Tax Incentives

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EDITOR'S NOTE

Some commentators have claimed that the Americans with Disabilities Act (ADA) is "morality on the cheap"—that Congress has mandated behaviors that will cost money, but has avoided finding money to foot the bill. With the enactment of the new access credit, Congress acknowledged that compliance with ADA could cost businesses, particularly small businesses, and moved to provide some relief, through the tax code, for compliance.

Daniel C. Schaffer examines the new access credit as well as two other provisions of the tax code (the section 190 deduction and the Targeted Jobs Tax Credit), which are related to the goals of the ADA. He suggests that an examination of the impact of these provisions would be an opportunity to examine the fundamental question of the efficacy of using the tax code to promote social policy. He proposes that monitoring the utilization of these provisions could provide valuable information about how the ADA is being implemented.

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Congress has often used the Internal Revenue Code as a means of promoting social and economic goals. Since 1976 Congress has reduced the tax burden of businesses that remove barriers to persons with disabilities (section 190 of the Revenue Code), and since 1978 it has reduced the taxes of businesses that hire certain subgroups of persons with disabilities (the Targeted Jobs Tax Credit—TJTC). In 1990, shortly after the enactment of the Americans with Disabilities Act (ADA), a new tax credit, the "access credit," was enacted to provide tax relief to small businesses that incur eligible costs when complying with the ADA. This article examines these provisions of the Revenue Code —provisions that complement the key policy goal of the ADA: full participation of persons with disabilities in the mainstream of American life.

THE DEDUCTION AND CREDIT FOR ADA-RELATED COSTS

Soon after Congress enacted the ADA, it turned its attention to providing relief for small businesses that incur expenses in complying with the Act. The Revenue Reconciliation Act of 1990 added an "access credit" (section 44) to the code, which enables small businesses to claim credit against taxes for one half of the first $10,000 of eligible costs of complying with the ADA.[1] The addition of the credit was offset by a reduction of the existing section 190 accessibility deduction from $35,000 to $15,000, making the change revenue neutral.[2]

TERMS OF THE DEDUCTION AND CREDIT

Section 190 of the Internal Revenue Code, first enacted in 1976,[3] allowed a business to deduct in the year incurred any "barrier removal expenses . . . for the purpose of making any facility or public transportation vehicle . . . accessible, and usable by handicapped and elderly individuals."[4] The deduction was limited to $25,000 per year when first enacted; in 1984 Congress raised the limit to $35,000 per year,[5] where it remained until the 1990 legislation.[6]

The reason for the 1976 enactment was expressed as follows:

> In spite of previous federal legislation to contend with the problem of architectural and transportational barriers to the handicapped and elderly, such barriers remain widespread in business

> and industry . . . [C]reating a tax incentive for a limited period could promote more rapid modification of business facilities and vehicles. [The removal of barriers had to meet the standards promulgated] by the Secretary [of the Treasury] with the concurrence of the Architectural and Transportation Barriers Compliance Board. . . . [7]

The Treasury regulations interpret the statute to mean the deduction may be taken only for the cost of adapting existing premises. "It does not include any part of any expense . . . in connection with the construction or comprehensive renovation of a facility or . . . vehicle."[8] This is a reasonable interpretation because section 190 speaks of "removal" of barriers,[9] and the legislative history just quoted refers to "modification."

The 1990 Act changed this statutory scheme in four ways.

1. It added the new section 44 to the Code, providing a credit against tax for 50 percent of eligible expenditures that exceed $250 but are not greater than $10,250. (For the difference between a tax deduction and a tax credit see the discussion below.)
2. This credit is allowed only to small businesses, unlike the section 190 deduction, which is allowed to firms of any size.[10]
3. It reduced the limit on the section 190 deduction from $35,000 to $15,000. Thus, for larger firms, the 1990 legislation lowered the section 190 deduction and did not add a credit as it did for small businesses.
4. The expenses for which the new access credit may be taken ("eligible access expenditures") are defined more broadly than the expenses for which section 190 allows a deduction. They include not only the removal of physical barriers (as under section 190), but also "all amounts paid for the cost of enabling [the taxpayer] . . . to comply with applicable requirements under" the ADA.[11] This extends tax relief for the first time to the kind of expenses the ADA calls "auxiliary aids and services": interpreters for individuals with hearing impairments, readers and taped texts for individuals with visual impairments, acquisition or modification of equipment or devices, and other similar services and actions.[12]

There are two restrictions on the kind of expenses for which the credit may be taken. First, no credit is allowed for the cost of removing "architectural, communication, physical or transportation barriers" in connection with "any facility first placed in service after the date of enactment" of the Revenue Reconciliation Act of 1990.[13] The credit, like the section 190 deduction, is not allowable for costs incurred when making new construction accessible to persons with disabilities. The reason is that the cost of retrofitting existing facilities is significantly higher than the cost of making new construction accessible to persons with disabilities. (For a further discussion of the cost of making new construction accessible, see the article by Burgdorf in this volume.)

