



KPMG report: Tax Policy and the 116th Congress – Observations and Preliminary Analysis

NOTE: Updated at 1 PM EST on January 17, 2019, to reflect Ways and Means Committee membership. See *TaxNewsFlash-Legislative Updates* page for developments after that time.

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Introduction

The 116th Congress began on January 3, 2019—in the midst of a partial shutdown of the federal government that is still ongoing as this report is being published. The new House is comprised of 235 Democrats and 199 Republicans (with one seat still not filled), while the new Senate consists of 53 Republicans and 47 Democrats (including as Democrats two Independents who caucus with the Democrats).

This report highlights key information about the 116th Congress and the tax legislative process and provides initial observations about tax policy and prospects for tax legislation in the new Congress.

As is explained below, given the composition of the new Congress, the likelihood of substantial additional tax cuts becoming law in the near future appears low—but so too does the possibility of enactment in the new Congress of substantial changes to the massive 2017 tax legislation (such as increases in the individual and corporate rates). Nonetheless, there is still a decent chance that bipartisan consensus could be reached on less sweeping matters, such as expired tax provisions, retirement savings incentives, some technical corrections, administration of the Internal Revenue Service (“IRS”), and, possibly, infrastructure-related tax issues.

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Background on the new House and Senate

The new Congress reflects a shift to divided government, with the Democrats controlling the House, the Republicans increasing their majority in the Senate, and a Republican president continuing to occupy the White House. This is a significant change from the “one-party rule” of the last two years in which Republican control of the House, Senate, and White House produced the massive 2017 tax legislation commonly called the Tax Cuts and Jobs Act (or “TCJA”)—and from the 111th Congress in which Democratic control of the House, Senate, and White House resulted in enactment of the Affordable Care Act in 2010.

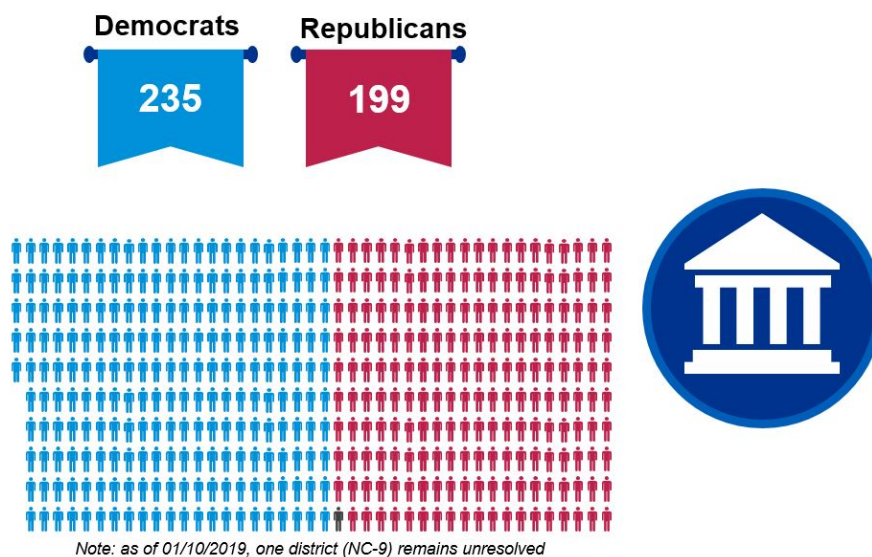
U.S. House of Representatives

In general

At the start of the 116th Congress, the House consists of 235 Democrats and 199 Republicans (with one seat still undetermined).¹

¹ As of publication date, election officials in North Carolina had not certified the results of the November 2018 election for the congressional seat in NC-9 due to a variety of allegations of election irregularities. At the time this publication was released, it was unclear how the matter would be resolved and when a representative for the NC-9 congressional seat would be sworn in to join the 116th Congress.

The U.S. House of Representatives - 116th Congress



In the House, the majority party controls the legislative agenda, sets the rules for the consideration of legislation, and chairs the committees. Further, it only takes a simple majority to pass legislation in the House, thereby allowing Democrats to pass legislation without the support of any Republican lawmakers—if House Democrats can remain sufficiently united.

Approximately 90 new “freshman” members (60 Democrats and 30 Republicans) entered the House in January. It seems inevitable that these freshmen will try to make their presence known. With over 25% of the Democratic caucus new to Congress, it will be interesting to see the influence that the largest Democratic freshman class in decades will exert upon the priorities, operations, and policies of the House. Indeed, the newly expanded Democratic caucus may soon see itself facing a mirror image of the Moderate-Conservative-Tea Party divide that challenged leaders of prior Republican House majorities.

The freshman Democratic class is itself divided, including progressives from “solidly blue” districts as well as more moderate members from other districts (such as districts that were represented by Republicans in the prior Congress) who may be more receptive to business concerns. With broad-ranging views and competing priorities, achieving

intra-party consensus within the Democratic caucus could prove to be challenging at times.

Leadership

Shortly after the new House convened, Rep. Nancy Pelosi (D-CA) was elected to be Speaker of the House, a post she previously held from January 2007 to January 2011. Speaker Pelosi replaced outgoing-Speaker Paul Ryan (R-WI). First elected to Congress from the San Francisco area in 1987, Speaker Pelosi has led the House Democrats since 2003 and is the highest-ranking elected woman in American history.

Assisting Speaker Pelosi with her charge of leading the Democratic caucus are Democratic Majority Leader Steny Hoyer (D-MD) and Democratic Whip James Clyburn (D-SC). The Pelosi-Hoyer-Clyburn triumvirate has led the House Democrats for over a decade.

With the retirement of former Speaker Paul Ryan (R-WI), the former number two and number three Republican leaders—Kevin McCarthy of California and Steve Scalise of Louisiana—were elected to move up to the number one and number two positions, respectively, on the Republican side.

