



CCH Tax Briefing: AMERICAN JOBS CREATION ACT OF 2004

Special Report

Updated October 11, 2004

Scorecard

- ✓ \$145 billion in tax cuts
- ✓ \$50 billion saved by ETI repeal
- ✓ \$95 billion in taxes/penalties
- ✓ 173 Act provisions
- ✓ 274 Code amendments
- ✓ 44 major changes, effective immediately
- ✓ 35 major changes, effective 1/1/05
- ✓ 61 revenue raisers
- ✓ 663-page Conference Report
- ✓ 2 years in the making

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Congress Approves Corporate Tax Cuts – And Much More – In FSC/ETI Repeal Legislation

What began as a bill to compensate exporters for repeal of a controversial \$50-billion tax-based trade subsidy has ballooned into a \$145-billion pre-election business tax break. The *American Jobs Creation Act of 2004* has passed Congress and is on its way to the White House for President Bush's signature. The new law passed the House on October 7, 2004, by a 280-141 vote, and was approved by the Senate on October 11, 2004, by a 69 to 17 majority. The new law – the most far-reaching tax cut in years – benefits U.S. manufacturers, multinational operations, agribusiness and energy companies. Small businesses, farmers, partnerships and real estate investors also share in the bounty. However, unlike the recently enacted *Working Families Tax Relief Act of 2004*, the latest tax cut has revenue-raising provisions that hit hard at both individuals and business taxpayers.

Impact *Not surprisingly, the 270-plus provisions within the American Jobs Creation Act of 2004 add more complexity to the tax law. As the fifth major tax cut in four years, the new law requires integration of its changes into an already existing web of statutory directives. Many provisions in the new law require immediate action to maximize benefits ... and avoid problems. Effective dates, however, are all over the map. Retroactive, date of enactment, next year, even 2006 implementation all adds to the initial confusion caused by this major new tax law.*

The *American Jobs Creation Act of 2004*:

- Repeals the FSC/ETI regime;
- Creates a new tax deduction for “manufacturers”;
- Continues enhanced small business expensing for two more years;
- Reduces the SUV loophole;
- Accelerates depreciation for leasehold and restaurant improvements;
- Makes significant changes to S corps rules;
- Simplifies international taxation;
- Gives farmers tax relief;
- Boosts tax shelter penalties;
- Tightens vehicle donation rules;
- And much more.

Comment The revenue-raising provisions, including ETI repeal, have been scored to bring in \$145 billion, making the net cost of the new law \$0. However, the revenue provisions are permanent, while most of the tax-cuts have a temporary life. This makes them a lot less expensive “on the books” but likely to be extended by a future Congress and eventually cost, under some estimates, over \$500 billion.

Comment Treasury Secretary John Snow complained in a letter to congressional leaders while the Conference met, that the bill was filled with provisions for “special interests.” Nevertheless, the White House has signaled that President Bush will

Continued on page 2

sign the bill when passed, satisfied that the bill on balance is consistent with his agenda.

FSC/ETI REPEAL

Four years ago, the World Trade Organization (WTO) declared the FSC/ETI (foreign sales corporation/ extraterritorial income) regime an illegal trade subsidy. Congress felt little need to do anything about the WTO's decision until the European Union (EU) slapped sanctions on U.S. exports. The EU penalty is currently 12 percent and had been growing at one percent each month. America's largest manufacturers and exporters have been clamoring for repeal.

Comment Under the FSC/ETI rules, qualifying U.S. exporters are eligible for an exclusion from gross income for qualifying extraterritorial income.

The new law gradually repeals the FSC/ETI regime, starting next year. Taxpayers will be able to claim 100 percent of their FSC/ETI benefits in 2004, 80 percent in 2005, 60 percent in 2006, and zero percent (a complete repeal) thereafter. The full exclusion generally remains in effect for taxpayers that had entered into binding contracts in effect on September 17, 2003.

Impact *This represents a "soft landing" for many multinational corporations as they wean themselves off the subsidies. However, the tax rate cut for manufacturers (see, below) that is intended to replace the subsidy, makes some businesses bigger winners than others. Those that can pass through the rather broad definition of "manufacturer" will do well; those that are entitled to both the extraterritorial income exclusion as it is being phased-out, and the manufacturers' reduced tax rate as it is being phased-in, do even better. Many service industries in particu-*

lar may need to restructure operations to maximize partial benefits under the new tax regime.

