

# WASHINGTON TAX NEWS



Potomac Law Tax Newsletter— August 2018

Susan Rogers

The House has adjourned for the summer and will return to work on September 4<sup>th</sup>. The Senate will work for most of the month of August, with only a one-week break August 6-10<sup>th</sup>.

In July, work continued in both the House and Senate on **appropriations bills for FY 2019**, which starts October 1, 2018. Congressional leadership would like to avoid an **omnibus spending bill** at the end of the year, and President Trump said earlier this year after signing the Bipartisan Budget Act of 2018, that he would not sign an omnibus bill this year.

The House approved several **health care related bills**, including legislation that would permanently repeal the 2.3 percent excise tax on medical devices, which was enacted as part of the Affordable Care Act, with the implementation delayed twice since enactment so that the tax is currently scheduled to take effect on January 1, 2020. No Senate action is currently scheduled. The House also approved two bills to expand various health care accounts for individuals, consolidating several bills approved by the Ways & Means Committee that aim to expand Health Savings Accounts (HSAs) and Flexible Savings Accounts (FSAs). The White House issued a statement in support of the bills, which now go to the Senate for consideration.

***For more information on these issues, please contact Susan Rogers at [srogers@potomacclaw.com](mailto:srogers@potomacclaw.com) or 202.492.3593.***

***House Ways & Means Committee Chairman Kevin Brady (R-TX) briefed his Committee colleagues on his Tax Cuts 2.0 proposal and released an outline, which he plans to revise over the coming weeks for consideration by the House in September. It is unlikely that such legislation would move in the Senate prior to the mid-term elections.***

***Susan Rogers***



## In This Issue

- Congressional Activity
- Online Sales Taxation
- Tax Reform Update and TCJA Guidance
- Technical Corrections
- Treasury and the IRS

### South Dakota v. Wayfair – Online Sales Taxation

On June 21, 2018, a divided US Supreme Court issued its opinion in *South Dakota v. Wayfair (Wayfair)*, upholding a South Dakota law requiring **sales tax collection by retailers** with an economic presence in the state. The case significantly alters the tax rules for retailers making sales in multiple jurisdictions.

The **House Judiciary Committee**, which has jurisdiction over state tax issues in the House, held a **hearing on the Wayfair** decision with lawmakers and witnesses disagreeing over whether the case was correctly decided and on what action, if any, Congress should take in response. Committee Chairman Goodlatte (R-VA) stated his opinion that the *Wayfair* decision overturned a stable precedent and would lead to states overreaching in the collection of taxes. He commented that the physical presence test provided a bright line rule for when a state could force a business to collect and remit sales taxes and that the Court's decision would increase complexity for remote sellers, who will have to deal with thousands of different taxing jurisdictions.

Chairman Goodlatte called for Congress to address the issue legislatively and to **consider a moratorium on collection** while states and stakeholders decide how best to proceed. Since some states have already had online sales tax collection rules in place, however, a moratorium could impact those established revenue streams. Other Committee members argued that no legislative action was necessary, commenting that the decision would equalize the tax treatment of online retailers and brick-and-mortar stores.

One concern addressed was the **possibility that states would attempt to collect sales and use taxes from online transactions retroactively**. Some states that already have laws in place or ready to enact have rules about retroactive collection and some do not.

There was also **discussion of the questions not answered by the Wayfair decision**. The decision states that a lack of physical presence in a state is not enough to create an undue burden under the Commerce Clause, but the Court did not discuss what *would* create an undue burden. The Committee discussed whether the threshold used by South Dakota for small businesses (\$100,000 in sales or 200 transactions into the state) should apply in every state or whether larger states such as California and New York should use higher thresholds. The Committee discussed the issue of the availability of software to help businesses navigate the complexity of the tax rules in different jurisdictions with some witnesses saying that the software would cost millions, while the representative of the National Retail Federation stated that the software would cost much less.

### Treasury and the IRS

The Senate Finance Committee favorably voted out of Committee **the nomination of Charles Rettig to be IRS Commissioner**. If confirmed by the full Senate, he would serve a term that expires November 12, 2022. Rettig was generally supported by both Republicans and Democrats on the Committee, but his nomination was held up after Committee Democrats opposed new IRS guidance in Rev. Proc. 2018-38, which generally provides that tax-exempt organizations, other than 501(c)(3) groups, are no longer required to disclose names and addresses of donors.