House Leadership - 116th Congress



New House rules

In its first week in session, the House approved new rules, some of which might have an impact on tax legislation. Some of these rules will be referenced later in this report.

For example, the new rules include:

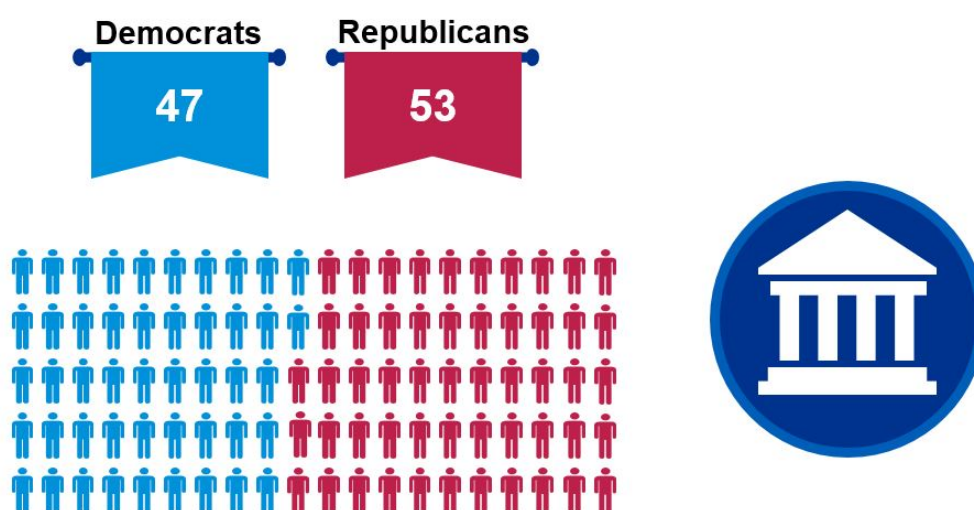
- Elimination of the requirement of a three-fifths supermajority for increasing taxes.
- Reinstatement of a House PAY/GO rule, which generally establishes a point of order against entitlement or revenue bills that would increase the deficit. In other words, revenue offsets would be required for bills that would lose revenue over a 5-year or 10-year budget window. The rule could be waived, however, by majority vote, if permitted by the Rules Committee.
- Repeal of the requirement that revenue estimates include an estimate of the macroeconomic effect of legislation (often referred to as "dynamic scoring").
- In effect, a requirement that most bills go through a committee with jurisdiction.
- A requirement that the House consider a bill with 290 co-sponsors, regardless of committee action.
- A new self-executing rule that would temporarily suspend the debt limit upon passage by the House of a budget resolution. Senate approval, generally requiring 60 votes, would still be required for suspension of the debt limit, however.
- A requirement that the legislative text of a bill be available at least 72 hours before a vote on the House floor.
- Elimination of term limits for committee chairs and members of the Budget Committee.

U.S. Senate

In general

At the start of the 116th Congress, the Senate consists of 53 Republicans and 47 Democrats (counting as Democrats two Independents who caucus with the Democrats). This reflects a net gain of two seats by Republicans in the November 2018 election.

The U.S. Senate - 116th Congress



While a number of actions can take place in the Senate with a simple majority vote—such as the confirmation of certain Administration officials and federal judges—passage of legislation generally requires the support of 60 senators to avoid a filibuster. Thus, with Republicans holding fewer than 60 seats, at least seven Democratic votes would be required in most situations for legislation to move through the Senate (absent a change in Senate rules governing filibusters). The general need for 60 votes, possible exceptions to this general rule, and the application to tax policy are discussed later in this report.

A long-standing Senate PAY/GO rule generally provides a process to challenge the consideration of revenue and mandatory spending legislation that is projected to increase the on-budget deficit

in any one of four different time periods: the current fiscal year, the budget year, a 6-year budget period or an 11-year budget period.

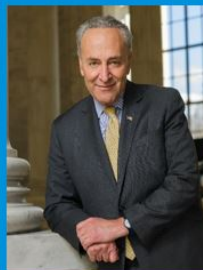
Leadership

Senate leadership for the 116th Congress largely remains the same as in the prior Congress, with Mitch McConnell (R-KY) as Senate majority leader and Chuck Schumer (D-NY) as minority leader. Richard Durbin (D-IL) was elected to continue his post as minority whip while John Thune (R-SD) was elevated to majority whip, replacing former majority whip John Cornyn (R-TX) who was prevented from seeking an additional term in the position due to Republican caucus term limit rules.

Senate Leadership - 116th Congress



Majority Leader McConnell (R-KY)



Minority Leader Schumer (D-NY)



Majority Whip Thune (R-SD)



Minority Whip Durbin (D-IL)

The tax-writing committees

The tax-writing committees in the House and Senate—the House Committee on Ways and Means and the Senate Committee on Finance—play key roles in the analysis, development, and drafting of modifications to the tax law. As indicated above, changes in House rules may help secure the role of committees in the House legislative process by limiting the application of the top-down leadership-driven model that had been seen to an increasing extent in prior years.

With the ability of individual tax-writing Committee members to influence the substance and shape of tax legislation, a familiarity with the leadership and membership of these Committees can be

important to understanding the possible future tax policy agenda of Congress.

House Ways and Means Committee

Congressman Richard Neal (D-MA) is the new chairman of the tax-writing committee in the House—the Ways and Means Committee. Chairman Neal replaces former Chairman Kevin Brady (R-TX), who will move to serve as the ranking Republican on the Committee. With the chairmanship comes the ability to set the agenda for the Committee's focus and activities for the next two years.

Ways and Means Chairman Richard Neal



Richard Neal has represented the First Congressional district of Massachusetts since 1988 after previously serving as the mayor of Springfield.

