WASHINGTON TAX UPDATE:
CONGRESS, TREASURY, GLOBAL

March 2019 **Susan Rogers**

The **US government reopened January 26th** with a short-term deal reached to fund those government operations without approved fiscal year spending until February 15th, and with no time to spare, the House and Senate then approved legislation that would provide funding for the remaining unfunded departments through September 2019, thereby avoiding another government shutdown. Because the spending package did not include the funding for a border wall requested by the President, he declared a national emergency in order to divert federal appropriated funds to building the wall.

The House approved a **resolution to overturn that declaration** by a vote of 245-182 with 13 Republicans joining all Democrats in support. If the Senate approves the resolution, it will go to the President, who has said he will veto it. The margin of approval in the House would be insufficient to override a Presidential veto. House Democrats are moving ahead with other legislative priorities including gun control, voting rights, campaign finance, and ethics reform. The Congressional Progressive Caucus has released its "Medicare for All" proposal, but it is unlikely that any of these issues will be successful in advancing in the Republican-controlled Senate.

In This Issue

Ms. Rogers also publishes "Washington & the World: US & International Tax" covering newsworthy tax issues affecting cross-border business.

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Susan Rogers has 30 years of experience in the tax policy field in Washington including five years as Majority Tax Counsel to the US House Ways & Means Committee and several years of experience managing global tax issues for a Fortune 100 multinational.

Additional Tax Resources at Potomac Law Group:

- **Viva Hammer joined the firm from the Joint Committee on Taxation where she was a leader on the international provisions of the 2017 tax reform, the Tax Cuts & Jobs Act. She has also served at the Office of Tax Policy at the Treasury Department, focusing on the taxation of financial institutions and products.**
- **Matthew Lykken has 3 decades of planning and audit experience in international corporate tax in a variety of industries, including roles as global head of tax and regional director.**

The Tax-Writing Committees: Tax Reform, Technical Corrections & Tax Extenders

House Ways & Means Committee: The Ways & Means Committee held a hearing to examine retirement security and various proposals to strengthen employer-sponsored savings plans, multiemployer plans, and Social Security. Two members of the Committee introduced a bipartisan bill called the Retirement Enhancement and Saving Act that would enhance and encourage tax-favored saving options for employers and individuals. Supporters of retirement security legislation are optimistic that a vehicle will emerge this year that could carry this type of tax issue along with other tax issues, such as tax extenders. The Committee also held a hearing entitled "Legislative proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns" with reports that Chairman Neal plans to build the case for requesting and reviewing the President's tax returns.

The Ways & Means Committee held an **infrastructure hearing**, entitled "Our Nation's Crumbling Infrastructure and the Need for Immediate Action" on March 6th. Chairman Neal has listed infrastructure funding as a top policy goal for his committee in this Congress, and he is hoping to produce a legislative plan with bipartisan support, but finding agreement on how to fund the plan will be challenging. At the hearing, the Chairman expressed support for the Low Income Housing Tax Credit, the New Markets Tax Credit, and reviving the Build America Bonds (BABs) program.

Senate Finance Committee: SFC Member Menendez (D-NJ) introduced legislation that would repeal the state and local income tax (SALT) deduction cap that was included in the Tax Cuts & Jobs Act and offset the cost of the repeal by increasing the top tax rate for individuals to 39.6% (from 37%.) A companion bill was introduced in the House by Congressman Pascrell (D-NJ). Although W&M Committee Chairman Neal has been critical of the SALT cap, he has not committed to moving this legislation, which would likely not advance in the Senate.

Extenders: The W&M Subcommittee on Select Revenue Measures has scheduled a hearing for March 12th on expired and expiring tax provisions, but Chairman Neal has not yet stated when the full Committee will work on an extender package. SFC Chairman Grassley (R-IA) is interested in moving a package of tax extenders, including the biodiesel credit, but it appears unlikely that an extender package will be approved prior to April 15th. Chairman Grassley and Ranking Democrat Wyden (D-OR) released a new 2-year extender bill with a focus on alternative fuels and renewable energy provisions and a collection of tax relief provisions and incentives to benefit individuals and taxpayers affected by certain disasters in 2018. One new complication this year for an extender package is that House Democrats re-established the "pay as you go" rule which requires offsets for legislation adding to the deficit, but this rule can be waived.