Second, only "reasonable" costs, not "unnecessary" ones can be used in computing the credit.[14] Because section 44 extends only to expenses incurred for the purpose of enabling a business to comply with the ADA,[15] a requirement that expenses be reasonable and necessary will probably not have a significant effect on the expenditures eligible for the credit.

Representatives of persons with disabilities joined with representatives of small businesses in support of the new access credit, which had originally been discussed during congressional consideration of the ADA. Both the House and Senate determined that the credit would be considered separately from the ADA, and after its passage. The final credit that was enacted represents the merger of a number of bills introduced to provide tax relief for ADA-related expenditures.[16] The credit was enacted as part of the Revenue Reconciliation Act of 1990, three months after the ADA was enacted.

Although all provisions of the ADA did not take effect at the time of enactment (firms are given time to comply by phasing in the Act's effective dates of requirements), the access credit took effect on November 5, 1990, the date of enactment of the 1990 Revenue Act. This timing was deliberate. The sponsors of the credit wanted to give a benefit to small businesses that complied with the ADA even before they were under a legal obligation to do so.[17]

In summary, small businesses have both the access credit and the deduction available to them for ADA-related costs. The access credit can be utilized for a wide range of expenditures ("eligible access expenditures"), whereas the deduction is only available for the removal of physical barriers. Big businesses have only the deduction available to them. When claimed for the removal of physical barriers, both the

TABLE 1
Comparison of Credits and Deductions

	1[a] No deduction or credit	2[a] Deduction	3[b] Credit	4[c] Deduction at 15%
1. Income	$2.00	$2.00	$2.00	$2.00
2. Deduction	- (.0)	- (1.00)	- 0	- (1.00)
3. Taxable income	2.00	1.00	2.00	1.00
4. Tax at 34%	.68	.34	- .68	$ 0.5 (tax at 15%)
5. Tax credit	—	—	- (.50)	—
6. Tax after subtracting tax credit	.68	.34	.18	$0.15
7. Tax saving from deduction or credit	—	.34	.50	.15

Note: In all columns, the income before deductions is assumed to be $2.00. Column 1 shows result with neither a credit nor deduction, column 2 with a deduction, and column 3 with a credit for 50% of the $1.00 spent, as in §44. Notice that the subtraction of the deduction occurs before multiplying the tax rate times taxable income (lines 2, 3, and 4), whereas the credit is subtracted from the tax (lines 5 and 6).
[a]Tax rate = 34%.
[b]Tax rate = irrelevant.
[c]Tax rate = 15%.

deduction and the credit are available only for existing facilities, not for facilities that are new or undergoing extensive renovation.

DIFFERENCE BETWEEN A TAX DEDUCTION AND A TAX CREDIT

Both deductions and credits reduce income tax, but in different ways. The difference between a deduction (section 190) and a credit (new section 44) is that a deduction is subtracted from taxable income, whereas a credit is subtracted from tax. Allowing a firm a deduction for an expenditure of $1.00 reduces its taxable income by that amount, and reduces its tax by its tax rate (for corporations today, usually 34 percent) times the amount of the deduction: in this example, 34 percent of $1.00 or 34 cents. A credit of 50 percent of the $1.00 spent would reduce the firm's tax by 50 percent of $1.00, or 50 cents. (Compare columns 1, 2, and 3 of table 1.)

The advantage of taking a 50 percent credit instead of a deduction is even greater if the tax rate is lower. The rate is only 15 percent on

corporate taxable income up to $50,000 and 25 percent on taxable income from $50,000 to $75,000. For a corporation with a taxable income below $50,000, deducting an expenditure of $1.00 reduces its tax by 15 cents. The change to a 50 percent credit increases the tax benefit to fifty cents. (Compare columns 3 and 4 of table 1.)

In summary, the amount of a deduction depends upon the tax rate, whereas the amount of a tax credit does not. (Column 3 of table 1 remains the same no matter what the tax rate, whereas columns 2 and 4 are quite different.) In general, the lower the income, the more advantage the credit has over a deduction. Thus, for small businesses, which are likely to have less income than large businesses, a credit is often more beneficial.

DIFFERENTIAL IMPACT ON SMALL BUSINESSES

The enactment of the new access credit in section 44 was the Congressional response to the concerns of small business about the costs of complying with the ADA. Small businesses eligible for the access credit are defined as those whose gross receipts are under $1 million or that have 30 full-time employees or less. Congressional sponsors of the tax credit crafted it to favor small business. Senator Pryor (D-Ark) noted that small business could "most use help and . . . will be called upon most often to accommodate the disabled. . . . Large businesses that may have benefitted slightly more under the $35,000 deduction . . . are already in a better position to comply with the ADA since most already employ or serve disabled persons."[18] In commenting on one of the access credit bills, the Small Business Legislative Counsel noted that "we are gravely concerned about the burden . . . [of ADA] upon small business. The . . . potential costs of compliance are significant. Your initiative will provide a positive incentive to comply with the law, and this may reduce the likelihood of chaos on Main Street and confrontations in the court house."[19]

In order to keep the new section 44 credit revenue neutral, Congress reduced the maximum deduction under section 190 from $35,000 to $15,000.[20] With both the credit and the deduction available to small businesses and only the deduction available to large businesses, Congress was clearly directing relief to the small businesses.