Impact *At press time, there remains some controversy over whether the EU will consider the gradual reduction of the FSC/ETI exclusion sufficient to halt imposition of penalties.*

MANUFACTURERS' DEDUCTION

To replace the FSC/ETI regime, Congress has created a new deduction for manufacturers. The most expensive provision in the new law, the deduction will effectively reduce the corporate income tax rate for domestic manufacturing three percentage points, from a top rate of 35 percent down to 32 percent. More good news is that lawmakers have defined

"The new law ... benefits U.S. manufacturers, multinational operations, agribusiness and energy companies. Small businesses, farmers, partnerships and real estate investors also share in the bounty."

"manufacturers" (and their underlying "production activities") very broadly. Many domestic producers qualify for the new deduction, including, but not limited to:

- Traditional manufacturing;
- Construction;
- Engineering;
- Energy production;
- Computer software;
- Films and videotape; and
- Processing of agricultural products.

When fully phased in by 2010, the deduction will be equal to nine percent of the lesser of:

- (1) qualified production activities income for the year, or
- (2) taxable income for the year.

The new deduction, however, starts at a transition percentage of three percent for 2005 and 2006; and will rise to six percent for 2007 through 2009.

The deduction is limited to 50 percent of the W-2 wages paid by the taxpayer during the tax year.

Impact *Corporations, individuals, S corps, partnerships, estates, trusts, and cooperatives can take advantage of the new deduction. Taxpayers also may use the new deduction for AMT purposes.*

Impact *The new deduction goes far beyond counterbalancing the FSC/ETI exclusion. In fact, some estimate that the majority of companies able to take the deduction were never affected by the FSC/ETI exclusions. All qualifying U.S. "manufacturers," whether or not they export, are eligible for this new deduction. The numbers also explain the impact: a \$76-billion price tag for replacing the \$50-billion exclusion. Supporters, however, argue that the deduction will create new jobs and grow the economy more than enough to offset the initial cost.*

Impact *Many businesses may be surprised that they qualify as "manufacturers." Some, however, were well aware of the opportunities to broaden the definition of "manufacturer" and lobbied hard on Capitol Hill to be specifically included. For example, a national retail coffee-house chain will be allowed to call its coffee roasting a manu-*

Phase-In Schedule:

	% ETI Benefits Allowed	% Production Activities Deduction
2004	100%	0%
2005	80%	3%
2006	60%	3%
2007	0%	6%
2008	0%	6%
2009	0%	6%
2010	0%	9%

facturing process, although it lost on having in-store beverage preparation qualify.

Impact *Treasury and the IRS are going to have to draft regulations explaining what business activities qualify as “manufacturing” for the new deduction. High-ranking Treasury and IRS officials have appeared less than enthusiastic about working with such a broad definition. However, given the need for businesses to start planning immediately, they will have to get guidance out quickly.*

SMALL BUSINESS EXPENSING AND DEPRECIATION

Two years ago, Congress raised the threshold for small business expensing from \$25,000 to \$100,000. This special treatment is reduced when the cost of qualifying property placed in service for the tax year exceeds \$400,000. The enhanced treatment was designed as a temporary measure to stimulate the economy, falling back to \$25,000 in 2006. The new law extends the higher small business expensing amounts through 2007.

Impact *Not only does the extension give taxpayers more certainty in their planning, it also may indicate that Congress may make the higher amounts permanent.*

Comment The threshold is indexed for inflation starting in 2004. It is \$102,000, with a \$410,000 property cap for 2004. This change carries through the indexing to 2007 as well.

SUV deduction. Large sports utility vehicles will no longer be able to be driven through a large tax loophole by business owners. Because the vehicle caps on depreciation do not apply to cars or trucks weighing more than 6,000 pounds, taxpayers can deduct up to the full cost of the SUV immediately as a section 179 deduction. Now, the deduction for vehicles weighing not more than 14,000 pounds is capped at \$25,000, effective for property placed in service after the date of enactment.

Impact *Owners of heavy SUVs still fare better than other vehicle owners, however. First-year deduction amounts for vehicles under 6,000 pounds currently are capped at \$2,960 (not counting bonus depreciation, which expires this year).*

Depreciation. Congress approved a 15-year recovery period, using straight-line depreciation, for qualified leasehold improvements to nonresidential real property placed in service after the date of enactment and before January 1, 2006. If the lessor made the improvement, subsequent owners generally cannot use the 15-year period to depreciate the improvement.

