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Data Trickles In On TCJA's Job Offshoring Effects

By **Alex M. Parker**

Law360 (September 16, 2019, 8:30 PM EDT) -- Democratic lawmakers are stepping up their criticism of international provisions of the 2017 tax overhaul based on research suggesting they may already be pushing jobs offshore — but, so far, data on the law's economic effects is limited.

Democratic presidential candidate Sen. Amy Klobuchar, D-Minn., and congressional colleagues are asking Treasury officials to outline how it's tracking offshoring encouraged by the Tax Cuts and Jobs Act. (AP)

Since passage of the Tax Cuts and Jobs Act in 2017, critics have claimed that both the tax on global intangible low-taxed income and the deduction for foreign-derived intangible income give U.S. companies an incentive to create more tangible property offshore, and reduce it at home.

Democratic presidential candidate and Minnesota Sen. Amy Klobuchar joined three of her congressional colleagues to press the U.S. Treasury on the point **in a Sept. 9 letter**, asking officials to outline how it's tracking offshoring due to the law and how it's working to "mitigate the incentives for offshoring created by the 2017 tax law."

The letter cites a **July paper** that found a spike in foreign investment in 2018 immediately following enactment of the law.

"While the ultimate effects of the incentives included in the international tax provisions may take years to materialize, initial reports confirm our belief that these incentives favor the offshoring of physical operations by U.S. corporations," wrote Klobuchar, Sen. Chris Van Hollen, D-Md., Sen. Tammy Duckworth, D-Wis., and Rep. Peter DeFazio, D-Ore. "One comprehensive study recently found that while U.S. corporations have increased their total investment in physical operations since the 2017 tax law was enacted, this increase in investment is attributable almost entirely to an increase in foreign investment — investment in U.S. operations by U.S. companies has not changed."

The law's authors said GILTI and FDII would stem tax avoidance and income-shifting through the use of valuable, mobile intangible assets such as intellectual property. But rather than try to identify those assets directly, the provisions use a formula that ultimately targets unusually high returns on tangible property. That, critics allege, is **where the problem lies**. The more tangible property a company holds offshore, the smaller its return and the less tax it owes under GILTI. Likewise, the less tangible property it holds domestically, the more it qualifies for FDII's 37.5% deduction on intangible income. Tangible assets could include facilities or factories, and the jobs that go with them.

Defenders of the law claim the fears are overblown. It's much more difficult to move a real facility than it is to reassign ownership to a patent or line of code. Likewise, companies wouldn't base investment decisions about a new factory based on tax considerations alone — those are often last on a list of factors including infrastructure and workforce quality. Companies would lose tax benefits in the U.S., such as depreciation deductions. And companies would realize a benefit only if they went to countries with tax rates significantly lower than the U.S. rate of 21%, which may not include many capable of supporting an infrastructure and workforce attractive for investment.

So far, both sides of the debate have mostly relied on theoretical predictions, as analysts have only begun to pore over 2018 data. A paper authored by four accounting professors and released by the American Accounting Association in July found some evidence to suggest that the biggest increase in investment in the first nine months of 2018 was in foreign locations, especially by companies that already had high amounts of foreign operations and income.

But many experts are wary of drawing any conclusions from available data.

"The increase in foreign investment suggests there is a problem. But there are transition issues that cloud the picture during this period," Steven Rosenthal, a former legislative counsel at the Joint Committee on Taxation and a senior fellow at the Tax Policy Center, wrote to Law360.

Rosenthal is among the critics predicting that GILTI will push jobs out of the U.S. But he also noted that other factors could explain the most recent numbers, including that companies were holding off on investment decisions until the passage of the law. For that matter, companies may still be mulling international investment decisions as they try to wrap their head around the complex GILTI rules, which were only **finalized in June.**

"We want to make strong conclusions about the macro data and how it's going to effect the overall economy, but we're discovering that GILTI is very company-specific," said Kyle Pomerleau, an economist with the conservative-leaning Tax Foundation in Washington, D.C.

Some companies have reported increases in tax costs due to GILTI, especially from its foreign tax credit limit. Under prior law, companies could hold most income offshore indefinitely, so GILTI could be a significant new cost.

"There is no one general rule or prediction that would apply widely across companies," Aparna Mathur, a scholar of economic activity at the conservative American Enterprise Institute, wrote to Law360. "The impact of the TCJA on companies depends very specifically on each company's particular income and asset profile and the extent of its foreign operations, so it's hard to say whether companies as a whole now have an incentive to locate more investment in the U.S. or locate that investment overseas."

Mollie Mathis, an accounting professor at Auburn University and one of the American Accounting Association paper's authors, said that she and the other professors involved with the study are working to update it with new data.

More recently, they did not find an increase in capital expenditures, at home or abroad, based on the new data. But they're still working to identify other possible effects that could be skewing the results.

"Based on the limited data we have, we documented an increase of foreign investment," Mathis said. "We want to make sure that that would hold in a broader time period."

--Editing by Tim Ruel and John Oudens.
