WASHINGTON TAX NEWS

Potomac LAW GROUP PLLC

Potomac Law Tax Newsletter—April 2018 **Susan Rogers**

Prior to leaving for their Easter recess, Congressional leaders approved legislation called the Consolidated Appropriations Act, 2018, which is an **omnibus spending package** that funds the federal government for the remainder of FY 2018. Passage of this bill, which was signed into law by the President on March 23rd, ends the series of Continuing Resolutions that have repeatedly been used by Congress since the start of FY 2018 to fund the government on a short-term basis and removes the threat of any additional government shutdowns during this fiscal year. Some conservative Republicans were unhappy with the bill's spending increases and some Democrats were unhappy that the bill did not include a resolution of the DACA (Deferred Action for Childhood Arrivals) issue. Prior to signing the bill, the President threatened to veto it because it did not include adequate funding for his border wall or a Dreamer deal.

Although it is unlikely that Congress will advance any other significant pieces of legislation before the fall elections, this spending bill only funds the government until the beginning of FY 2019, which is October 1st. Therefore, another omnibus spending bill or a Continuing Resolution will be needed to fund the government through the elections in order to avoid a government shutdown.

For more information on these issues, please contact Susan Rogers at srogers@potomaclaw.com or 202.492.3593.

Some reports have suggested that the omnibus spending bill which Congress recently approved was the "last train to leave the station" in Washington this year prior to the November mid-term elections with respect to legislation.

Susan Rogers

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Miscellaneous Tax Developments

The United States filed its amicus brief in *South Dakota v. Wayfair, Inc.* No. 17-494, with the Supreme Court. The US argued that *Quill Corp. v. North Dakota*, 504 US 298 (1992) should not be applied to online sales, and the South Dakota law imposing **sales taxes on sales by online retailers** does not violate the commerce clause.

The **Joint Select Committee on the Solvency of Multiemployer Pension Plans** held an organizational meeting to adopt committee rules and hear opening statements. The 16-member bicameral, bipartisan committee, which was authorized by the Bipartisan Budget Act of 2018, is charged with studying the funding challenges facing multiemployer plans, reviewing potential solutions, and developing legislative recommendations that could be considered by the House and Senate.

International Issues

The European Union issued a report on the proposal for a Council directive on a **Common Consolidated Corporate Tax Base (CCCTB)**, which would create a single EU corporate tax regime. The proposal also covers the Common Corporate Tax Base (CCTB), a separate, complementary measure that would create the basis for the harmonized EU corporate tax system. The proposals have been approved by the EU Economics and Monetary Committee and are scheduled for a vote in the EU Parliament.

The **OECD issued new model disclosure rules** that require lawyers, accountants, financial advisors, banks, and other service providers to inform tax authorities of any schemes they put in place for their clients to avoid reporting under the OECD Common Reporting Standard (CRS) or prevent the identification of the beneficial owners of entities or trusts. The model disclosure rules are part of a wider strategy of the OECD to monitor and act upon practices in the market to avoid CRS reporting and hide assets offshore.

The **Council of the European Union** reached an agreement on a Council Directive aimed at increasing transparency designed to address **aggressive cross-border tax planning**. The Directive requires intermediaries such as tax advisors, accountants, and lawyers that design and/or promote tax planning schemes to report schemes that are considered potentially aggressive. Member states will be required to automatically exchange the information they receive through a centralized database and will be obliged to impose penalties on intermediaries that do not comply with the transparency measures.

The **European Commission** announced two new legislative proposals intended to ensure that **digital business activities** are taxed in a fair and growth-friendly way in the EU. The first proposal is intended to reform corporate tax rules so that profits are taxed in jurisdictions where businesses have significant interaction with users through digital channels; this proposal forms the Commission's preferred long-term solution. The second proposal would implement a 3% interim tax on certain gross revenues from online placement of advertising, sale of collected user data, and digital platforms that facilitate interactions between users; this proposal is intended to cover, in the short-term, the main digital activities that currently escape tax altogether in the EU.