Prior law required that a “qualified” leasehold improvement or addition be depreciated using straight-line depreci-

ation over the same 39-year period as nonresidential real property. A qualified leasehold improvement is an improvement to the interior of a building, made by either the lessor or lessee and placed in service more than three years after the building is placed in service.

The new law also provides a 15-year recovery period and straight-line depreciation for qualified restaurant property placed in service after the date of enactment and before January 1, 2006. The property also becomes eligible for first-year bonus depreciation. Qualified restaurant property is a building improvement placed in service more than three years after the building is placed in service. The restaurant must use more than half of the building’s square footage.

Impact *The shorter recovery period and the availability of bonus depreciation for restaurant property provide much larger deductions in the first year.*

If a leasehold improvement or restaurant property qualifies as tangible personal property under existing law, taxpayers can use cost segregation to depreciate the elements separately over a shorter recovery period, using bonus depreciation and an accelerated depreciation method.

S CORPORATION REFORM

The new law dramatically changes the S corporation rules. The permissible number of S corporation shareholders increases from 75 to 100. Congress also approved treating all members of a family as one S corp shareholder. The new law defines members of a family as, “the common ancestor, lineal descendants of the common ancestor, and the spouses (or former spouses) of lineal descendants or common ancestor.” In addition, to qualify as common ancestor, the person must be no more than six generations removed from the youngest generation

of shareholders who otherwise would be members of the family.

The new law also:

- Permits traditional and Roth IRAs to hold shares in a bank that is an S corp;
- Allows suspended losses or deductions to be transferred in the case of transfers of stock to a spouse incident to divorce;
- Eases the rules for determining potential current beneficiaries of an electing small business trust;
- Relaxes some passive activity loss rules as they relate to qualified subchapter S trusts;
- Gives relief from inadvertent invalid subchapter S subsidiary elections and terminations;
- Provides for qualified subchapter S subsidiaries to file information returns; and
- Permits distributions from an ESOP maintained by an S corp to repay certain loans.

Impact *S corps are among the fastest growing business entity in the U.S., vying neck and neck with partnerships (which include LLCs) for the lead. The new provisions are sure to boost the popularity of S corps. Individuals contemplating starting a business or reorganizing an existing business will need to look long and hard at the new S corp rules, especially if the business owners are family members. A husband and wife may want to include one or more children or grandchildren as S corp shareholders. Under the new law, they can treat all of them as one shareholder.*

STATE SALES TAX DEDUCTION

The new law allows individuals to deduct state sales taxes instead of deducting state and local income taxes. This election has been made available for tax years beginning after 2003 and before 2006.

Taxpayers electing to deduct state and local sales taxes paid will have two options — determine the deductible amount by accumulating receipts or using tables to be prepared by the Secretary of the Treasury based on average consumption and other factors.

Impact *Congress realized that it was imposing a burden by ordering the creation of these tables so close to the end of the year and the beginning of filing season. As a result, the conference report signaled that Congress doesn't expect the Treasury to have the tables ready before the 2005 filing season. What estimates will be allowed for 2004 returns without these table remains to be seen.*

Impact *The new sales tax deduction is available not only to taxpayers living in states without an income tax, but also to those in any state who find that sales taxes paid during the year (for example, for several major purchases) exceed their state income tax liability for the year. However, the new deduction is available only for taxpayers that itemize their expenses. It is important to keep in mind that the alternative minimum tax (AMT) may eliminate any benefit provided by the sales tax deduction provision. Taxpayers are not allowed to deduct state and local taxes when computing the AMT.*

Comment Taxpayers in seven states cannot deduct state income taxes on their individual federal returns because they pay no state income taxes.

INTERNATIONAL TAX REFORM

The new law contains a host of provisions targeted at taxpayers with international business operations. Congress approved reducing the number of foreign tax credit baskets from nine to two.

The two new baskets are passive category income and general category income. The new law also delineates some financial services income as general category income and allows taxpayers to make a temporary election about certain creditable foreign taxes. Congress also approved changes to the interest expense allocation rules for the foreign tax credit limitation.