He first joined the Ways and Means Committee in 1993 and has served as the Committee's top Democrat since 2017.

During his tenure as a member of the Ways and Means Committee, he has worked to modify the tax code in a variety of ways to prevent the "offshoring" of American jobs, to encourage retirement savings, to increase the deductibility of health care and education expenses, among other issues.

Upon his nomination as Ways and Means Chairman, Mr. Neal announced his intention to lead the committee to "...immediately work to enshrine health care protections for pre-existing conditions, shore up retirement savings and push for infrastructure investments...." Additionally, Mr. Neal indicated that Ways and Means could begin holding hearings on an infrastructure package as early as February; that he plans to look at possible tax changes to help "stave off the looming retirement savings crisis;" and that he would consider possible changes to the tax "overhaul" that was enacted in 2017.²

Based on announcements by Chairman Neal and Ranking Member Brady, the Ways and Means Committee consists of 25 Democrats and 17 Republicans. Eleven of the Democrats and three of the Republicans are new to the Committee. Thus, the ratio of majority (Democratic) members to minority (Republican) members is 25 to 17. By comparison, in the prior Congress, the ratio of majority (Republican) to minority (Democratic) members was 24 to 16. Because only a simple majority of the Committee is required to approve legislation, it would be possible for Ways and Means to favorably report tax legislation with only Democratic votes.

² Richard Neal [press release](#) 12/21/18, "U.S. rep. Richard Neal says Ways and Means Committee to prioritize health care protections, retirement savings."

House Ways and Means Committee membership

Majority

Chairman Richard E. Neal, MA
 John Lewis, GA
 Lloyd Doggett, TX
 Mike Thompson, CA
 John B. Larson, CT
 Earl Blumenauer, OR
 Ron Kind, WI
 Bill Pascrell Jr., NJ
 Danny Davis, IL
 Linda Sánchez, CA
 Brian Higgins, NY
 Terri Sewell, AL
 Suzan DelBene, WA
 Judy Chu, CA
 Gwen Moore, WI
 Dan Kildee, MI
 Brendan Boyle, PA
 Don Beyer, VA
 Dwight Evans, PA
 Brad Schneider, IL
 Tom Suozzi, NY
 Jimmy Panetta, CA
 Stephanie Murphy, FL
 Steven Horsford, NV
 Jimmy Gomez, CA

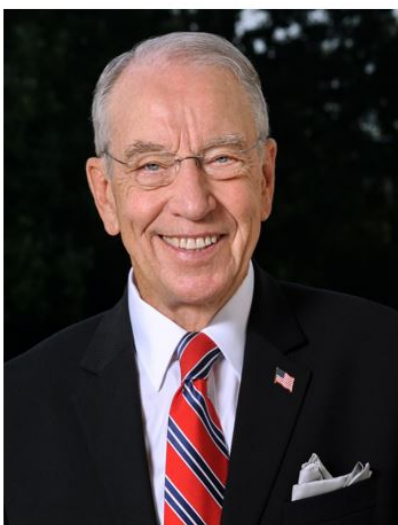
Minority

Ranking Member Kevin Brady, TX
 Devin Nunes, CA
 Vern Buchanan, FL
 Adrian Smith, NE
 Kenny Marchant, TX
 Tom Reed, NY
 Mike Kelly, PA
 George Holding, NC
 Jason Smith, MO
 Tom Rice, SC
 David Schweikert, AZ
 Jackie Walorski, IN
 Darin LaHood, IL
 Brad Wenstrup, OH
 Jodey Arrington, TX
 Drew Ferguson IV, GA
 Ron Estes, KS

Senate Finance Committee

Senator Charles Grassley (R-IA) is the chairman of the Senate Finance Committee. Chairman Grassley is a familiar presence as he has served as chairman of the Committee twice before. Republican caucus term limits for Committee leaders make the 116th Congress the last Congress in which Senator Grassley will be eligible to lead the Finance Committee.

Senate Finance Chairman Charles Grassley



Senator Charles Grassley (R-IA) will return as Chairman of the Senate Finance Committee in 2019 after previously serving as the committee's chairman from January 2001 to June 2001 and from January 2003 to January 2007 as well as ranking member from June 2001 to January 2003 and from January 2007 to January 2011.

Chairman Grassley has represented Iowa in the Senate for 38 years since his election in 1980. As the longest serving member of the majority party, Chairman Grassley has been elected as the Senate president pro tempore. Due to this position, Chairman Grassley is currently third in the line of presidential succession following Vice President Pence and Speaker Pelosi.

Senator Grassley has indicated that his priorities for the new Congress include:

- making permanent a number of temporary provisions of the 2017 tax reform law;
- improving retirement savings;
- protecting taxpayer rights and modernizing the IRS;
- encouraging innovation and research and development (R&D); and
- enhancing the competitiveness of U.S. businesses.³

Additionally, given Chairman Grassley's reputation as an advocate for whistle-blower protections and strong oversight, the Finance Committee can be expected to make investigations and oversight matters a priority under his leadership.

The Finance Committee includes 15 Republican members and 13 Democratic members. Reflecting the overall increase in the GOP Senate majority, this two-seat Republican majority on the Finance Committee is an increase from the one-seat majority in the prior Congress.

It is likely that the increase in the ratio of Republicans to Democrats on the Finance Committee will make it easier for Republicans to pass Committee legislation with the required simple majority without requiring the support of any Democrats. Nonetheless, despite the partisan nature of 2017's major tax legislation (i.e., the TCJA), Senate Finance Committee members have had a history of frequent bipartisan cooperation in the tax arena.