Technical Corrections: A staff member of the Ways & Means Committee recently said at a Washington tax conference that the W&M Committee would not take up the discussion draft that was released by former-Chairman Kevin Brady (R-TX), but that Chairman Neal is open to addressing technical corrections after Committee hearings and discussions involving Democratic Committee members, who were not involved in drafting the Brady bill. The Chairman has said that the Committee will hold hearings on technical correction legislation in March, but no date has been announced.

Congress/The Debt Ceiling & the Budget

The current **debt limit ceiling** expired on March 2nd, but the Congressional Budget Office issued a statement that the Treasury Department should be able to avoid the need for an increase in the debt limit until late summer or early fall. Treasury can shift funds by using "extraordinary measures" to delay a default on payments. With that timing, it is possible that legislation to increase the debt limit could be packaged with other issues in the fall including **funding for the federal government for FY 2020**.

The first step in the budget process will be the release of the Administration's budget, which reportedly will be March 11th. Congress will then need to approve new overall spending levels for FY 2020, which starts on October 1st. If such legislation is not approved, automatic spending cuts, known as sequestration, apply to lower discretionary spending by $125 billion in 2020, which is a 10 percent reduction from 2019. The House Budget Chairman has said that House Democrats will be looking to match any increase in military spending with an equal increase in non-military spending, and he also suggested that the budget proposal could include increases in tax rates for corporations and wealthy individuals. The House budget resolution will represent a messaging document for Democrats with respect to their tax and spending priorities. Tax legislation proposals would be developed by the Ways & Means Committee, and Chairman Neal has made it clear that he plans to hold a series of hearings this year before tax proposals are released.

Treasury and the IRS

Tax Cuts & Jobs Act Guidance

Foreign Tax Credit Rules: The **IRS has scheduled a public hearing** for March 14, 2019, on its proposed regulations regarding changes to the **foreign tax credit (FTC)** and related rules for allocating and apportioning expenses for determining the FTC limitation that were made by the TCJA. The proposed regulations were issued on December 7, 2018, with corrections issued on March 5, 2019. The deadline for submitting requests to speak and topics is March 8, 2019. The proposed rules cover a number of issues including: (1) the allocation and apportionment of deductions under Code sections 861 through 865 and adjustments to the FTC limitation under Code section 904(b)(4); and (2) transition rules for overall foreign loss, separate limitation loss, and overall domestic loss accounts under Code sections 904(f) and (g), and for the carryover and carryback for unused foreign taxes under Code section 904(c).

Foreign Derived Intangible Income (FDII): The **IRS issued proposed regulations under Code section 250 on the deductions for foreign derived intangible income (FDII) and global intangible low-taxed income (GILTI).** The TCJA provides domestic corporations with a deduction for FDII and GILTI, applicable to tax years after 2017. A US shareholder of a controlled foreign corporation for any taxable year is required to include in gross income the shareholder's GILTI for the year.

The US **FDII regime has been identified as a preferential tax regime by the OECD Forum on Harmful Tax Practices** (FHTP), which has triggered the review process to determine if it is a harmful tax regime. As a member of the "Inclusive Framework on BEPS," the US has agreed to be bound by the OECD/G20 BEPS Action 5 minimum standards relating to preferential tax regimes that can result in BEPS, and the US has also agreed to be peer-reviewed on whether the agreed-to BEPS minimum standards are being implemented in the US. The peer reviews are carried out by the FHTP. The US has provided material in writing to the FHTP on the issue, but the review was deferred until FDII regulations are issued. The US argument is that the FDII regime should be considered together with the global low-taxed intangible income (GILTI) rules to constitute one system that deals with preventing base erosion with respect to the location of intellectual property.

Code section 199A – Deduction for Qualified Passthrough Income: The **IRS posted a revised version of its final regulations** and new guidance under Code section 199A on the **deduction for qualified passthrough business income** covering how to define and compute the deduction along with an anti-abuse rule under Code section 643 to prevent taxpayers from using multiple trusts to avoid tax and/or improperly claim the deduction. The IRS explained that the revised version includes several edits such as "corrections to the definition and computation of excess section 743(b) basis adjustments for purposes of determining the unadjusted basis immediately after an acquisition of qualified property, as well as corrections to the description of an entity disregarded as separate from its owner for purposes of section 199A and Sections 1.199A-1 through 1/199A-6."

Opportunity Zones: Treasury and the IRS held a hearing on the proposed regulations for the Qualified Opportunity Zone program, which were released on October 19, 2018. 22 speakers provided comments and recommendations on several topics related to greater flexibility on the types of investments permitted and the time for making them.

