

WASHINGTON TAX NEWS



Potomac Law Tax Newsletter— June 2018

Susan Rogers

Speculation is growing about **whether House Speaker Paul Ryan (R-WI) will step down** before the mid-term elections, since he has already announced his retirement at the end of this session of Congress and he has experienced some challenges within his party on recent legislation. The **farm bill was defeated** on the House Floor when a group of moderate Republicans and Freedom Caucus members joined Democrats in opposing the legislation, and there is an **effort to force a vote on immigration issues** and the “Dreamers” issue by centrist Republicans. It is not clear, however, who would have enough votes at this time to replace him as reports are that House Majority Leader McCarthy (R-CA) has not yet confirmed the 218 votes needed.

House Majority Whip Scalise (R-LA) has announced that there will be **second vote on the farm bill** on June 22nd following a **vote on an immigration bill** that will include border wall funding, security and enforcement provisions, cuts to legal immigration, and a process for Deferred Action for Childhood Arrivals program recipients to obtain three year renewals of their work permits. GOP leaders do not believe they have the votes to pass the immigration bill, but the House Freedom Caucus made its support for the farm bill conditional on the immigration bill vote being scheduled.

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

Senate Majority Leader McConnell cancelled most of the Congressional August recess for the Senate in order to work on federal spending bills and pending confirmations, which will keep Democratic senators from campaigning in August for the mid-term elections. The House is unlikely to cancel their August recess.

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Politics & Congressional Activity

Senate Republicans have been assessing what issues should be included on their **agenda for the rest of 2018**. Issues under consideration include: repealing or modifying Obamacare; **a second tax bill**; expanding gun rights; initiating budget reforms; and eliminating or restricting the Consumer Financial Protection Bureau.

A major **infrastructure bill is not expected to advance this year**, despite the release of a White House framework earlier this year. Some minor infrastructure issues are being incorporated into a variety of program authorizations, but proponents of major change have accepted that this issue will have to wait until 2019.

Senate Finance Committee: SFC Chairman Hatch announced that Mark Prater, the Republican Chief Tax Counsel and Deputy Staff Director, would be leaving Capitol Hill after a career of 30 years at the Committee. Jennifer Acuna will replace him as Chief Tax Counsel, and Jeff Wrase will take the deputy staff director spot. Becky Cole will join the SFC staff as Policy Director. The chairman of the Senate Finance Taxation and IRS Oversight Subcommittee, Senator Rob Portman (R-OH), stated that several bills that would overhaul IRS operations should be prioritized and passed prior to the August recess along with the confirmation of Charles Rettig as the IRS Commissioner.

Joint Tax Committee: The Joint Committee on Taxation issued its annual report on tax expenditures covering FYs 2017-2021, which incorporates many of the changes resulting from the enactment of the Tax Cuts and Jobs Act (TCJA). Tax expenditures are defined as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability,” and are viewed as a source for potential revenue raisers when the tax-writing committees are working on tax legislation.

South Dakota v. Wayfair – Online Sales Taxation: Prior to the US Supreme Court agreeing to review *South Dakota v. Wayfair*, Congressional negotiators had been working for years on a compromise solution for regulating online taxation, but those talks are now at a standstill awaiting the court’s decision. The chief counsel to House Judiciary Committee Chairman Goodlatte (R-VA) has indicated that work on a compromise bill continues but progress has been halted. When the Supreme Court agreed to hear the case, it seemed that the prevailing opinion was that *Quill Corp. v. North Dakota* would be overturned, but oral arguments on the case have cast doubt on how the court will rule. One of the issues in contention is whether states can compel taxation from out-of-state sellers or whether that is a policy question that should be answered by Congress.

Treasury and the IRS

The IRS issued **Revenue Procedure 2018-29**, which provides **procedures for taxpayers changing their method of accounting for the recognition of income to conform with FASB Topic 606** (Revenue from Contracts with Customers). It provides procedures for obtaining automatic consent from the IRS for such an accounting method change if such change is made for the same taxable year in which the taxpayer adopts the new accounting standard. The IRS guidance modifies the previously issued Revenue Procedure 2017-30 with new procedures under Code section 466. It does not cover changes to Code section 451 made by the TCJA, although the IRS noted that it is preparing additional guidance to address that area.