Senate Finance Committee membership

Majority	Minority
Chairman Charles Grassley, IA	Ranking Member Ron Wyden, OR
Mike Crapo, ID	Debbie Stabenow, MI
Pat Roberts, KS	Maria Cantwell, WA
Mike Enzi, WY	Bob Menendez, NJ
John Cornyn, TX	Tom Carper, DE
John Thune, SD	Ben Cardin, MD
Richard Burr, NC	Sherrod Brown, OH
Johnny Isakson, GA	Michael Bennet, CO
Rob Portman, OH	Bob Casey, PA
Pat Toomey, PA	Mark Warner, VA
Tim Scott, SC	Sheldon Whitehouse, RI
Bill Cassidy, LA	Maggie Hassan, NH
James Lankford, OK	Catherine Cortez Masto, NV
Steve Daines, MT	
Todd Young, IN	

³ Floor remarks by Senator Grassley of Iowa on Senate Finance Committee Tax Priorities for the 116th Congress, 12/12/18

The general legislative process

The Democratic-controlled House and the Republican-controlled Senate can be expected to have quite different legislative priorities, including in the area of tax. The need for House, Senate, and president to agree for legislation to become law can be expected to greatly limit what may be accomplished. There may be some areas of agreement, however, so it is important to understand the general legislative process.

House

In the House, the majority party generally controls the legislative agenda and it only takes a simple majority to pass legislation. Thus, it would not be surprising for the House to pass some legislation (including tax legislation) reflecting its priorities with only Democratic votes. The critical question is to what extent the House also might consider some legislation with bipartisan appeal that could be agreeable to the Republican-controlled Senate and the White House—and whether any tax provisions might be part of such legislation. Possible tax issues that potentially could elicit bipartisan support are discussed more in the [Possible Tax Agenda](#) section of this report.

Senate

Under current Senate rules, 60 votes are generally needed to avoid a filibuster of legislation. Thus, barring a change to long-standing Senate rules to modify various filibuster-related procedures (a very controversial process known as the “nuclear option”),⁴ the support of at least some Democratic senators generally would be needed to achieve this 60-vote threshold—that is, some level of bipartisan support would be required for tax legislation to move through the Senate. With an increased Republican majority but a politically charged atmosphere, it remains to be seen whether securing 60 votes might be easier in this Senate than was the case in the prior two years.

⁴ Maintaining the 60 vote/filibuster standard has long enjoyed overwhelming bipartisan support in the Senate.

There is an alternative to the general Senate rules—known as “budget reconciliation”—pursuant to which some types of legislation (including certain tax measures) can be approved in the Senate with only simple majority support. These are the procedures the 115th Congress used to pass the 2017 major tax legislation commonly called the TCJA without the support of any Senate Democrats. However, the use of budget reconciliation to move tax legislation through the Senate in the 116th Congress is unlikely due to the “divided” Congress. As a threshold matter, using this process requires that both the House and the Senate agree on and pass a budget resolution. This resolution creates “reconciliation instructions” charging specified committees to report legislation in the form of a “reconciliation bill” that achieves certain revenue objectives. It would be quite surprising for the Democratic-controlled House to agree to a budget resolution that would allow the Senate Republican majority to move tax legislation without requiring any Senate Democratic votes.⁵

Thus, as a practical matter, any tax legislation that passes the Senate in the 116th Congress is almost guaranteed to enjoy bipartisan support—increasing the odds that the House and Senate ultimately might be able to reach consensus on such legislation and that the legislation might become law.

President

It is not clear how President Trump will work with congressional Democrats as this Congress progresses. Moreover, it is not clear to what extent the “rocky start” of their relationship during the partial government shutdown may affect their future interactions.

⁵ Even if a budget resolution could be passed, keep in mind that, at least under current budget reconciliation rules, various procedural limitations can constrain the substance of the legislation, making it difficult to address provisions that have no revenue effect (like technical corrections) or that increase the deficit outside the 10-year window (like making last year’s temporary individual tax cuts permanent without offsets).

Nonetheless, the Trump Administration can be expected to work closely with Republicans in the Senate in an effort to ensure that any legislation (including tax legislation) that passes the Senate is amenable to the White House. Indeed, Senate Majority Leader McConnell has to date declined to bring to the Senate floor any appropriations legislation relating to the partial government shutdown that would not be supported by the president. This could be indicative of how the Republican-controlled Senate might proceed on other issues—at least to the extent those matters raise significant policy or political concerns.

In addition, questions remain as to what the president's tax priorities during the new Congress might be; what trade-offs he might be willing to make; how his priorities might align with those of Senate Republicans; and how his decisions on tax issues might be influenced by other priority matters. Additional details regarding to what extent tax changes are a priority and what specific proposals might be supported by the Administration might be reflected in the Administration's budget proposal for the upcoming fiscal year or in the president's annual State of the Union address.

Key upcoming deadlines

There are a number of tax and nontax deadlines that could affect the legislative agenda. As explained later in this report, some of these might provide “vehicles” for tax provisions with bipartisan support. Some of the “dates to watch” are highlighted in the graphic below.

For example, at the time this report was published, the partial government shutdown that began in December 2018 was still ongoing and the prospects for its resolution were not yet clear. If the resolution ultimately involves extending funding for affected government agencies for a short period of time, this would potentially set the stage for another government funding showdown in the not too distant future.