Other important actions impacting on foreign tax credits and international taxation include:

- Application of a re-sourcing rule to U.S. source income when a taxpayer's foreign tax credit is reduced because of an overall domestic loss.
- Application of look-through treatment under subpart F for sales of partnership interests.
- Clarification of certain deem-paid foreign tax credits.
- Creation of new exceptions from the definition of U.S. property for certain shareholders in controlled foreign corporations.
- An election for taxpayers required to translate foreign income taxes at the average exchange rate to use exchange rates at the time the taxes are paid.
- Elimination of secondary withholding tax on dividends paid by some foreign corporations.
- Similar treatment of interest paid by foreign partnerships and foreign corporations.
- Taxpayer-friendly treatment of certain regulated investment company (RIC) income where dividends are received by foreign persons and their estates.
- Repeal of foreign personal holding company and foreign investment company rules.
- Modification of temporary exceptions from subpart F personal holding company income for banking, finance and similar business activity.
- Relaxation of the rules requiring foreign investors receiving REIT distributions to file U.S. returns.
- Reduction in the withholding tax rate on U.S. source dividends paid to a Puerto Rico corporation.

- More generous tax treatment for some gambling winnings of nonresident aliens.

Foreign tax credit carryover/carryback. The new law also calls for a 10-year carryover of the foreign tax credit and a one-year carryback period. Current rules generally permit a two-year carryback and a five-year carryover.

AMT treatment. Under current law, the AMT foreign tax credit is generally limited to 90 percent of the taxpayer's AMT. Congress voted to abolish the 90-percent limitation. The new treatment is effective for tax years beginning after December 31, 2004.

TAX BREAKS FOR FARMERS

Agribusiness as well as traditional farmers made out well under the new law. In addition to qualifying the processing of agricultural products as "manufacturing" eligible for the three-percent corporate tax reduction, the new law adds over 20 agricultural tax breaks and incentives to the Code, including:

Weather-forced livestock gain. The time within which the proceeds from livestock sold only on account of weather-related conditions must be reinvested in similar livestock in order to defer gain is extended to four years, up from two years. Congress also authorizes Treasury to further extend the replacement period on a regional basis if the weather-related conditions persist longer than three years.

AMT relief. The benefits of special income averaging allowed to farmers and fishermen usually have been lost if the taxpayer is subject to AMT since averaging only applies in computing regular tax. Lawmakers voted to permit income to be determined for the AMT comparative computation without regard to income averaging.

Tobacco buyout. One of the more controversial provisions in the legislation is a provision to set up a \$10 billion fund to provide relief for tobacco farmers. Many lawmakers tried unsuccessfully to fund the buyout only if a provision permitting the FDA to regulate tobacco was also added.

TAX SHELTERS AND ABUSIVE TRANSACTIONS

Until this past week, Washington insiders believed that the FSC/ETI bill would contain many new and tough anti-tax shelter provisions. The same measures, such as new curbs on corporate inversions and foreign leasing deals and codifying the economic substance doctrine, had been proposed but dropped from earlier bills. The FSC/ETI bill was seen as the last, best hope for these measures. Instead, Congress voted not to include the majority of them in the final bill. They also left out language requiring corporate CEOs to verify the accuracy of their business income tax returns and protections for whistleblowers.

Comment

Senator Charles Grassley, R-Iowa, Senate Finance Chairman, vowed to resurrect these measures as soon as possible. Grassley and his Democratic colleague, Senator Max Baucus of Montana, promised to "keep the pressure" on companies that have moved their headquarters, on paper, offshore to save on U.S. taxes while enjoying the stability and security of doing business in the U.S.

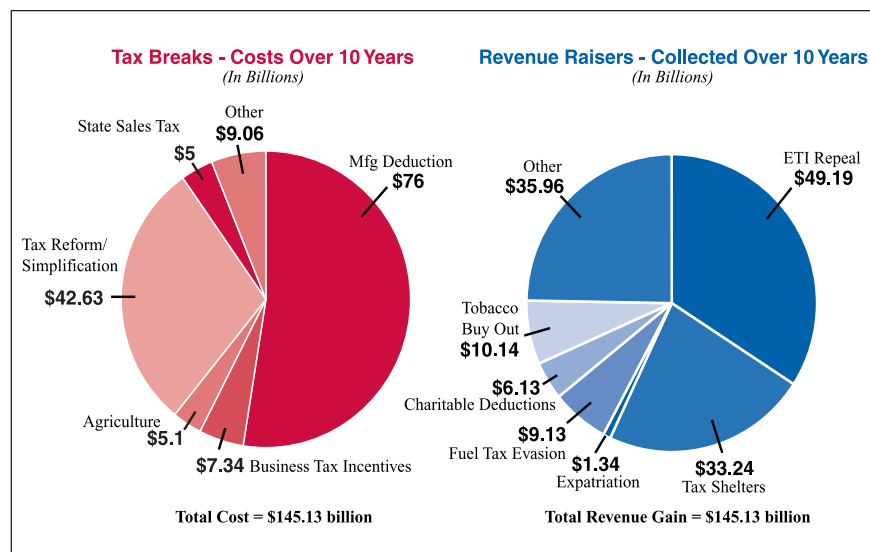
The new law tackles inversions but not as strongly as Grassley and

