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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

No Big Boom For BigLaw — Yet

By **Peter Zeughauser, Zeughauser Group**

Law360, New York (November 6, 2017, 5:36 PM EST) -- A year ago, on election eve, my partners and I hosted cocktails and dinner in Napa for approximately 20 managing partners and chairs of BigLaw firms. Being on the left coast, election results were just starting to come in when we sat down for dinner. As dinner was served, Dow futures dropped 900 points. By the time dessert was on the table, most of our guests' stomachs had similar drops. The room was too stunned to speculate what Donald Trump's election would mean for BigLaw. Asked recently, many of the folks at that dinner think President Trump's election has been irrelevant to BigLaw.

The morning after the election, anticipating chaos in the new administration, **I was quoted** on Law360 as saying, "We're going to see a legal industry on steroids," and a Trump administration "[will] be the biggest thing in the legal industry since the enactment of the U.S. Constitution." Well, at least I got it half-right. We have had a year of chaos, mostly good for most of BigLaw, but it hasn't been on steroids. In fact, compared to the nearly 30 percent increase in the Dow since Trump's election, BigLaw has had only a modest improvement in business. What happened?

The Trump administration certainly started with a bang. The biggest promises were fast action to repeal and replace Obamacare, to make health care more affordable for everyone, and to enact massive tax cut legislation and a massive infrastructure spending bill. None have happened. Even so, the economy is steaming ahead with gross domestic product growing at an annual rate of 3 percent. Pretty strong.

Trump promised he would be unpredictable. When the market plummeted 900 points on election eve, the pundits said it was because the markets hate unpredictability. Trump has been unpredictable. But the market has climbed to record-breaking highs. Why isn't BigLaw busier?

Trump also promised we would win so much that we would get tired of winning. But, in the legal sector, the only lawyers tiring of winning are the immigration lawyers who've repeatedly defeated Trump's travel ban, and they're all working for free. Winning is always fun, but it isn't making BigLaw any money.

Trying to explain BigLaw's malaise in a booming economy has given me an appreciation for the difficulty of Janet Yellen's job. There is a lot that goes into the mix of the BigLaw microeconomy and it is hard to account for it all. But let me take a crack at it.

First, I've written before that law is a "follow-the-money profession." BigLaw's clients use assets to create more assets. When they are putting capital to work, BigLaw is busy. The "mother of all work" for BigLaw is large-cap public company mergers and acquisitions. When it's hot, BigLaw rates, hours, revenues and profits soar. But deal activity was down 25 percent as of the end of the third quarter, and the deals that are closing are smaller. The dearth of large-cap M&A activity is likely attributable to the high valuations produced by the soaring stock market, which is still anticipating tax reform and infrastructure spending. But, with no bargains out there, there aren't any buyers. No large-cap M&A, no big boom for BigLaw.

Second, for Trump to make BigLaw tired of winning, he's going to have to break the gridlock in Congress. Pundits are saying that it's unlikely that a big corporate tax cut alone will spur M&A activity. Only time will tell if they're right. Most often, major tax overhauls are akin to full employment acts for lawyers. But there can't be any doubt that a big infrastructure spending bill piled on top of tax cuts would be a major shot in the arm for BigLaw. And, as I'll note later, with the benefit of hindsight, President Ronald Reagan's tax trifecta may have planted the seeds for BigLaw's golden era. It is possible that the good times could still roll.

Even with Trump yet to pop, there has been some bump up for BigLaw. High stock market valuations have lubricated capital markets practices. Although the deals are smaller, private equity deals continue to drive high levels of performance at firms with strong private equity practices. And securitized asset practices have come back strongly.

Even though the uptick has been modest, there are two important qualifiers to calling the first year irrelevant to BigLaw. First, lawyers would agree that any president's most lasting mark on the country are his Supreme Court appointments. After Congress invoked the "nuclear option" (no small feat), Justice Neil Gorsuch sailed through his confirmation hearings. Of course, Gorsuch is 50, with a long career ahead. Whether he seasons on the court as an Antonin Scalia versus a David Souter remains to be seen, but his impact will be a lasting Trump legacy.

Second, and more importantly, it can be fairly argued that Trump is entitled to another three months before we render a final judgment on his first year. After all, he's only been in office nine months. Fully aware that judgment day is approaching quickly, he is working hard, or shall I say tweeting vigorously, to get tax overhaul legislation on his desk for signature before New Year's Eve. With the 2018 elections around the corner, he may be able to overcome the gridlock that has plagued infrastructure and Obamacare repeal and replace.

Whether a tax overhaul will ignite BigLaw revenue growth remains to be seen. There are lessons to be learned from history. Reagan was the last president qua master tax reformer. In his first year, he signed Kemp-Roth (the Economic Recovery Tax Act, or ERTA), which cut taxes, ballooned the deficit and sent interest rates soaring to over 20 percent (ask a baby boomer how painful that was!). The result — the second dip of the now infamous "double-dip" recession. BigLaw suffered.

A year later, Kemp-Roth was reversed with the Tax Equity and Fiscal Responsibility Act, or TEFRA — a backlash to ERTA and the largest tax increase in history, kicking off the now-famous Reagan recovery. Congress acted again in 1986 when it passed the Tax Reform Act, or TRA, shifting a chunk of the federal tax burden from individuals to corporations. The ERTA-TEFRA-TRA trifecta arguably set the stage for BigLaw's golden era of unprecedented prosperity. A lesson from history: ERTA was sponsored by Republicans, TEFRA by a Democrat (former Rep. Pete Stark of California), and TRA by two other Democrats (former Rep. Richard Gephardt of Missouri and former Sen. Bill Bradley of New Jersey). Reagan reached across the aisle for his greatest tax victories; so could Trump, and he could do it before the end of his first year in office. As the famous scholar-athlete Yogi Berra once said, "It ain't over till it's over." Trump has a little time left to see if he can play bipartisan ball with Congress and create "déjà vu all over again," letting the good times roll for BigLaw.

—By Peter Zeughauser, Zeughauser Group

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