The IRS has published new guidance and resources on the **Country-by-Country (CbC) Reporting Guidance** webpage. The IRS has also updated the Jurisdiction Status Table with recently signed Competent Authority Arrangements for the exchange of CbC reports.

The IRS launched a **new awareness campaign** for tax practitioners to **protect client data** by issuing a revised Publication 4557, Safeguarding Taxpayer Data, and a new document, Publication 5293, Data Security Resource Guide for Tax Professionals. The campaign encourages tax professionals to take stronger security steps to protect client data following continued security threats to tax and financial data held by tax professionals.

### Treasury and the IRS—Inversions

Treasury and the IRS issued **final regulations** to take effect on July 12, 2018, to address **transactions that are structured to avoid Code sections 7874 and 367 and certain post-inversion tax avoidance transactions**. The final rules modify and clarify parts of the 2016 proposed regulations. The IRS stated that “the changes ... help to ensure that the regulations do not impact mergers that provide market benefits, independent of tax avoidance; for example, those that increase efficiencies within the corporation or provide other growth opportunities or that contribute to social welfare. These regulations still maintain the thresholds and substantiation requirements of the 2016 regulations aimed at discouraging tax motivated inversions.” Although the IRS concedes that the TCJA includes provisions that “may increase incentives to invert, including the tax imposed on Global Intangible Low Tax Income (GILTI) of foreign subsidiaries,” it believes that overall the TCJA reduced overall tax-motivated incentives to invert.



## Technical Corrections

*The outline that Chairman Brady released on Tax Cuts 2.0 is silent on the status of technical corrections legislation even though he recently indicated that he would provide more details on the timeline for this legislation.*

*Based on comments from Speaker Ryan (R-WI), the technical corrections legislation will likely not be considered until a lame duck session after the elections and would move separately from the Tax Cuts 2.0 bills. He commented “We always knew when you switch from a worldwide to a territorial system and redo everything else, you’re going to have glitches, you’re going to have issues. We’re compiling those issues, typically on the international side, and then we intend to put together a technical corrections bill at the end of the year.”*

*Speaker Ryan indicated that deferring the vote on technical corrections legislation until the lame duck session would be necessary in order to pick up Democratic support for the bill as it is unlikely Democrats would cooperate on moving the bill before the elections. Reports are that Democrats feel the process has been rushed and secretive, and they have not been involved.*

## TAX REFORM UPDATE — Tax Cuts 2.0

**House Ways & Means Committee Chairman Brady (R-TX) briefed his Committee colleagues on his Tax Cuts 2.0 proposal and released an outline, which he plans to revise over the coming weeks for consideration by the House in September, although it is unlikely that such legislation would move in the Senate prior to the mid-term elections.** Approval in the Senate would require 60 votes to overcome procedural hurdles, because Republicans have not passed a joint FY 2019 budget resolution with reconciliation instructions that would allow for passage of tax legislation with a simple majority.

Chairman Brady will spend the next month conducting “listening sessions” to get feedback from House members and constituents. Committee Democrats have reportedly not been included in discussions about possible proposals. Tax Cuts 2.0 may be **packaged as separate bills** rather than one bill to facilitate timely movement in the Senate. The retirement savings bill would appear to have the best chance of moving in the Senate as SFC Chairman Hatch (R-UT) and Ranking Member Wyden (D-OR) have cosponsored legislation called the Retirement Enhancement and Savings Act, and there is bipartisan support of this issue.

The outline **does not identify any significant revenue provisions that would offset the cost of the proposed tax cuts.** The Congressional Budget Office estimates the 10-year cost of making the tax cuts permanent at \$650 billion and the Joint Committee on Taxation at \$405 billion. Chairman Brady suggested that there would be no major revenue offset title in any of the Tax Cuts 2.0 bills, although minor provisions may provide small revenue gains.