Small businesses with a low taxable income are favored most. Recall that under a credit for 50 percent of an expenditure, spending $1.00 reduces a firm's tax by 50 cents (50 percent of $1.00). If a corporation's

income is less than $50,000, its tax rate is only 15 percent, and a deduction of $1.00 reduces its tax by only 15 cents (15 percent of $1.00). The corporate tax rate rises to 25 percent for taxable income above $50,000 and 34 percent for taxable income above $75,000. Even in the 34 percent bracket, the credit is better than a deduction: the credit for an expenditure of $1.00 reduces tax by 50 cents, while deducting $1.00 reduces tax by 34 cents.

Finally, the 1990 legislation increased the reward for small expenditures and reduced the reward for larger expenditures. This is the result of limiting the credit to $10,000 of costs while reducing the deductible amount from $35,000 to $15,000. This formulation benefits small businesses the most because their expenditures are likely to be small. A payment of $35,000 deducted under old section 190 would reduce tax by $11,900, assuming a tax rate of 34 percent. The 1990 Act offers a credit that reduces tax by $5,000 and a deduction that reduces tax by $5,100, for a total tax benefit of $10,100[21]

EFFECTIVENESS OF THE DEDUCTION AND CREDIT AS INCENTIVES

The most important question about the deduction and credit is whether they provide a benefit for persons with disabilities. In particular, do businesses provide more access to customers and employees with disabilities than they would if there were no such tax incentive? Currently, there are no data available to answer that question. We do not know how many business firms used the section 190 deduction in past years, nor the amount of the average deduction. The Internal Revenue Service does not break out these numbers in its annual Statistics of Income, and the Department of the Treasury has never published them.

One reason there is so little information about section 190 is that there have never been congressional oversight hearings at which the Department of the Treasury might have presented information. The Department of the Treasury has neither favored nor opposed it. There are no reports on its efficacy from the General Accounting Office, congressional committee staff, or in the secondary literature. The history of this bit of tax law confirms the observation of the late Stanley Surrey, who stated: "It can generally be said that less critical analysis is paid to . . . subsidies [delivered through tax law] than to almost any direct expenditure program one can mention."[22]

As far as we know, this deduction has never been expensive for the

government, which suggests that it has not been widely used. When it was first enacted in 1976, it was expected to cost $11 million annually.[23] When Congress reinstated it in the Tax Reform Act of 1984 after a brief period of expiration and increased the deductible amount to $35,000, the Joint Committee on Taxation estimated the annual revenue loss as $16 million in 1985 and $7 million in 1986.[24] These are small amounts considering the number of business firms in the United States. In 1990, the National Federation of Independent Business asserted: "The credit was proposed because smaller businesses do not have enough taxable income to take full advantage of a deduction."[25] In predicting that the 1990 legislation would be revenue neutral, however, congressional revenue estimators seem to have expected that relatively few firms will use the credit. If, for example, the average credit claimed was $2,500 (half the maximum), no firm claimed a section 190 deduction, and the revenue loss from section 44 was $10 million (a hypothetical number based on the estimates published for the 1984 Act), only 4,000 firms would have claimed the credit. Considering that there may be over 16 million firms eligible for the credit, this is a small number indeed.[26]

One explanation of why the deduction has apparently not been widely used is that businesses have done little to provide access to persons with disabilities. If so, this may change with the enactment of the ADA, which was indeed the expressed reason for enacting the new credit. Other explanations for the apparent minimal usage of the deduction are that (1) it is unknown to businesses and (2) it is too much trouble to claim the relatively small amount deductible. These explanations seem unlikely because many small businesses retain accountants to prepare their tax returns—and accountants are generally well versed in the various deductions available to businesses.

Any evaluation of the deduction under the original section 190 and of the credit and deduction under new section 44 and revised section 190 will require an examination of criteria against which the provisions will be measured. Is it enough if they help small business, or must there be a concomitant rise in the employment and/or participation rate of persons with disabilities? Is it acceptable if they provide windfalls for what businesses would have done anyway? The legislative history indicates that the credit and deduction are intended to shift some of the financial burden of complying with ADA from small businesses to the government.[27] Wide usage of the credit and deduction would indicate that this goal was being met. However, data revealing wide usage of

these provisions may or may not indicate movement toward the full participation goal of the ADA.

