Appendix II: GAO Contact and Staff Acknowledgments

GAO Contact

Jessica Lucas-Judy, (202) 512-6806 or lucasjudyj@gao.gov.

Staff Acknowledgments

In addition to the individual named above, Tara Carter (Assistant Director), Michael O'Neill (Analyst in Charge), Virginia Chanley, Jacqueline Chapin, Julie Cotton, Svetlana Cunningham, Robert Letzler, Daniel Mahoney, Christina C. Murphy, Dylan Stagner, Andrew J. Stephens, Kari Terrio, and Alicia White made significant contributions to the report.

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