The **OECD** announced that the **Multilateral Convention to Implement Tax Treaty Related Measures** to Prevent Base Erosion and Profit Shifting will enter into force on July 1st, and its contents will start to have effect for existing tax treaties of signatories who have formally ratified the convention beginning in 2019. The convention will modify existing bilateral tax treaties to quickly implement certain tax treaty measures, including those on hybrid mismatch arrangements, treaty abuse, and permanent establishments, developed as part of the BEPS project. The United States is not a signatory.

Treasury and the IRS

The IRS announced on its website that it would **close the 2014 Offshore Voluntary Disclosure Program** (ODVP), stating that while the program has been successful in the past, there has been a significant decline in the number of taxpayers participating as well as an increase in awareness of offshore tax and reporting obligations. The Streamlined Filing Compliance Procedures will remain available after the 2014 ODVP closes.

The IRS **Large Business and International (LB&I) division** has identified 5 additional compliance campaigns, which completes the redefinition of large business compliance work. The new campaigns cover: (1) costs that facilitate a Code section 355 transaction; (2) self-employment tax under the Self-Employment Contributions Act; (3) partnerships that stop filing tax returns; (4) the incorrect reporting of sales of partnership interests; and (5) the Code section 168 disposition regulations on recognizing gain or loss on the disposition of MACRS property and the partial disposition election.

Both President Trump and W&M Chairman Brady (R-TX) have made comments suggesting the possibility of additional tax legislation in 2018 that might include "phase two" of tax cuts, but it seems unlikely that this type of legislation would advance due to the November mid-term elections. Chairman Brady and White House officials have both commented that they would like to consider making permanent the individual tax cuts included in the TCJA that are temporary. In contrast, House Speaker Ryan, who has announced that he will not run for re-election, has stated that he does not expect any major changes to the tax code in 2018 and does not expect Congress to consider technical corrections legislation prior to the November elections.

Senate Democrats have unveiled a proposal that would undo several of the key provisions of the TCJA in order to fund an infrastructure spending plan. The plan is not expected to be considered in either the Senate Finance Committee or on the Senate Floor. Democrats are expected to use it as a messaging document for the fall mid-term elections. It would undo changes related to the top income tax rate for individuals, the alternative minimum tax, the estate and gift tax rates, the

TAX REFORM UPDATE

IRS Personnel Change and TCJA Guidance

The **resignation of Dana Trier**, the Treasury Department Deputy Assistant Secretary for Tax Policy, could have an impact on the ability of Treasury to implement the new tax law and issue guidance in a timely manner. There is a long list of new guidance projects related to implementing the TCJA with 18 new projects having been added to the annual Treasury-IRS priority guidance list in recent weeks. The two leaders of the Congressional tax-writing committees have expressed confidence that Trier's departure will not slow down the implementation process. In public comments, Trier stated that implementation of the international tax changes will be particularly challenging citing the deemed repatriation provision for previously untaxed overseas earnings as a specific challenge.

The White House has announced that President Trump intends to nominate **Michael Desmond to be chief counsel of the IRS and assistant general counsel of the Treasury Department**. Desmond's role would be to advise the IRS commissioner on the interpretation, administration, and enforcement of tax laws, which is a critical role with respect to implementation of the new tax law. Both Desmond and Charles Rettig, who has been nominated to be the IRS Commissioner, are awaiting Senate confirmation.

The IRS released an **updated withholding calculator** and a **new version of Form W-4** to help ensure that individual taxpayers have the correct amount of tax withheld from their paychecks following enactment of the TCJA.

The IRS issued **Notice 2018-18** announcing that the Treasury Department and the IRS intend to issue regulations on Code section 1061 as enacted by the TCJA. These regulations will provide that the term "corporation" for purposes of Code section 1061(c)(4)(A) does not include an S corporation. The effect of the regulations would be that a **carried interest** held through an S corporation would be subject to the new three-year holding period to qualify for capital gains rates. The notice provides that the regulations are intended to be effective for taxable years beginning after December 31, 2017.