Determining whether usage of the credit and deduction are correlated to increased participation by persons with disabilities will require a detailed analysis. The purpose for which the claimed expenditures were made needs to be examined for its direct impact on persons with disabilities. For example, if the credit was utilized to provide reimbursement for a portion of the cost of purchasing equipment for an individual who was hired by a firm, it would be clear that claiming the credit was directly correlated with participation of a person with a disability. However, claiming the credit to add a ramp to a building may or may not be correlated with increased participation. In other words, the existence of the ramp does not necessarily mean that persons with disabilities entered the building and/or participated in the program or utilized the services.

Many factors need to be considered in examining the relationship of claims and participation. Time is one such factor. For example, people who use wheelchairs might not use the ramp in the first year (perhaps because they are unaware of it), but might use it in subsequent years.

An analysis of the nature of the claims would offer a revealing picture of the types of expenditures and accommodations taking place in a range of settings. Such an analysis could be quite useful in assessing the overall implementation of the ADA.

THE TARGETED JOBS TAX CREDIT AND PERSONS WITH DISABILITIES

DESCRIPTION OF THE TARGETED JOBS TAX CREDIT

The 1990 tax legislation also renewed another provision of the tax code intended to promote the participation of persons with disabilities—the Targeted Jobs Tax Credit (TJTC). Renewed until December 31, 1991 in the Revenue Reconciliation Act of 1990, this provision is intended to promote employment for persons with disabilities, among others.[28] As with the new credit and revised deduction under sections 44 and 190, enactment of the ADA may result in wider usage of TJTC for persons with disabilities. Like the deduction and credit, TJTC is a tax benefit available to employers, and not directly to persons with disabilities.

The TJTC was first enacted in 1978,[29] and has been periodically

renewed since then.[30] In 1977, Congress had experimented with a tax credit for employers who increased the number of persons they employed, as a remedy for general unemployment. The TJTC was a shift to a credit for hiring members of specific disadvantaged groups with high levels of unemployment. The Senate Finance Committee's explanation for the change was that "the unemployment rate has declined sufficiently so that it is appropriate to focus employment incentives on those individuals who have high unemployment rates, or on other groups with special employment needs."[31] Most of the cost of the program derives from lost tax revenue, estimated at $81 million for 1991 and $104 million for 1992.

For reasons that I will review later in the article, the Department of the Treasury has opposed renewal of the credit since 1985. However, a coalition of businesses that use the credit and representatives of targeted beneficiaries has prevailed upon Congress to retain the credit. Although the efficacy of the credit in terms of increasing employment for the targeted groups is a subject of debate, the program holds considerable political appeal. Among the reasons for its appeal are that it addresses unemployment by subsidizing businesses directly and it targets the "hard core" unemployed, especially unemployed youth.[32]

An employer's credit against tax is 40 percent of the wages paid to an employee (up to $6,000) during the first year of employment. This would give a maximum tax credit of $2,400 per person hired; however, a deduction for wages paid is denied to the employer to the extent of the credit,[33] reducing the maximum tax benefit by about $800 ($2,400 times the rate of tax, usually 34 percent for corporations). Therefore, the actual maximum tax credit available under the TJTC per person per year is about $1,600. The first year of employment will usually extend over two of the employer's taxable years. If, for example, an employer who uses the calendar year as the taxable year hires an employee on July 16, 1990, and employs him through the end of 1991, the employer's tax return for 1990 would claim a credit based on wages paid from July 16, 1990 to the end of that year, and its return for 1991 would claim a credit based on wages paid from January 1, 1991 through July 15, 1991.

The TJTC is available to an employer who hires members of any of ten statutorily delineated groups that are vulnerable to high unemployment.[34] Although persons with disabilities may be in a number of the targeted groups, they are represented most often in the categories of "vocational rehabilitation referrals," defined to mean persons with a

"disability which, for such individual, constitutes . . . a substantial handicap to employment" and who has completed or is receiving vocational rehabilitative services.[35] A second targeted group with a substantial proportion of persons with disabilities is the group of recipients of supplemental security income (SSI).[36] SSI is a cash-assistance program, administered by the federal government, which provides a minimum income to needy persons who are aged, blind or have disabilities.

CONCERNS ABOUT THE IMPACT AND UTILIZATION OF TJTC

Unlike the deduction under section 190, the efficacy of the TJTC as a method of yielding benefits for targeted groups has been discussed by Department of the Treasury officials, employers, representatives of the targeted groups, and in the secondary literature. In this section, I examine the information available related to the usage and efficacy of TJTC and the extent to which TJTC may benefit persons with disabilities.

Impact of TJTC. A frequently cited shortcoming of the TJTC is that it reaches only a small fraction of those whom it is intended to benefit. Economically disadvantaged youth (aged 18 to 24) form the largest of the groups for which TJTC is claimed (58.5 percent or 332,712 individuals in 1987).[37] Yet, in 1989 the Department of the Treasury reported that employers had claimed the credit for only about 8 percent of the disadvantaged youth who had found employment in 1981.[38] (The 1986 report on the credit by the Department of Treasury and the Department of Labor called this "lack of penetration.")[39] The Treasury interprets this to mean that for 92 percent of the disadvantaged youth hired, the TJTC was irrelevant.[40]

Persons with disabilities, as far as we can determine, constitute a relatively small proportion of those certified as members of TJTC targeted groups. In 1987, 6.9 percent of the total of TJTC-certified persons (39,448 individuals) were certified as members of the targeted group of "vocational rehabilitation referrals." Only 0.8 percent of the total (4,449 individuals) were in the target group of SSI recipients.

