TaxNewsFlash

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Legislative update: U.S. Congress back in session before elections

Both chambers of the U.S. Congress are back in session this week and face a busy agenda before the expected recess in mid-October for the November 6 midterm elections. The greatest immediate legislative priority is keeping the government operating past the September 30 fiscal year-end. At the same time, the Senate will continue to consider both tax and non-tax nominations. This leaves little time before the elections for tax matters—other than likely addressing aviation taxes that are scheduled to expire on September 30. Still, it remains possible (although far from certain) that Congress may soon begin consideration of extenders, technical corrections, and “tax reform 2.0.”

Read a **printable version** [PDF 456 KB] of this report.

Pre-election agenda

Funding for the federal government expires on September 30; however, the House and Senate have yet to complete legislative action on 12 appropriations measures to fund the government past that date.

The Senate has been proceeding on a bipartisan basis to combine nine appropriations measures into three bills. To date, the Senate has succeeded in passing two of these combination bills.

The fate in the House, however, is uncertain, as House members may seek to add their own priorities. Also uncertain is the disposition of the remaining three appropriations measures addressing Homeland Security, State and Foreign Operations, and Commerce / Justice / Science, where immigration issues potentially could complicate consideration. With only 16 scheduled legislative days before the October 1 deadline, appropriations can be expected to consume most of the legislative air for the next few weeks.

Beginning with hearings scheduled for today, the Senate will also be occupied with the nomination of Judge Kavanaugh to be a justice of the U.S. Supreme Court. These hearings could take several weeks or longer, possibly extending the issue into October and the final days before adjournment for the elections. The Kavanaugh hearings could delay Senate action on pending tax nominations—Charles Rettig for Commissioner of Internal Revenue and Mike Desmond for IRS Chief Counsel.

With the distraction of these important non-tax matters, it's easy to lose sight of the potential tax agenda. Still, there are a number of tax matters that may attract congressional attention in the coming weeks and months.

Aviation taxes

Taxes that are dedicated to the airport and airway trust fund are scheduled to expire on September 30, along with the authorization of certain FAA programs. Unless legislative action is taken, the following taxes will expire:

- The imposition of tax at an increased rate on certain removals, entries, and sales of aviation gasoline and kerosene used in noncommercial aviation
- The tax on amounts paid for taxable transportation of persons by air
- The tax on amounts paid for taxable transportation of property by air
- The exemption for aircraft in fractional ownership aircraft programs

"Tax reform 2.0"

The House Ways and Means Committee may soon release, and possibly mark up, a "tax reform 2.0" package of legislation. It's also possible, but not certain, that the full House may vote on such a package.

As reported in ***TaxNewsFlash***, Ways and Means Chairman Brady previously released a two-page "framework" for tax reform 2.0 that included making permanent individual and small business tax cuts that expire in 2025 (these cuts were enacted on a temporary basis in December 2017).

However, even if the House were to pass legislation making these temporary provisions permanent, it appears quite unlikely that the Senate would take up such legislation, given the busy Senate schedule and the difficulty of securing the 60 votes needed to pass such a measure.

It is possible (although not particularly likely) that the Senate might address other discrete components that may be in a House tax package and that have bipartisan support—such as some retirement provisions—after the elections.

Possible "lame duck" agenda

Congress will return from the November midterm elections to a "lame duck session" with roughly 16 legislative days during which both the House and Senate are scheduled to be in session. How much Congress can accomplish in those 16 days is somewhat dependent on the outcome of the midterm elections.

The stakes in this year's midterm elections are high for the future of tax legislation. Congress passed a sweeping tax bill in December 2017 with zero Democratic votes. Various Democrats have already suggested that if they gain control of either or both chambers of Congress, they will push to make significant changes to the 2017 tax law.

In considering how much Congress might accomplish, the history of tax legislation in recent lame duck sessions can be instructive.