other lawmakers wanted. Lawmakers approved language defining an inversion. They also voted to impose an excise tax on top management personnel holding stock options and other stock-based compensation in the company. In addition, Treasury is expected to issue regulations about the allocation of income among parties to a reinsurance agreement.

Enhanced penalties. Congress also approved increasing penalties for promoters and investors failing to disclose their participation in abusive transactions. Taxpayers, other than individuals, failing to disclose a reportable transaction risk a \$50,000 penalty. For individuals, the penalty is \$10,000. If the shelter is a "listed transaction," the penalty skyrockets to \$200,000 (\$100,000 for individuals). The new law also creates a new accuracy-related penalty for reportable and listed transactions. Promoters also could be liable for a penalty equal to 50 percent of the gross income derived from the abusive transaction.

Impact

Congress voted to give the IRS discretion in applying the penalties. The IRS is sure to continue its "carrot and stick" approach with taxpayers it suspects of either promoting abusive shelters or participating in them.



Confidentiality rules. The new law relaxes the confidentiality rules for communications between taxpayers and practitioners about shelters and extends the statute of limitations to capture more abusive transactions. They also approved beefing-up the government's power to use injunctions to stop abusive shelters.

"Material advisors" Promoters – and individuals and businesses doing business with them – risk tougher sanctions. All "material advisors" failing to file information returns about reportable transactions will be sanctioned. "Material advisors" also will be penalized for not maintaining lists of investors in abusive transactions. These new provisions will generally be effective after the date of enactment.

Foreign leasing arrangements. Some powerful lawmakers on Capitol Hill have been gunning for a fight over leasing deals to foreign and tax-exempt entities. Opponents claim they are nothing but tax avoidance schemes. The new law limits the depreciation and amortization periods for intangibles leased to tax-exempt entities, especially with leases involving computer software. The new law also limits the deductions allowable in connection with property used by governments or other tax-exempt entities.

Economic substance doctrine. Many lawmakers believe that codifying the economic substance doctrine will curb tax shelters. They don't like it when different courts apply the doctrine differently. A uniform definition, they say, will prevent courts from misapplying the doctrine. Opponents of codification counter that the doctrine needs to be flexible and remain judge-made law. Opponents were able to keep codification out of the new law.

Repatriation of foreign earnings. Lawmakers are very divided over how to "encourage" companies to reinvest their foreign earnings in the U.S. Some want a temporary tax rate cut; others want to take different approaches. The new law includes a provision to make certain dividends received by a U.S. corporation from a controlled foreign corporation eligible for an 85-percent dividends-received deduction (equivalent to

a 5.25-percent rate, assuming application otherwise of the top corporate rate). Taxpayers must elect whether to take the deduction for dividends received either during the first tax year before enactment of the new law or during the last tax year before enactment. Generally, the special treatment is available only for cash dividends with exceptions. The new law imposes some thresholds and requires taxpayers to identify how they will reinvest the dividends in the U.S.

Expatriation. Congress voted to crack down on U.S. citizens who relinquish their citizenship for tax avoidance purposes. The new law sets out objective rules for determining if tax avoidance motivated the move offshore. If these individuals return to the U.S. for more than 30 days, they will be treated as citizens for federal tax purposes and be taxed on their worldwide income. They also will be required to file annual returns if they are subject to the alternative tax regime.

Foreign accounts. Taxpayers failing to report their foreign financial accounts risk a heightened civil penalty of \$10,000. If their behavior is willful, the penalty jumps to \$100,000 or 50 percent of the transaction or account.