There is no study available that examines the impact of TJTC on the subgroup of persons with disabilities, nor on most other subgroups targeted by TJTC. Often the analyses and examinations of the group of economically disadvantaged youth are used as a surrogate for the whole program because this group has had the largest number of persons certified for TJTC.[41]

Another concern about the effect of the credit is that even if employers do hire members of the targeted groups whom they would not have otherwise hired, there may be no net increase in net employment of targeted workers (or, in another variation, workers generally). "If newly hired . . . targeted employees replace previously employed targeted employees who are no longer eligible for the credit or are hired in place of [other] targeted workers, targeted employment will not increase on a net basis."[42] The Congressional Budget Office speculated that net job creation occurred under TJTC,[43] but other commentators have noted that "little evidence exists to determine whether employers substituted TJTC eligible workers for other employees rather than creating additional jobs" (Levitan and Gallo 1987, 647).

THE TJTC: A WINDFALL TO EMPLOYERS?

Unlike most tax programs, the TJTC is not run by the Internal Revenue Service alone, but in conjunction with the Department of Labor and state job-security offices. An employer gets a tax credit if the state job-security agency "certifies" that the person to whom the employer pays wages is a member of a targeted group.[44] The employer must apply for a certificate on or before the first day the new employee starts work.[45]

Under this system firms may hire the applicants they prefer, later inquiring whether any bring with them the tax credit. An employer who finds that some of the new employees qualify, then asks the state employment security agency to certify those persons, making sure to submit the request on or before the day the employees begin work. This practice is called "retroactive certification."

Some employers go a step further. They use specialized firms to screen new employees, after they have been hired, to determine which of them will bring the tax credit. (These firms are said to be paid a fee contingent on the number of certifications they obtain.) A 1985 study of large users of the TJTC found that three quarters of them relied on this method.[46] A variation on this method was to send requests for certification of every new hire, letting the local state employment security agency sort out who qualifies and who does not.[47] (The Revenue Reconciliation Act of 1989 amended the statute to forbid this practice.)[48]

For employers who use retroactive certification, the tax credit functions as a windfall, in the sense that it pays them to do what they would have done in the absence of the credit. At this point, it seems to be

generally recognized that "requesting TJTC eligibility after hiring contradicts the Act's intent of increasing job opportunities for those who otherwise might not be hired" (Levitan and Gallo 1987, 645). Congress attempted to forbid this practice in 1981, but the statutory language used proved to be ineffective.[49]

In 1989 the Department of the Treasury recommended a prohibition against retroactive certification.[50] If the retroactive certification were prohibited, advance certification of eligible individuals by the state job-security agencies would be the only avenue of certification. The agency issues a "voucher" to the job seeker as a preliminary determination that the seeker is a member of a targeted group. The job seeker can present the voucher when applying for a job, assuring an employer that the agency will certify him or her as a member of a targeted group. The TJTC would be allowed only where the state employment security agency has issued a voucher to the person hired before that person applied for a job. This proposal was not adopted by Congress, and the issue of "retroactive certification" is still problematic for the TJTC.

The many questions raised about the efficacy of TJTC have led to calls for repeal and reform from a range of quarters. The debate is often highlighted when the credit expires and is considered by Congress for extension, which will next occur at the end of 1991.

THE ADA AND THE TJTC

The interplay between the mandate of the ADA and the TJTC has positive potential. As we move toward implementing ADA, we anticipate that employers increasingly will hire more persons with disabilities. Employers may also take greater advantage of TJTC, either as a "windfall" (or subsidy for a behavior they would have engaged in without the credit), or as an effective incentive to change their behavior and hire a person with a disability, perhaps even seek out a person with a disability, which they might not have done otherwise.

Of course, the persons with disabilities who are targeted by the TJTC comprise a smaller universe, probably considerably smaller, than the persons with disabilities who are protected by the ADA. In addition, the TJTC is available to an employer for only one year, whereas the ADA antidiscrimination mandate is ongoing.

It is worthwhile to consider how these two statutes, in their implementation, may differ and be in need of reconciliation. An employer who utilizes the TJTC by inquiring in advance whether a potential

employee is certified for TJTC may be in violation of the ADA. The ADA specifically prohibits preemployment "inquiries of a job applicant as to whether such an applicant is an individual with a disability."[51] One can imagine situations in which the closer a job interview comes to satisfying this clause of the ADA, the more a tax credit for hiring a person with a disability becomes a windfall to the employer.