In both 2006 and 2010 when the midterms saw a change in control of one or both houses of Congress, large tax bills were passed during the lame duck sessions following the elections (*Tax Relief and Health Care Act of 2006 and Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010*).

In 2012, when midterms resulted in no changes in control to either chamber, Congress again approved a lame duck tax bill—*American Taxpayer Relief Act of 2012*—also known as the "fiscal cliff" bill.

With this history, a lame duck tax bill cannot be ruled out—but unlike in 2006, 2010 and 2012, this year appears to lack compelling "must do" tax items (such as addressing the expiration of the Bush tax cuts as was the case in 2010 and 2012).

Further, regardless of the election outcome, the highly charged political atmosphere and the need for 60 votes in the Senate to pass significant legislation may make it too difficult to pass significant tax legislation prior to a new Congress being sworn in January 2019.

There are agenda items (outlined below) that Congress can address if it chooses to do so—it's simply not clear yet how urgent these items will be when Congress returns from the midterm elections.

Technical corrections

It is possible that Congress might consider at least some technical corrections with respect to last year's tax reform legislation. Bipartisan support will be necessary, however, as securing the 60 Senate votes that will be needed to pass legislation might involve "horse trading" that could bog down the legislation. Additionally, depending on the election results, some members may prefer to defer matters relating to the 2017 tax legislation to the new Congress that will convene in January 2019. Thus, the immediate prospects for enactment of technical corrections remain highly uncertain.

Expired provisions

A number of tax incentives expired at the end of 2017, including various provisions relating to energy.

There may be an effort by some members (particularly in the Senate) to address expired provisions. However, given the recent precedent of reinstating expired provisions retroactively, even those members who support extension may well be willing to defer consideration to the next Congress. Thus, the prospects of expired provisions being addressed in a lame duck session, either coupled with technical corrections or standing alone, are highly uncertain.

"Wayfair"

The U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc*. has increased the pressure for federal legislation governing state sales taxes on purchases from "remote" sellers. Previously, legislation addressing online sales taxes had stalled in the House due to concerns from some members about a perceived "tax increase." With the Supreme Court's decision, pressure may increase on Congress to address the issue comprehensively. However, given the press of other issues in the run-up to the upcoming elections, this would appear to be an issue for 2019, and possibly beyond.

Bluebook

One important tax item that is not directly dependent on congressional approval is the release of the "Bluebook" for last year's tax bill. Typically the Joint Committee on Taxation (JCT) will issue a description of enacted tax legislation (known as the Bluebook) at the conclusion of a Congress. But JCT occasionally will issue a Bluebook prior to the end of a Congress when there is a perceived need for taxpayers to better understand congressional intent in a new law.

JCT staff and members of Congress have suggested that a Bluebook for last year's tax law could be released as soon as this fall. But the timing of the Bluebook is uncertain—perhaps complicated by the difficulty in achieving consensus on exactly what congressional intent was for each item in the nearly $10 trillion bill.

Regulatory matters

Treasury and IRS continue to issue regulatory guidance with respect to last year's tax bill.

To date, Treasury has issued proposed regulations on section 965 (deemed repatriation), section 168(k) (100% bonus depreciation regime), section 199A (the new partnership deduction regime), as well as other important pieces of guidance on the new tax law. Read a **KPMG summary** [PDF 599 KB] of the new law guidance issued by Treasury through June 13, 2018. Updates of this KPMG summary will be provided as future releases.

Treasury guidance on the new global minimum tax (GILTI) is expected imminently, and guidance with respect to other international items (the BEAT and FDII) is expected this fall.

Finally, there have been numerous reports that the Trump Administration is considering indexing capital gains through administrative action, without legislation. The George H.W. Bush Administration considered this issue and decided it did not have authority to make such a change without legislation. Further, even if the Treasury determines that such authority exists, the change would involve complex technical issues. Nonetheless, it remains uncertain at this time what, if anything, the Trump Administration might decide to do on this front.

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