Some 2019 Dates to Watch*

Date	What to Watch
Jan. 29?	State of Union address?
March 1	Debt limit suspension ends
Spring	Original due dates for 2018 returns for calendar year taxpayers – including returns that would be affected if provisions that expired at end of 2017 were extended retroactively and returns that take into account the 2017 tax act
May 31	National Flood Insurance program expires
Sept. 30	Specified health insurance policy fee & credit for health insurance costs of certain individuals expire. So do various non-tax programs, including Medicaid disproportionate share hospital cut delay, community health center funding, and certain programs for older Americans and public land
Oct. 1	FY 2020 begins (lower spending caps under Budget Control Act kick in)
Dec. 31	Various provisions expire, including: suspension of medical device tax, NMTC limitation, employer credit for paid family and medical leave, WOTC, CRAFT beverage provisions, look-through treatment of payments between related CFCs, beginning-of-construction date for wind renewable power facilities claiming certain credits in lieu of production credit, and annual health insurer fee suspension

*Depending upon outcome of negotiations regarding the partial government shutdown that began in December of 2018, government funding for some agencies could expire at some point before the start of the FY 2020 fiscal year.

Moreover, government funding for *all* agencies for the fiscal year that begins October 1, 2019, may need to be addressed later in 2019—along with the thorny issues associated with lower caps for both defense and nondefense spending that could require across-the-board reductions in government programs through sequestration under the Budget Control Act of 2011. These caps have been waived by previous Congresses, but not without difficulty, as these spending issues raise politically sensitive issues on which different members have different views and can prove to be very contentious. It is also possible that some immigration and border security issues associated with the current shutdown might remain in play, and that members may seek to attach other controversial “policy riders” as well.

In the past, legislation extending government funding has been viewed as “must pass” legislation and has sometimes served as a “vehicle” for some tax provisions on which consensus among the House, Senate, and White House can be reached. Given the contentiousness of current government funding negotiations and the generally negative political atmosphere, however, it is far from certain whether any government funding bills enacted this year might serve as such vehicles.

Adding to the agenda of “must pass” legislation that can often be politically charged, the current suspension of the “debt limit” expires after March 1, 2019. Thus, at some point—possibly in summer or fall of 2019—Congress will again need to suspend the debt limit so that the Treasury can continue to issue debt. In recent years, suspension of the debt limit has often been a controversial measure in Congress. As a very general matter, historically, most Democrats have supported debt limit suspensions; however, some conservative Republicans have opposed such measures. Nonetheless, it remains to be seen whether and to what extent this year’s debt limit vote may be contentious. Indeed, depending upon how the current shutdown is resolved, it is possible that immigration and border security issues—as well as other issues—on which congressional Democrats, congressional Republicans, and the White House may be far apart could become part of debt limit discussions, making reaching consensus even more difficult.

Like government funding legislation, addressing the debt limit, in the past, has sometimes served as a vehicle for some tax provisions. However, in the current environment, recent precedent might not prove to be a reliable indicator of what happens during this Congress.

As also illustrated in the above graphic, there are a number of upcoming deadlines directly related to tax. For example, a number of tax provisions expired at the end of 2017.⁶ Calendar year taxpayers will be filing their 2017 tax returns soon, making the question as to whether some or all of those provisions might be extended retroactively more urgent—and likely increasing the political pressure exerted by affected taxpayers on both Democrats and Republicans to act soon. Further, some additional tax provisions expired at the end of 2018⁷ and others expire later in 2019. If Congress addresses the “2017 provisions” early in the year in light of the filing season, it is possible, although far from certain, that some of these other provisions might be addressed at the same time.

⁶ See [JCX-5-18](#) for a list of federal tax provisions that expired in 2017.

⁷ See, e.g., [TaxNewsFlash](#) regarding expiration of oil spill excise tax and [TaxNewsFlash](#) regarding lower coal excise tax rate beginning in 2019.

As discussed earlier in this report, the House might spend time on, and might even pass, some legislation that reflects mostly Democratic priorities—legislation that the Republican-controlled Senate may not take up or on which the two chambers cannot reach agreement. For example, although it's far from certain (particularly given different views among different House Democrats), it is within the realm of possibility that the House might consider legislation addressing immigration reform, clean energy, health care, public housing, gun control, or corporate monopolies—areas that the Senate might not even deliberate.

It is also worth noting that, early this year, many taxpayers will be filing their first returns that reflect the enactment of the TCJA. Thus, many individuals will see to what extent their tax liability decreased or increased as a result of the TCJA, to what extent they receive refunds or owe money given the revised withholding tables, and what the personal impact is of temporary changes to the individual tax rules, such as the rate changes, increased standard deduction, repeal of the individual AMT, and the limit on the SALT deduction. At the very least, it seems likely that the filing season will provide an opportunity for members of Congress to highlight what they view as positive or negative about the TCJA and the overall tax system—and it could provide a backdrop for “messaging legislation.” ([See discussion of the possible tax agenda below](#)).

The possible non-tax agenda

Congressional agendas can be unpredictable—especially when control is divided between Republicans and Democrats. Still, certain non-tax items (including both legislative and oversight matters) seem likely to receive considerable effort and time in the coming year. Moreover, as indicated in the above discussion of key upcoming deadlines, upcoming spending and debt limit issues could prove contentious.

Indeed, the fact that the new Congress convened in the middle of a partial government shutdown has already shifted issues associated with the shutdown to the front burner, including how to fund the government and for how long, and whether additional money should be allocated to certain specific border security measures. The contentiousness associated with resolving the shutdown could affect the general dynamic between the House and Senate, Republicans and Democrats, and, of course, the White House and Congress going forward.

Further, several of the new House Democratic committee chairs have vowed to use the oversight power vested in their committees to examine both the Executive Branch generally and, potentially, the president specifically. There could be, by some accounts, dozens of such investigations launched in the coming year. These actions could dim prospects for bipartisan cooperation in other areas, making reaching consensus on much future legislation difficult.

As discussed below, by affecting both the schedule and the overall political atmosphere, the nontax agenda may affect the likelihood that bipartisan and bicameral consensus can be reached on significant tax legislation.

Possible tax agenda

Overview

As noted above, the direction of the 116th Congress remains murky, and this lack of clarity certainly includes the tax agenda. This is a notable difference from the early days of the 115th Congress—where it was evident that the Republican-controlled House and Senate would aggressively pursue tax reform to the virtual

exclusion of other tax matters.