The IRS added **13 new projects to its 2017-2018 Priority Guidance Plan** including the following: (1) final regulations addressing partnership representatives; (2) proposed regulations addressing revisions to certain partnership rules in Chapter 63 made by the Tax Technical Corrections Act of 2018; and (3) final regulations under Code sections 7874, 367, 956, 7701(l), and 304 regarding inversions and related transactions (related to temporary regulations published in April of 2016).

International Issues

The **OECD announced that it is considering two new projects to revise transfer pricing guidelines** including changes to Chapter IV (Administrative Approaches to Avoiding and Resolving Transfer Pricing Disputes) and Chapter VII (Special Considerations for Intra-Group Services). Public comments are due by June 20, 2018.

The **European Commission has proposed new rules for cross-border conversions or divisions** that would prevent companies from moving their registered offices to letterbox companies located in other European Union countries to create tax advantages with similar rules for cross-border company divisions. The proposals are part of a package of company law rules aimed at making it easier for companies to convert, merge, or divide across borders within the EU.

The **Council of the European Union adopted a directive strengthening rules to prevent money laundering and terrorist financing**. The directive is designed to broaden access to information on beneficial ownership to improve transparency in the ownership of companies and trusts.



Technical Corrections

Comments from both House and Senate tax writers indicate that it is unlikely that a technical corrections bill will be attached to the reauthorization of the Federal Aviation Administration legislation, which is considered a “must-pass” bill in the fall. The House has approved a bill extending the FAA authority through September 30, 2023, and because it includes a tax title, there has been speculation that it could be a vehicle for a technical corrections bill.

W&M Committee Chairman Brady, however, has said that discussions between Republicans and Democrats about technical corrections are in the early stages, and there is no confirmed schedule for advancing this legislation.

On the Senate side, Senate Commerce, Science, and Transportation Committee Chairman Thune (R-SD), has stated that he would like to keep the reauthorization bill clear of unrelated tax issues. In addition, Republicans will need Democratic support in the Senate to advance a technical corrections bill, and that support is highly unlikely before the mid-term elections.

TAX REFORM UPDATE — Second Tax Bill in the Fall?

Based on comments from both the White House and W&M Committee Chairman Brady, it appears that Republicans are working on a second tax bill that would have as its centerpiece a proposal to make the individual tax provisions of the TCJA permanent. The timetable Chairman Brady has outlined has a new tax bill introduced by the time Congress leaves for its August recess and approved in the House by October. The White House has signaled a similar timeline in comments from both the President and White House Director of Legislative Affairs Marc Short with an indication that they are also running numbers on other components of a possible bill. Chairman Brady has said that other possible topics will include enhancing retirement savings, indexing capital gains to inflation, incentives for business innovation, and making immediate business expensing permanent. **Despite this support, enactment of a second tax bill in 2018 is uncertain since achieving the 60-vote approval needed in the Senate for a tax bill that advances outside of the budget reconciliation process will be challenging.** Senate Majority Leader McConnell (R-KY) has expressed doubts about moving a second tax bill this year.

House Minority Leader Pelosi (D-CA) has stated that **if Democrats take control of the House** as a result of the mid-term elections, they will work to **revamp the tax system created by the TCJA** and focus more on tax relief for the middle class. Many Democrats supported lowering the corporate tax rate to help make US companies more competitive globally, but they believe the TCJA went too far in that regard with Senate Democrats releasing a proposal that would increase the current rate of 21% to 25%.

Ways & Means Hearings on the TCJA

The W&M Committee held the first in a series of hearings on the TCJA on May 16th and a second hearing on May 23rd with the purpose of assessing the impact of the new law on the US economy and on small businesses. Both hearings featured **partisan comments and views** which can be expected to be the tone of debates on the new tax law in the run-up to the fall elections. Republicans argue that the new tax law is making US businesses more competitive globally and increasing job growth and wages in the US, while Democrats contend that it disproportionately benefits corporations and will increase the deficit.