Of course there are ways in which no conflict would exist because an employer may know about the TJTC certification of a potential employee without asking that employee. That information would be volunteered by the potential employee, the state employment-security agency, or, when it is making the referral to the employer, the vocational rehabilitation agency. In addition, it may be acceptable for the employer to inquire whether the person is certified for TJTC in general, and this might not be a violation of the ADA prohibition against preemployment inquiry regarding a disability. Because persons with disabilities make up such a small percentage of the total TJTC-certified population, an inquiry related to TJTC status would not serve as a proxy for an inquiry about disability status.

Although the use of a voucher that could be presented by the job applicant may be an appealing way to resolve this dilemma, vouchers bring their own set of drawbacks. At least one study indicates that employers discriminate against applicants who present TJTC vouchers. In 1985, an experiment was conducted whereby two groups were sent out to apply for jobs. One group presented TJTC vouchers to prospective employers and the control group did not. Members of the control group were hired about twice as frequently as applicants with vouchers (Burtless 1985). The result is striking, and has been interpreted by some to mean that a TJTC voucher is stigmatizing and results in the exact opposite of what is desired: discrimination and rejection from employment. For persons with disabilities, who already encounter discrimination on an all-too-regular basis, the addition of a TJTC voucher may have particular liability.

Although the extent of the benefit TJTC provides to persons with disabilities is unclear, nevertheless at least some employers are using it. With the addition of the ADA anti-discrimination mandate, employers may use the credit more widely. Close monitoring of the interaction of these two statutes will facilitate a better understanding of exactly how TJTC works for persons with disabilities and how it might be improved.

RECOMMENDATIONS AND CONCLUSION

It will be necessary to gather and analyze data to answer basic questions about the use and efficacy of the section 190 deduction, the new access credit, and the TJTC for persons with disabilities. In the case of the Section 190 deduction, it would be informative to know how many firms used the deduction each year, the amount of the average deduction, the amount of tax saved by the average firm using the deduction, and the industries that most widely claimed the deduction. These data could be obtained by examining tax returns that claim the deduction and the data should be made available as well for the new access credit as it begins to be used by employers.

Other questions would require empirical study that goes beyond data in the files of the Internal Revenue Service. What proportion did the credit or deduction represent of the average firm's cost of removing barriers or otherwise providing access to persons with disabilities? Did the firms claiming the credit or deduction experience increased participation by persons with disabilities? The Department of the Treasury should begin to monitor both the new access credit and the revised deduction, collecting and publishing information for a future evaluation of the statute.

The questions raised by critics of the TJTC should continue to be explored and more data about the utilization of the credit should be collected.[52] An in-depth examination of the interplay of TJTC and ADA would be instructive in terms of how it could be more effective in accomplishing increased employment for persons with disabilities.

Finally, an examination of the efficacy of these three provisions in the tax code would be an opportunity to consider the advantages and disadvantages of promoting social policy through the tax code, as opposed to direct appropriations. (This practice has been called "tax expenditure" [Surrey 1973].) Provisions in the tax code appear to receive less scrutiny in terms of their impact than programs funded through direct appropriations (for example, the vocational rehabilitation program). The section 190 deduction has been in place for over 14 years, apparently without any analysis of its utilization or impact. On the other hand, the vocational rehabilitation program, like many other programs that receive appropriated funds, is examined in depth through the reauthorization process every three to five years, and in the appropriations committees every year.

Congress clearly intended to lessen the financial burden of comply-

ing with ADA by enacting the new access credit. The section 190 deduction is available to firms that remove physical barriers. The TJTC is intended to result in increased employment for eligible persons with disabilities (among others). Clearly all three of these provisions in the tax code complement the ADA goal of full participation in the mainstream of American society by persons with disabilities. The challenge for implementation is to see that these provisions work in synchrony—the tax code and civil-rights law—as a powerful blend applied toward the fulfillment of a long-awaited promise.

NOTES

1. Revenue Reconciliation Act of 1990, P.L. 101-508, §11611 (a).
2. Id. at §11611 (c).
3. Tax Reform Act of 1976, P.L. 94-455, §§22 (a) & (c), 90 Stat. 1914.
4. I.R.C. §190 (b)(1).
5. Deficit Reduction Act of 1984, P.L. 98-369, §1062 (b), 90 Stat. 1047.
6. As a matter of financial analysis, section 190 is not about the deductibility of the cost of removing barriers. It is about the timing of the deduction. As a business expense the cost would be deductible under general principles of tax law even without section 190. It would, however, be capitalized and deducted over the remaining life of the structure modified. Section 190 changes this timing to allow more of the deduction to be taken in the year of expenditure. The advantage to the taxpayer is that taxable income is reduced in the year of the section 190 deduction, at the cost of not having the deduction in the later years in which it would ordinarily be taken. Tax is deferred by shifting from the year of the expenditure to later years. The benefit is purely a matter of the time value of money: it is better to pay later than to pay now because one can invest the unpaid tax until the time comes when it must be paid.
7. I.R.C. §190 (b)(2). Large parts of the obligatory prolix regulations were drawn from the American National Standards Institute (1971): American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped. Treas. Reg. §1.190-2 (b)(1) (1979).
8. Treas. Reg. §190-2 (b) (1979).
9. I.R.C. §190 (a) & (b).
10. I.R.C. §44 (a) & (b).
11. I.R.C. §44 (a) & (c).
12. ADA, §3(1); I.R.C. §44 (c)(2).
13. I.R.C. §44 (a) & (c)(4).
14. I.R.C. §44 (a) & (c)(3).
15. I.R.C. §44 (a) & (c)(1).
16. E.g., S. 1661, 101st Cong., 1st Sess. (1989); H.R. 3500, 101st Cong., 1st Sess. (1989).