With divided control of the 116th Congress, it seems likely that one or both chambers will pursue some legislation reflecting the priorities of their respective majorities, but not with the intention of that legislation actually becoming law. Rather, separate Democratic and Republican proposed legislation could serve as “messaging” pieces for 2020 voters. It is no secret that both parties will want to control the next Congress (as well as the next White House) and one way to convince voters to support them is through highlighting the parties’ varying visions for the future of the tax system.



We have already seen this debate begin to play out in 2019 with a [back](#) and [forth](#) between policymakers as to whether a substantial increase in the top marginal individual rate is good policy. The parties are likely to continue to jockey for position on tax policy throughout the coming year and beyond. Also worth watching will be intra-party squabbles on tax priorities. It is safe to say that, at least as of today, neither party speaks with a unified voice on the direction of tax policy. Whether those disparate voices come into harmony in 2019 will help set the stage for the tax debate that seems virtually certain to come with the 2020 presidential election campaigns.

Prospects for enactment of new tax laws

Prospects for actual enactment of new tax laws in the 116th Congress likely will depend on a few key factors.

First, of course, is whether the House, Senate, and White House can reach consensus on particular tax issues. This remains possible because, despite the divided control of Congress, there are a handful of issues which have received bipartisan support that could be on the agenda.

Still, even where there is a will, there must still be a way—thus, a second factor is whether there is a suitable legislative “vehicle” to which tax provisions could be attached. In some instances, tax matters may be deemed important enough to move on their own. But in many other cases, tax matters might only pass Congress by being attached to other larger and more pressing legislative vehicles.

Finally, the prospects for the foregoing two factors will likely be influenced by the overall political environment. Said differently, if the GOP and Democrats put aside bigger political differences, many possibilities are open for compromise. If they do not, then the environment may make any tax legislation unlikely in the coming year.

With this background, the discussion below tries to shed some light on some of the key questions people have been asking.

Key questions for tax policy in 2019

What about the TCJA—Might parts of it be overhauled . . . or fixed?

In 2017, Republicans in the House and Senate moved the legislation commonly known as the TCJA through the legislative process at breakneck pace. The legislation ultimately became law, but without support from any congressional Democrats. That begs the questions of to what extent the Democratic House (1) might try to reverse some of the TCJA's significant law changes or, conversely, (2) might be amenable to enacting technical corrections.

Significant changes

It is certainly possible that the House might try to advance legislation revisiting and possibly reversing some of the significant changes made by the TCJA. For example, some progressive Democrats can be expected to advocate cutting back benefits to high income individuals and businesses (like increasing top individual rates, modifying estate tax provisions, carving back the scope of 199A, increasing the corporate rate, and perhaps increasing rates of some of the key international provisions such as the so-called tax on "GILTI"). Further, some Democrats (and some Republicans) from states with relatively high state taxes are interested in [eliminating TCJA's new limit on SALT deductions](#). Restoring the full SALT deduction could prove costly and House PAY/GO rules (unless waived) would seem to necessitate offsetting tax increases elsewhere, including perhaps some of the significant changes to the TCJA listed above.

Still, given the different views among various Democrats on tax issues, it's not clear that these major changes to the TCJA could pass the Democratic-controlled House, let alone the Republican-controlled Senate. As such, the chance that major changes to the TCJA could make it to the legislative process "finish line" and become law in the 116th Congress seems low.

Conversely, in the unlikely event Senate leaders were able to secure 60 votes to move bipartisan tax legislation that would make the TCJA tax rate cuts for individuals (including high income individuals) and businesses permanent, the Democratic House would seem unlikely to agree to such legislation—plus PAY/GO rules and the possibility of revenue offsets could come into play. Thus, massive changes to the TCJA's rate structure seem unlikely in the near future.

Technical corrections

By contrast, there is a decent chance, but by no means a certainty, that at least some technical corrections to the TCJA might be enacted in the 116th Congress.

Shortly before the end of the last Congress, then-Ways and Means Committee Chairman Brady released draft legislation identifying scores of technical corrections. See [TaxNewsFlash](#). However, at least at the start of the new Congress, it appears that House Democrats will conduct a series of hearings on various aspects of the TCJA to get a better understanding of some its provisions, before agreeing to corrections or other modifications.

Nonetheless, both Democrats and Republicans can be expected to be lobbied heavily

with respect to some technical corrections (such as a correction relating to cost recovery for qualified improvement property). Therefore, there likely will be political pressure on both parties to pass legislation dealing with at least those corrections that have broad taxpayer support. As such, it is possible that some technical corrections that have been identified may be addressed this Congress, while others may not.

Moreover, keep in mind that, historically, technical corrections legislation typically has not moved on a “stand-alone” basis. Instead, technical corrections typically have been attached to other legislation in order to move forward in the process—such as legislation that is perceived as “must pass” or that has broad and deep support. Thus, although it is possible that technical corrections could move forward on their own, it seems more likely that they would be attached to some other legislation—perhaps as part of the “horse trading” that can often accompany putting together a government funding or debt limit bill.

One advantage that technical corrections may have (as compared to other tax legislation) is that, by definition, technical corrections are scored as revenue neutral. This revenue neutrality means that a technical corrections bill is, by itself, PAY/GO compliant.⁸

Might there be bipartisan consensus on some of the “expired provisions”?

As mentioned in the discussion of [key upcoming deadlines](#) above, several tax incentives related to energy, cost recovery, and other miscellaneous areas expired at the end of 2017. Returns for the 2017 year will be due soon and, although there is not complete consensus on the matter, many members of Congress (both Republicans and Democrats) would like to extend those expired items, both retroactively for 2018 and potentially prospectively as well. Accordingly, “extenders” may be an area where the House and Senate can agree to act. In fact, Ways and Means Chair Neal vowed to take up extenders early in the new Congress.