IRS Notice 2018-54: State and Local Tax Deduction Issues

Under the TCJA, the amount of state and local taxes individuals can deduct is capped at \$10,000. Several states, including New York, New Jersey, Illinois, California, and Connecticut, have considered proposals to allow residents to contribute to charitable organizations controlled by local governments to gain a credit against state and local taxes owed. Taxpayers can deduct these payments as charitable donations while also using them to satisfy local tax liabilities. **Notice 2018-54 announces forthcoming regulations that will address the “tax treatment of certain payments made by taxpayers for which taxpayers receive a credit against their state and local taxes.”** The IRS said that the proposed regulations will make clear that the requirements of the Internal Revenue Code, informed by substance over form principles, govern the federal income tax treatment of such transfers. The regulations will help taxpayers understand the “relationship between the federal charitable contribution deduction and the new statutory limitation on the deduction for state and local tax payments.”

TCJA Guidance

The spring agenda released by the Office of Information and Regulatory Affairs stated that Treasury and the IRS will release **guidance on foreign tax credits related to changes in the TCJA in August**. The Treasury Department is also expected to release **guidance in September for how global intangible low-taxed income regulations affect US shareholders** under Code section 951A.

The IRS issued **Notice 2018-30**, which modifies prior guidance **for determining the recognition of built-in gains or losses under Code section 382(h)**. The notice modifies the Code section 338 and section 1374 approaches in Notice 2003-65 to take into account changes to Code section 168(k) resulting from the TCJA. The IRS explained that “under the proposed notice, the hypothetical cost recovery deductions that would have been allowable had an election under section 338 been made or had the asset been purchased at fair market value are determined without regard to the additional first year depreciation deduction in section 168(k).” In addition, in computing the amount of cost recovery deductions that are not attributable to an asset’s built-in loss on the change date under the 1374 approach described in Notice 2003-65, the hypothetical deductions that would have been allowable had the loss corporation purchased the asset for its fair market value on the change date are determined without regard to Code section 168(k).

The IRS issued **Notice 2018-43** inviting stakeholder **input on its 2018-2019 Priority Guidance Plan** by June 15, 2018. The annual Plan outlines the tax issues the IRS intends to address via regulations, notices, revenue rulings, revenue procedures and other documents over the 12-month period from July through June. The Notice states that due to the demand for guidance needed to implement the TCJA, it is likely that some projects on the 2017-2018 Plan will be carried over. The IRS laid out criteria upon which it will base its determination of which guidance projects to include.

In comments at a recent Senate Appropriations Committee hearing, Acting IRS Commissioner Kautter testified that the **IRS is on schedule for releasing its updated tax forms and instructions to reflect changes made the TCJA** by this summer. He said that most of the regulatory implementation projects for the new law will be completed by fall.

An IRS official speaking at an American Bar Association conference indicated that **guidance on bonus depreciation** could be issued in mid-summer, noting that the IRS has made significant progress on clarifying questions that have arisen as a result of the TCJA, which expanded bonus depreciation to allow for a 100 percent deduction for the cost of qualified property bought and placed in service after Sept. 27, 2017, and before 2023. Several questions have arisen on effective dates, recovery periods, construction contracts, and what kind of property can qualify.

Several American Bar Association committees are collecting public comments on the **tax treatment of fringe benefits and compensation at nonprofits** from the TCJA. Current questions include what the tax rate is that a group should use to calculate unrelated business taxable income (UBTI) if the group operates on a fiscal year, since the TCJA was effective on January 1st. The new law requires certain amounts a tax-exempt group paid for qualified transportation fringe benefits, parking facilities, and on-site athletic facilities to be included in UBTI. With respect to the taxation of excess employee compensation, guidance is needed on whether the tax year will be a calendar year or fiscal year and what is included in “remuneration” under the new Code section 4960.

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