**His plan covers three areas** including (1) Protecting middle-class and small business tax cuts (including income tax rates, the standard deduction, and the 20 percent deduction for certain pass through income) by making them permanent (rather than expiring after 2025); (2) Promoting family savings; and (3) Spurring new business innovation. Some details were provided for the “Promoting family saving” section which covers (1) the creation of a new Universal Savings Account to “offer a fully flexible savings tool for families”; (2) expanded 529 education accounts to allow the use of funds to pay for apprenticeship fees to learn a trade, cover the cost of home schooling, and help pay off student debt; and (3) “new baby savings” which would allow families to access their own retirement accounts penalty-free for expenses when welcoming a new child into the family, whether by birth or adoption.

**The innovation section** is less specific but includes the comment that Tax Reform 2.0 will “help brand-new businesses write off more of their initial start-up costs and remove barriers to growth.”

There have been reports that a **proposal to index capital gains** to inflation may also be included, but it was not part of this outline, although Congressman Nunes (R-CA) has introduced legislation with a proposal for capital gains indexing. Recent reports suggest that Treasury is considering acting unilaterally to index capital gains to inflation. Indexing capital gains through executive action would likely invite a court challenge. Treasury Secretary Mnuchin has said that he is considering the issue stating, “If it can’t get done through a legislation process, we will look at what tools at Treasury we have to do it on our own and we’ll consider that.” Consideration was given to doing this in 1992, but Treasury concluded it did not have the authority to proceed.

## Tax Reform Update (continued)

Chairman Brady has also said that the House will need to address the **foreign provisions of the TCJA** but this issue was also not addressed in this outline. “We didn’t have as much time to model and analyze it,” Brady said. “Now that we’re getting that feedback, we’re going to be making those changes, fine-tuning the international side to make sure it hits the mark,” he said adding that changes may be included in “tax reform phase two and beyond.”

The states of New York, Connecticut, Maryland, and New Jersey filed a **lawsuit** in the Southern District of New York arguing that the \$10,000 cap on the **state and local tax (SALT) deduction** passed as part of the TCJA is unconstitutional. The complaint argues that the SALT cap was enacted to target Democratic-leaning states and interferes with the sovereign authority of the states.

## TCJA Guidance

Passthrough Deduction rules: Treasury and the IRS sent the proposed regulations to implement the 20 percent deduction for the qualified business income of pass through businesses to the Office of Management and Budget for review on July 23, 2018, and they could be released in early August. OMB explained that the forthcoming rules will provide “guidance on computations necessary in computing the deduction for qualified business income” of pass through entities under new Code section 199A.

International rules: On August 1st, Treasury released proposed regulations related to the Code section 965 transition tax, which imposes a one-time deemed repatriation tax on deferred foreign earnings. The regulations, which exceed 250 pages, provide guidance for taxpayers on including the tax on their 2017 returns.

## Other Issues

Treasury and the IRS issued Notice 2018-61 stating that Treasury intends to issue regulations on Code section 67(g) on the deductibility of certain miscellaneous itemized expenses incurred by estates and non-grantor trusts. The notice states that estates and non-grantor trusts can rely on the notice for taxable years beginning after December 31, 2017.

Treasury and the IRS posted a **new draft Form 1040** for next year’s tax filing season. The draft form is only two pages, but most of the information contained on the old Form 1040 has been moved to separate schedules. The Form will be finalized later this summer and then replace the current Form 1040 as well as Forms 1040A and 1040 EZ.

**Other areas that could see guidance during the next few months** include entertainment expenses and the state and local tax (SALT) deduction. Other issues included on the Priority Guidance list are: (1) hybrid dividends and payment under Code section 267A; (2) rules regarding the business interest limitation under Code section 163(j); (3) the carried interest earnings “loophole”; and (4) bonus depreciation.

## **For additional information and advice on these issues, please contact:**

### **Susan Rogers, Partner**

Potomac Law Group, PLLC

One International Place, Suite 1400

Boston, MA 02110

**202.492.3593**

**[srogers@potomaclaw.com](mailto:srogers@potomaclaw.com)**

**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.**

Copyright 2017 Potomac Law Group, PLLC. All rights reserved. Any tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding U.S. federal, state, or local tax penalties or promoting, marketing, or recommending to another party any transaction or matter addressed in this communication (or any attachment). The information contained herein is for informational purposes only and is based on our understanding of the current tax laws and published tax authorities in effect as of the date of publishing, all of which are subject to change. You should consult with your professional tax advisor to discuss the potential application of this subject matter to your particular facts and circumstances.