Importantly, while Congress could take up extenders as “stand-alone” legislation that has not happened often historically. More likely, extenders might need to be attached to another, and more urgent, legislative vehicle (such as a debt limit or government funding bill).

If the House and Senate do decide to address expired provisions, perhaps early in 2019, the question arises as to whether they might also extend some of the tax provisions that expired after the end of 2017 or that are scheduled to expire later this year.

As discussed above, the suspension of the medical device excise tax and the “craft beverage” provisions enacted as part of the TCJA both are scheduled to expire at the end of 2019. It’s possible that some Democrats may prefer to first try to address the upcoming suspension of the medical device excise tax as part of health care legislation—rather than to address it in extenders legislation if extenders legislation moves early this year. Likewise, it is possible that some House Democrats might prefer to defer consideration of the craft beverages provisions until they’ve completed their larger examination of the TCJA. Thus, it remains to be seen whether, how, or when these provisions might be addressed.

The increase in the coal excise tax that is dedicated to the Black Lung Disability Trust Fund falls in the category of provisions that expired after the end of 2017. However, resolving issues associated with black lung trust fund funding could be very difficult and contentious. It is possible that Congress might try to address coal excise tax issues as part of larger efforts to deal with those issues, rather than in an “extenders” bill.

⁸ Note that, even if budget reconciliation could be used for tax legislation in the 116th Congress, procedural requirements associated with the budget reconciliation rules would make it difficult for provisions (like technical corrections) that are scored as having no revenue effect to be included in such legislation. See note 5, *supra*.

It also will be interesting to see whether the House will waive PAY/GO rules in addressing “extenders” legislation—as was often the practice in previous Congresses.

Are there other issues on which there is potential for bipartisan consensus?

There are other tax issues on which bipartisan consensus may be possible and that stand a chance of making it through the entire legislative process and becoming law. For example:

- Ways and Means Chairman Neal has long been an [advocate of better tax policy addressing retirement security](#). He also introduced legislation at the beginning of the 116th Congress relating to the establishment of a Pension Rehabilitation Trust Fund and multiemployer pensions (H.R. 397, [Rehabilitation for Multiemployer Pensions Act](#)). Further, bipartisan retirement bills were introduced in the prior House and Senate ([H.R. 5282](#) and [S. 2526](#)). Thus, the House and Senate might be willing to act on tax-related retirement legislation and ultimately might be able to agree on its substance. Potential legislation addressing failing pension plans also could be a possible vehicle for retirement-related tax provisions.
- There also has been bipartisan consensus around some proposals relating to IRS administration in the last Congress. (See, e.g., [TaxNewsFlash](#) (Senate bill), [TaxNewsFlash](#) (House action), and [TaxNewsFlash](#) (House action).) It’s possible these kinds of proposals could move forward in the new Congress.
- At varying times, both Republicans and Democrats have expressed support for an enhanced commitment to infrastructure investment. President Trump has also voiced his support for new infrastructure policies. It remains possible that the new Congress could pursue an infrastructure bill. Whether Republicans and Democrats can agree on the direction of (or sources of funding for) such a bill remains to be seen. However, if infrastructure legislation moves forward, it could be a vehicle for infrastructure-related tax provisions (including both new incentives as well as revenue offsets).
- In the health tax context, there also has been bipartisan consensus in the past on delaying, or repealing, the medical device excise tax and the so-called “Cadillac tax.” Thus, it’s possible that bipartisan consensus could be reached on such matters. However, it’s also possible that larger politics surrounding healthcare could make movement of such legislation difficult.

What about a middle income tax cut paired with rate increases for businesses and upper income individuals?

Before the 2018 elections, President Trump mentioned the possibility of a middle income tax cut. He also suggested, on at least one occasion, that he might be open to the possibility of offsetting some of the revenue costs of such a cut by increasing tax rates established by the TCJA. President Trump, however, has been relatively quiet about a middle income tax cut since the elections and it is not at all clear that, if such a tax cut proposal were on the table, he would support paying for it with rate increases.

It is possible that the House might try to pass a middle or lower income tax cut that includes increased rates on businesses and high income individuals; indeed, some Democrats might be expected to advocate such an approach. Further, offsetting any tax cuts may be important to some other Democrats who are focused on the size of the deficit. Indeed, as explained above, the new House rules, in some situations, generally require the revenue costs of tax legislation to be offset by “revenue raisers” within the 5-year and 10-year “budget windows” (unless the PAY/GO rules are waived). Nonetheless, some

other House Democrats might not be supportive of raising rates. Thus, while it would not be surprising for the House to pass such legislation, it is far from certain that this would be the case.

Moreover, even if the House were to pass a middle income cut paired with rate increases for businesses or the wealthy, the likelihood of such legislation passing the Senate seems low. Indeed, it may be unlikely that Senate Republican leadership would even consider such legislation. Thus, although there's no certainty, the odds of a middle income tax cut bill that increases rates on individuals and businesses actually becoming law in the new Congress appear slim.

Might a budget bill be a vehicle for tax legislation?

As explained in the [discussion of the general legislative process](#) above, under current Senate rules, 60 votes are generally needed to avoid a filibuster of legislation. However, budget reconciliation procedures can allow some types of legislation (including certain tax measures) to be moved forward in the Senate with only a simple majority vote.

Although the 115th Congress used these procedures to pass the TCJA in the Senate with only Republican votes, the use of budget reconciliation to move tax legislation through the current Senate appears unlikely—in large part because of the threshold requirement that the House and Senate agree on and pass a budget resolution. As noted above, it would be surprising for the Democratic-controlled House and the Republican-controlled Senate to reach agreement on a budget resolution that would allow the Senate to move tax legislation with fewer than 60 votes.⁹

Might there be other vehicles for tax legislation?