"OTHER" REVENUE PROVISIONS

Also grouped together in the new law under the heading, "Other Revenue Provisions" are numerous ways to raise billions of dollars in revenue. While all the provisions are important, here are a few affecting the most taxpayers:

Vehicle donations. Congress voted to limit the deduction for vehicles contributed to charity. The amount of deduction will depend on how the donee organization uses the vehicle. If the charity sells the vehicle without using the vehicle in any significant way (or without improving the vehicle), the amount of the charitable deduction cannot exceed the gross proceeds from the sale. The taxpayer also must produce an acknowledgment as to value from the charity if the charity keeps the vehicle for its

own use. Stiff penalties will be imposed on charities that don't approach this obligation honestly. The charity also is required to pass along to the IRS the information in the written contemporaneous acknowledgment that it is required to give to the donor.

Impact *Vehicle donation programs are booming and many taxpayers expect to write-off the full "blue book" value of their old car or truck. The acknowledgment rule for arm's-length sales applies for contributions made after December 31, 2004.*

Impact *Taxpayers who have inflated deductions in past years are not home free. They still are required to substantiate the value of their vehicle donation on audit of a return for any open year.*

Intellectual property donations. Under the new rules, if a taxpayer contributes a patent or other intellectual property (other than certain copyrights or inventory) to a charitable organization, the taxpayer's initial charitable deduction is limited to the taxpayer's basis in the contributed property or its fair market value, whichever is less. The intellectual property donor is allowed to take an additional charitable deduction based on a specified percentage of the income the donee receives with respect to the donated property. The additional deduction can be taken either in the contribution year or subsequent tax years. The amount of any additional deduction is calculated on a sliding scale. These new rules apply to contributions made after June 3, 2004.

Company aircraft. The new law closes a loophole in connection with the use of company aircraft by executives. For officers, directors, and 10-percent-or-greater owners, no deduction will be allowed for expenses for the use of a facility (such as an airplane) in connection with a nonbusiness activity, to the extent that the expenses exceed the amount treated as compensation or includible income for that individual.

Impact Some S corporations had been passing through as deductions the full cost of the use of corporate jets by their executive/shareholders while the shareholder only had to recognize the personal use in income using the Standard Industry Fare Level (SIFL) mileage rate. That technique is now halted.

Other items. Congress also approved new rules about the treatment of partnership loss transfers and basis adjustments, and repeal of special rules for FASITs. Efforts to reduce fuel tax evasion are also addressed.

IRS ADMINISTRATION

Installment agreements. Congress also voted to authorize the IRS to enter into partial installment agreements. The IRS must review those partial installment payment agreements at least every two years.

Consolidated return regs. Responding to Rite Aid, lawmakers approved language authorizing Treasury to provide rules treating corporations filing consolidated returns differently from corporations filing separate returns.

Private sector debt collection. For the first time, the IRS will be able to

use private debt collection agencies to collect taxes. If the taxpayer cannot pay in full, the debt collection company can offer the taxpayer an installment agreement to pay over five years. Otherwise, it must turn the taxpayer's financial information over to the IRS for further action.

LAST, BUT NOT LEAST...

Many more provisions warrant mentioning, including:

- An above-the-line deduction for attorneys' fees and costs stemming from "unlawful discrimination" lawsuits.
- The exclusion of certain like-kind exchange property from the home-sale gain nonrecognition rules.
- Extension of the noncash contributions reporting rules.
- New reporting requirements for taxable mergers and acquisitions.

Also, taxpayer-friendly incentives were approved for:

- Manufacturers and importers of bows and arrows.
- Manufacturers of tackle boxes and sonar fish finders.
- Independent film and video producers.
- Wholesale distributors of distilled spirits.
- Native Alaskan whalers.
- NASCAR track owners.
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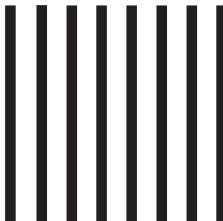
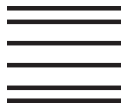
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
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ETI Repeal Under the American Jobs Creation Act of 2004: Analysis of the Law's Impact on U.S. Business—Reviews the history of the U.S. tax benefits for exporters, analyzes the relevant provisions of the new law, and looks ahead at what planning strategies exporting companies might consider in response to the new changes. **Price:** \$45.00 per copy. **Est. pub.:** Nov. 2004, about 128 pages. **Book #:** 04582301  [Click here to order.](#)

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