The IRS issued a Frequently Asked Questions page on its website about the **deemed repatriation transition tax** under Code section 965, which generally requires US shareholders (as defined in Code section 951(b)) to pay a transition tax on the untaxed foreign earnings of certain specified foreign corporations as if those earnings had been repatriated to the US. Taxpayers may have to pay this tax with the filing of their 2017 tax returns, and those who electronically file Form 1040 are asked to wait to file their return on or after April 2, 2018, in order to give the IRS time to make system changes.

Technical Corrections to the TCJA

No technical corrections to the TCJA were included in the omnibus spending package which Congress passed prior to their spring recess. House Speaker Ryan (R-WI) has indicated that Congress will likely not advance a technical corrections bill until late in 2018. Two Congressional hearings have been held to discuss a number of ambiguities in the new tax law that need to be addressed covering these areas: (1) the carried interest rules; (1) prevention of abuse of the new pass-through rules; (3) the depreciable life of qualified improvement property; and (4) sales to agricultural cooperatives.

W&M Committee Chairman Brady has stated that his Committee is developing a list of provisions that must be addressed either administratively or through substantive changes to the tax code, and he has encouraged the business community and taxpayers to identify provisions that they believe must be addressed. He has not, however, been specific as to the timing of legislation on these issues. A complication for Republicans when they do advance technical corrections legislation is that they will need Democratic support to ensure passage, because it will most likely be done outside of the budget reconciliation process, and Democrats do not appear to be willing to support this process.

Specific TCJA Issues

Treatment of prepaid property taxes

In December, the IRS asserted that prepaid property taxes could be deducted for 2017 only if they had been assessed as of December 31, 2017. The TJCA specifically stated that prepaid state and local income taxes for 2018 cannot be deducted against 2017 taxes, but it was silent on the issue of prepaid state and local property taxes. W&M Committee Democrats have sent a letter to Acting IRS Commissioner Kautter challenging the IRS position saying that the omission was intentional, and the IRS has, therefore, exceeded their authority. The letter asked the IRS for information on a number of related issues as well as questioning the comments of Treasury Secretary Mnuchin about possible audits of real estate taxes in states that are pursuing workarounds for the new limitation on state and local tax deductions.

Fine-tuning international provisions

Chairman Brady has confirmed that the W&M Committee is working on “fine-tuning” the international provisions of the TCJA, which is needed, he said, because of the speed with which the House and Senate rolled out and approved their respective tax reform proposals, and then conferenced to produce a final bill during a 10-day period. He acknowledged that a significant amount of new policy was enacted, but he has not been specific about what changes are being considered or what the timetable would be for either hearings or legislative action.

Business Entertainment Expenses

One unexpected change in the TCJA is the elimination of the 50 percent deduction for entertainment expenses, which will likely have an impact on the attitude of businesses toward the entertainment of clients and customers. Companies are likely to continue to utilize sales and marketing budgets for this type of activity, but the loss of the tax deduction could impact the size of the budgets. The decrease in the corporate tax rate, however, makes the deduction less valuable.

The Joint Committee on Taxation — Bluebook on the TCJA

Chief of Staff Tom Barthold has said that the Joint Committee on Taxation (JCT) does not have a target date for release of the **“bluebook” describing the TJCA** but hopes to release it prior to the end of 2018. The bluebook is a publication by JCT in consultation with the two tax-writing committees that describes the tax legislation enacted during each Congress. Barthold has said that the 2018 bluebook will include a list of technical corrections that are needed and an explanation of any “garbled” language in the TCJA.

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Susan Rogers has 30 years of experience in the tax policy field in Washington including several years as Majority Tax Counsel to the House Ways & Means Committee and extensive experience managing global tax issues for a Fortune 100 multinational. Ms. Rogers’ practice focuses on providing information and strategic advice to clients on US and international tax policy issues and advice on how to manage tax policy risks.