17. "Many small businesses will not be required to comply with the ADA for several years. The tax credit in this . . . bill, however, will immediately offer those businesses an incentive to make access expenditures . In this way the ADA tax credit . . will reward small business for making those expenditures before they are required." Statement of Sen. Herb Kohl (D.Wisc.), 136 Cong. Rec. S 17520 (daily ed. Oct. 27, 1990).
18. 135 Cong. Rec. S 11710 (daily ed., Sept. 22, 1989).
19. Letter to Senator Pryor from Small Business Legislative Council dated Sept. 19, 1989, inserted in Congressional Record (daily ed., Sept. 22, 1989 at S 11711).
20. "Mr. Kohl: . . Finally my proposal for an ADA tax credit follows what must become every politician's first commandment: Thou shall not deficit spend. The tax credit I propose can be paid for completely by placing a . . . cap on the current $35,000 annual deduction allowed [by section 190]" 136 Cong. Rec. 312851 (daily ed. Sept. 12, 1990).
21. The following are illustrative examples:
    a. A corporation that is a small business spends $40,000 in 1989 for making its premises accessible to persons with disabilities. It could deduct $35,000 of this amount, without regard to whether it was a small business or a large one. The deduction reduced its tax by 34 percent of $35,000, or $11,900. If its taxable income before the section 190 deduction had been less than $50,000, the deduction would have reduced its tax by only $5,250 (15 percent of $35,000).
    b. A corporation that is a small business spends $40,000 in complying with the ADA in 1991. It may take a credit against tax of $5,000 (50 percent of $10,000), under new §44 of the Code. This reduces its tax by $5,000. It may also deduct another $15,000 under the revised §190; this reduces its tax by another $5,100 (34 percent of $15,000), for a total tax reduction of $10,100.
    c. If the taxable income of the corporation in example 2 had been less than $50,000 before the §190 deduction, the deduction would reduce its tax by only $2,250 (15 percent of $15,000), and the total tax reduction from deduction and credit would have been $7,250.
    d. A corporation that is not a small business spends $40,000 in complying with the ADA in 1991. It may not use the credit under new §44, and its deduction under §190 is limited to $15,000, reducing its tax by $5,100.
    e. A corporation spent $11,000 in 1989 for making its premises accessible to persons with disabilities. It could deduct all of this, for a tax reduction of $3,740 without regard to whether it was a small business. If its taxable income was below $50,000 (before the §190 deduction) its tax reduction would be only $1,350.
    f. A corporation that is a small business spends $11,000 in 1991 in complying with the ADA. It may take a credit against tax of $5,000 (50 percent of $10,000) and a deduction of the remaining $1,000 under revised §190. Its tax reduction is $5,000 plus $340 (34 percent of $1,000), or $5,340.
    g. A corporation that is a small business spends $9,000 in 1991 for compliance with the ADA. It is allowed a credit against tax of $4,250 (50 percent of [$9,000 less $250]). Senator Kohl explained that the purpose of denying

the credit for the first $250 of costs "represents the commitment of both business and the Federal Government to the goals of the ADA—a commitment demonstrated by willingness of both the private and public sectors to spend the money needed to make those goals a reality." 136 Cong. Rec. S 12151, S 12852 (daily ed. Sept. 12, 1990).

22. Hearings before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee, 92d Cong., 1st Sess. 48 (1972) (statement of Stanley S. Surrey).
23. S. Rep. No. 938, 94th Cong., 2d Sess. 439 (1976).
24. Staff of Joint Committee on Taxation, 98th Cong., 2d, Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* 1177 (Comm. Print 1984).
25. Statement of Michael Roush, National Federation on Independent Business, before Senate Small Business Committee, Sept. 19, 1990, reprinted in *Tax Notes Today*, 194–25.
26. The Internal Revenue Service reports that for 1986 it received 16,639,000 returns from businesses with annual receipts of less than $1 million. (U.S. Department of Commerce, Bureau of the Census, 1990: *Statistical Abstract of the United States, 1990*, 110th ed, 521.) Although this figure does not take into account the number of employees of a firm, it provides a useful guide to the number of business that might be eligible for the access credit.
27. Revenue Reconciliation Bill of 1990, S. 3209, as approved by the Senate Finance Committee on October 13, 1990, 1990 Stand. Fed. Tax Rep. (CCH).
28. I.R.C. §51, as renewed by P.L. 101–508, §11405 (a)(1990).
29. Revenue Act of 1978, P.L. 99–600, §321, 92 Stat. 2830.
30. The credit expired at the end of 1985, and was retroactively renewed in October 1986.
31. S. Rep. No. 1263, 95th Cong., 2d Sess. 125 (1978).
32. For example:

