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## New Tax-And-Climate Law Leaves Much for Treasury to Shape

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President's Joe Biden's economic package is now law, but the Treasury Department's work on it is just starting.

The new tax-and-climate law gives Treasury the authority to write regulations that will be needed to answer key questions about a host of the law's provisions: What will and won't count as part of a company's "book" income, which will be subject to a new minimum tax? What type of transactions will be considered stock buybacks, which the law also taxes? What requirements must companies meet to qualify for the law's clean-energy tax credits?

"I think they're going to have their hands full," said Lisa Zarlenga, a partner at Steptoe & Johnson LLP and a former Treasury tax legislative counsel.

Treasury says it's already at work and will have more to say about its plans in the coming months. On the book-income tax, the law gives Treasury "very broad grants of reg authority," and "a ton of guidance will be needed," said Jose Murillo, Treasury's deputy assistant secretary for international tax affairs, speaking Wednesday at a Practising Law Institute event.

There isn't much time—some of the law's key provisions take effect Jan. 1, and Treasury likely won't be able to write full regulations by then, tax attorneys and accountants said. But they think the department may issue notices by then that will provide at least some interim guidance for companies about how the law's provisions will be applied.

For Treasury, the work likely won't be on the same level as the huge regulation-writing burden that was dropped on the department following the 2017 tax overhaul, said Michael Desmond, a partner at Gibson Dunn & Crutcher LLP and a former IRS chief counsel.

With Treasury now largely done with the regulations needed to implement that law, "there is bandwidth to address the challenges" posed by the new law, Desmond said.

## Book-Income Tax Rules

Many of the IRA's regulatory projects focus on the new [15% minimum tax](#) on large companies' "book" income, which taxes the income they report on their financial statements regardless of how much they're paying otherwise.

In some cases, Treasury will have to write rules to clarify who will be subject to the tax. Other regulations will cover adjustments in calculating the amount of book income to be taxed—rules on adjustments or exceptions for items such as foreign taxes and defined-benefit pension costs and income, and special situations such as corporate reorganizations.

The law gives Treasury significant discretion in some areas. Matthew Gardner, senior fellow at the Institute on Taxation and Economic Policy, noted that the law seems to grant Treasury the power to exempt companies from the tax if their income suddenly dives below the law's \$1 billion threshold and Treasury "determines that it would not be appropriate" for the tax to continue to apply—even if their longer-term average profits mean they would otherwise fall under the tax's scope.

"It's like a magic wand there," Gardner said.

The law also calls for transactions that are "economically similar" to traditional corporate stock repurchases to be subject to the law's [1% excise tax](#) on stock buybacks. Treasury will have to decide whether that should include repurchases done as part of mergers and acquisitions and leveraged buyouts, for instance, or in transactions involving convertible securities or preferred stock.

"They are going to have to clarify what is and isn't covered by 'economically similar,'" Zarlenga said.

## Clarification on Credits

Treasury also will play a key role in writing regulations on the law's changes to energy tax credits, though the Energy and Labor Departments are also likely to be heavily involved.

"There will no doubt be a collaborative engagement and process," Desmond said.

The [energy and climate incentives](#) will require guidance in two key areas: the prevailing wage and apprenticeship programs, practitioners said. Many of the tax credits, such as for electric vehicles and energy-efficient commercial buildings, include mandates for those requirements.

Defining the prevailing wage requirements will be the "largest item" tax professionals hope to see, said Ron Wainwright, a partner at Cherry Bekaert LLP.

Treasury also will need to iron out definitions and procedural details relating to how companies can apply for direct pay, the extent of a good faith effort and the definition of significant employment.

For companies that would not meet the prevailing wage and apprenticeship requirements, a delay in guidance is welcomed, allowing taxpayers to qualify for a higher credit when they otherwise wouldn't.

“We don't want that for selfish reasons to come too quickly because we can get the higher credit, even if we're not complying with those rules,” said Michael D'Addio, a principal at Marcum LLP.

Once guidance is released with respect to the requirements, there will be 60 days before the guidance goes into effect. Some companies may rush to begin construction on projects sooner to avoid having to satisfy the prevailing wage or apprenticeship requirements, D'Addio said.

## Timeline for Treasury

Because the book-income tax takes effect at the start of 2023, “there will have to be some very immediate guidance,” Murillo said at the Practising Law Institute event, addressing “day one” issues like the tax's scope.

Practitioners predicted that Treasury may issue notices with interim guidance while it works on developing full regulations—which often takes a long time.

“I think they're probably going to have to start with figuring out what issues need guidance immediately,” Zarlenga said. “They probably want to hear from taxpayers about ‘what do we need guidance on day one?’”

Getting guidance by the end of the year would be ideal, practitioners said. But “it's difficult really to estimate,” D'Addio said. “We're still waiting for guidance and reg projects that are supposed to be issued two years ago.”

The fact that the book-income tax isn't a completely new concept may also help Treasury write rules more quickly and help companies adapt. A similar corporate alternative minimum tax was imposed for 30 years until it was repealed in 2017.

“It didn't get dropped out of the blue onto taxpayers,” Gardner said.

It isn't clear whether regulations to implement Biden's tax-and-climate package will be included in Treasury's 2022-23 Priority Guidance Plan—the department's annual list of major regulatory projects on its plate, which is slated to be issued within the next few months. The law's passage in August may not give Treasury enough lead time to incorporate those regulations in the guidance plan, practitioners said.

“It would be pretty darn impressive if they put out a Priority Guidance Plan with that,” Gardner said. “There's definitely some heavy lifting to be done.”