Depreciation Deductions for Passenger Cars: The IRS issued **Revenue Procedure 2019-13**, which creates a **safe harbor accounting method for calculating the depreciation deductions for passenger cars** qualified under the 100 percent additional first year depreciation deduction. Under the TCJA, the full first-year deduction applies to property placed in service after September 27, 2017 and before 2027. Under code section 179, depreciation deductions for passenger automobiles are subject to dollar limitations for the year the taxpayer places the passenger automobile in service and for each succeeding year, and the first-year limitation was increased by $8000. The safe harbor allows depreciation deductions for the excess amount during the recovery period subject to the depreciation limitations applicable to passenger automobiles. To apply the safe-harbor method, the taxpayer must use the applicable depreciation table in Appendix A of IRS Publication 946.

Base Erosion Anti-Abuse Tax (BEAT): The IRS announced that it will hold a hearing on the BEAT proposed regulations on March 25th .

Other Issues & Guidance

IRS Chief Counsel: The Senate confirmed Michael Desmond to be the Chief Counsel for the IRS and Assistant General Counsel at the Treasury Department by a vote of 84-15. The Office of the Chief Counsel serves as the chief legal advisor to IRS Commissioner Charles Rettig on all matters pertaining to the interpretation, administration, and enforcement of the Internal Revenue Code.

Code Section 355 Private Letter Ruling program: The IRS announced that the **18-month pilot private letter ruling program for businesses planning spinoff transactions under Code section 355** will continue after the scheduled March 21st termination date. The program was introduced in September 2017 to expand the scope of letter rulings that could provide specific guidance on whether certain distributions of a controlled corporation would qualify as tax-free or not. Based on a business meeting a facts-and-circumstances test, it could then move forward with a transaction with certainty about the tax consequences. In 2015, the IRS announced that it would no longer provide private letter rulings on Code section 355 transactions because some businesses were using the code section improperly to distribute earnings and profits, and in 2016, proposed regulations were issued followed by the pilot program.

International Issues

Brexit: After the U.K. Parliament's rejection of the government's draft agreement for leaving the European Union on January 15th and a House of Commons vote on February 14th against a motion reiterating support for Prime Minister May's approach to Brexit, uncertainty continues as the Prime Minister works to find an alternative plan that both the EU and the Parliament will accept, without which, the Government is facing a no-deal departure. A delay in implementation of Article 50 of the EU Treaty is now on the table as well as some discussion of holding a second referendum. The next pivotal week appears to be mid-March, when there will be a vote on the PM's new package, which if that fails will be followed by a vote on leaving with "no-deal," which is expected to fail after which there could be a vote on extending Article 50.

Digital Services Taxation/OECD announcement: Following the OECD announcement on January 29th that it is working toward a consensus plan to taxing digital commerce as part of the BEPS initiative, a **Consultation Document was issued on February 13th**, and interested parties were invited to comment by March 6th. A public consultation meeting will be held on March 13-14th in Paris as part of the meeting of the Task Force on the Digital Economy. A detailed program of work will be considered at the Inclusive Framework meeting in May and presented to the G20 Finance Ministers meeting in June with a goal of a consensus-based long-term solution in 2020. One of the challenges acknowledged in the Policy Note is the need to find solutions **that strike a balance between the needs of large and small countries and developed and developing countries**. Developing countries prefer a system that is simple to implement and administrable. This must be balanced against the interests of the US and the EU who prefer a profit allocation approach that supports accuracy.

Treasury Deputy Assistant Secretary for International Tax Policy, L.G. "Chip" Harter has publicly stated that he believes a final consensus proposal should be one that includes a minimum tax plus a modest increase in tax allocated to market jurisdictions based on the concept of marketing intangibles, rather than a radical proposal that abandons the arm's length standard or adopts full unitary taxation. The minimum tax could act to reduce the incentive of corporations to shift profits to find the lowest tax rate. The **US plans to release its own paper discussing the two pillars** in the near future including a minimum tax, and public comments will be requested. Harter has commented that all design options for a potential minimum tax are on the table for discussion including a per-country approach and an average rate approach like the US GILTI rules.

Senate Finance Committee Chairman Grassley (R-IA) joined Ranking SFC Democrat Wyden (D-OR) in a letter to Treasury Secretary Mnuchin noting their concerns about the OECD process and encouraging the Administration to work with the OECD on a "measured and comprehensive approach" to taxing digital commerce. On the Senate Floor, Chairman Grassley stated that he supports the OECD's efforts to reach a consensus, but he strongly opposes unilateral actions by individual countries and the European Commission that target US-based global companies.