    Mr. Stark [Rep. Fortney H. (Pete) Stark, D-Calif]: As you may recall, I was lukewarm to cautious about this program last year. But now I am a convert. . . . I do not like tax credits . But I dislike these tax credits least because they do help . . those who are most helpless. . . I support the continuation of the job credits because of the cuts being made in other spending programs at a time that I think most people consider unemployment unacceptably high. This has become the only game in town. It is certifiably the most help to the most disadvantaged and handicapped in our society.

    Extension of the Targeted Jobs Tax Credit: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means, 99th Cong., 1st Sess. 7 (1985).
33. I.R.C. §280C (a).
34. The groups are: (1) a vocational rehabilitation referral; (2) an economically disadvantaged youth; (3) an economically disadvantaged Vietnam-era veteran; (4) an SSI recipient; (5) a general assistance recipient; (6) a youth participating in a cooperative education program; (7) an economically disadvantaged ex-convict; (8) an eligible work-incentive employee; (9) an involuntarily terminated CETA employee; (10) a qualified summer youth employee.

35. I.R.C. §§51 (a), (b), (d)(1)&(2).
36. I.R.C. §51 (d)(5).
37. Joint Committee on Taxation, 1989: *Present Law and Issues Relating to the Targeted Job Tax Credit (H.R. 452, H.R. 815, and H.R. 2098)*, 22.
38. *Revenue and Spending Proposals for Fiscal Year 1990: Hearings Before the Senate Committee on Finance*, 101st Cong., 1st Sess. 195, 205 (1989) (statement of Dana L. Trier, Tax Legislative Counsel, Department of the Treasury) [hereinafter referred to as 1989 Treasury Statement]. This number was apparently taken from the Department of Treasury and Department of Labor, 1986: *The Use of Tax Subsidies for Employment* [referred to hereafter as the Joint Report].
39. Joint Report, supra note 38 at 90.
40. 1990 Treasury Statement, supra note 38 at 205.
41. A study by the Congressional Budget Office of the TJTC, for example, looked at the effect of the largest of the targeted groups (disadvantaged youth) because sufficient data existed only for that group. Congressional Budget Office, The Targeted Jobs Tax Credit 22, 20, 1984, reprinted in *Targeted Jobs Tax Credit Extension: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means*, 98th Cong., 2d Sess. 30, 57, 55 (1984) [hereafter cited as CBO report].
42. *Targeted Jobs Tax Credit: Hearings before the Subcommittee on Select Revenue Measures of the committee on Ways and Means*, 101st Cong., 1st Sess. 18, 26 (1989) (Statement of Thomas S. Neubig, Director, Office of Tax Analysis, Department of the Treasury) [hereafter referred to as 1989 OTA Statement].
43. CBO report, supra note 41 at 55–56.
44. I.R.C. §51 (d).
45. Id.
46. Joint Committee on Taxation, 1989: *Present Law and Issues Relating to the Targeted Jobs Tax Credit*, 18.
47. National Commission for Employment Policy, 1989: *The Targeted Jobs Tax Credit in Maryland and Missouri: 1982–1987* 73. This is an unusually rich and revealing study of the TJTC as it actually worked in two states.
48. I.R.C. §51 (d) (16) (c), enacted by P.L. 101–239, §7103(c) (1), 103 Stat. 2305.
49. I.R.C. §51 (d)(16), enacted by the Economic Recovery Tax Act of 1981, P.L. 97–34, §261 (c), 95 Stat. 172.
50. 1989 OTA Statement, supra note 42 at 18, 20.
51. ADA, §102 (c)(2). I am grateful to Daniel M. Fox for suggesting this point to me.
52. One observer has suggested the following: Congress should require the collection, dissemination, and analysis of data that would allow for better insights into TJTC operations. At a minimum, the following information is necessary to assess the effectiveness of TJTC: (a) job characteristics (including type of job, duration and wage rate); (b) firm characteristics (including type and size); (c) characteristics of vouchered individuals; (d) number eligible for TJTC and total requests for vouchers; (e) time required by public employment offices to respond to employer requests; (f) collection and analysis of post-hiring voucher requests and (g) more accurate estimates of revenue loss resulting from TJTC.

The General Accounting Office should be instructed to analyze the data and assess the program's effectiveness. *Targeted Jobs Tax Credit: Hearing before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means,* 101st Cong., 1st Sess. 38, 41 (1989) (Statement of Sar A. Levitan).

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