As mentioned above, it's possible that some legislation—such as infrastructure or pension plan legislation—could provide a vehicle for tax provisions related to those areas. Nonetheless, as also discussed above, other tax legislation—such as legislation addressing technical corrections or extenders—might need to be added to a broader legislative vehicle to move forward in the legislative process. Indeed, tax provisions might come into play as part of the “horse trading” associated with putting together legislation that is perceived as “must pass.”

As indicated in the discussion of some [key upcoming deadlines](#), bills that address government funding or the debt limit in the past have served as vehicles for some tax provisions. That could well be the case again in this Congress. However, given the current political environment and the possibly contentious issues that may be raised by funding and debt limit bills, this outcome is far from certain.

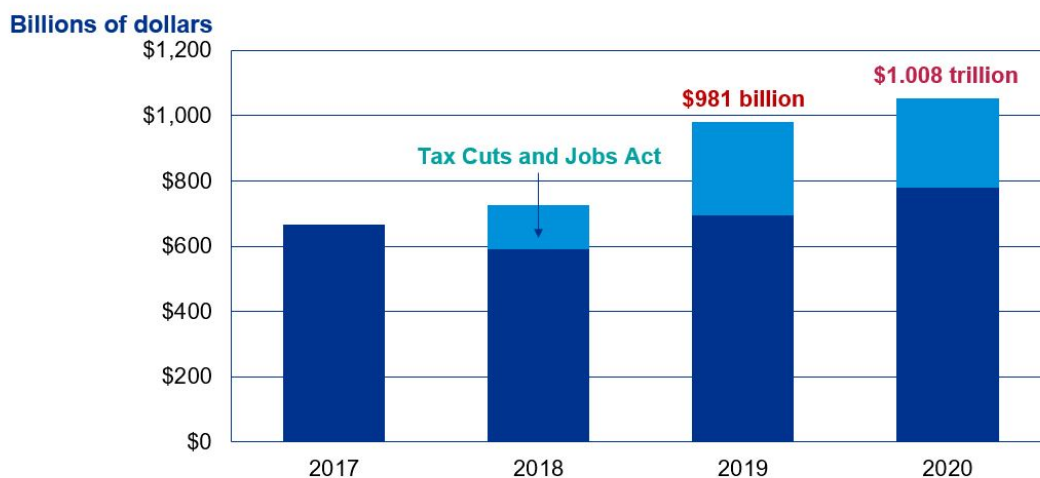
How does the size of the deficit factor into this?

Annual deficits and the growing national debt can be expected to weigh into many members' consideration of spending and revenue legislation. Indeed, one rationale for the reinstatement of the House PAY/GO rules could be to attempt to address these fiscal concerns.

The Congressional Budget Office (CBO) estimates the deficit in the current fiscal year will exceed \$900 billion and that it will exceed \$1 trillion in the 2020 fiscal year, as shown below.

⁹ See also note XX supra regarding how, under current budget reconciliation rules, various procedural limitations can constrain the design and substance of the legislation.

Projected annual budget deficits (Post-tax cuts)

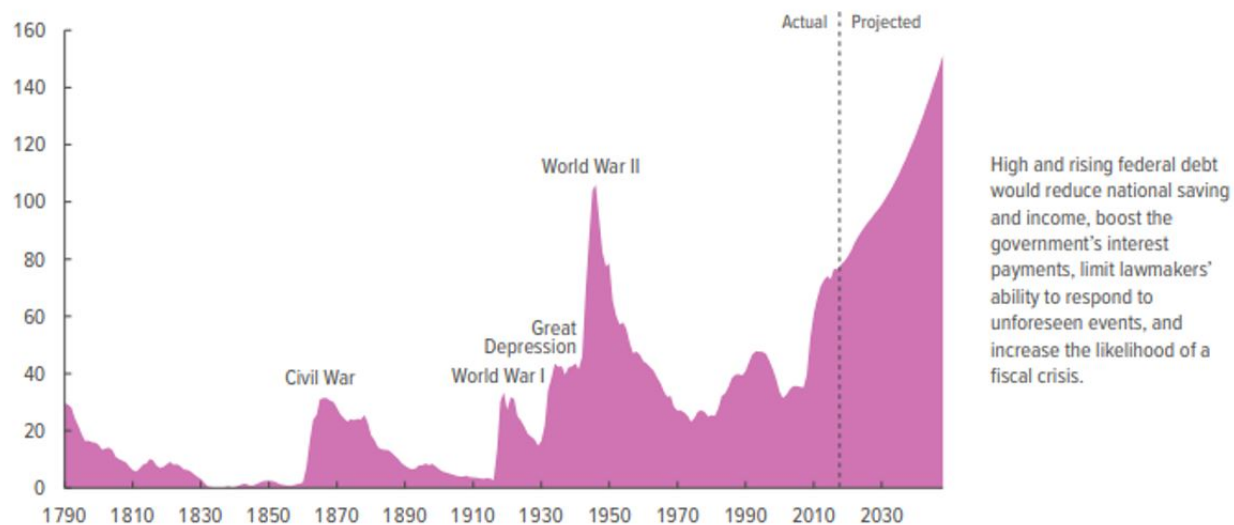


Source: Congressional Budget Office, *The Budget and Economic Outlook: 2018 to 2028* (April 2018)

While these numbers are large in absolute terms, they also are significant in relative terms. Federal debt as a percentage of Gross Domestic Product ("GDP") has been on the rise for years and CBO projects that the trend of increasing levels of debt will continue for the foreseeable future, as shown below.

Federal debt held by the public

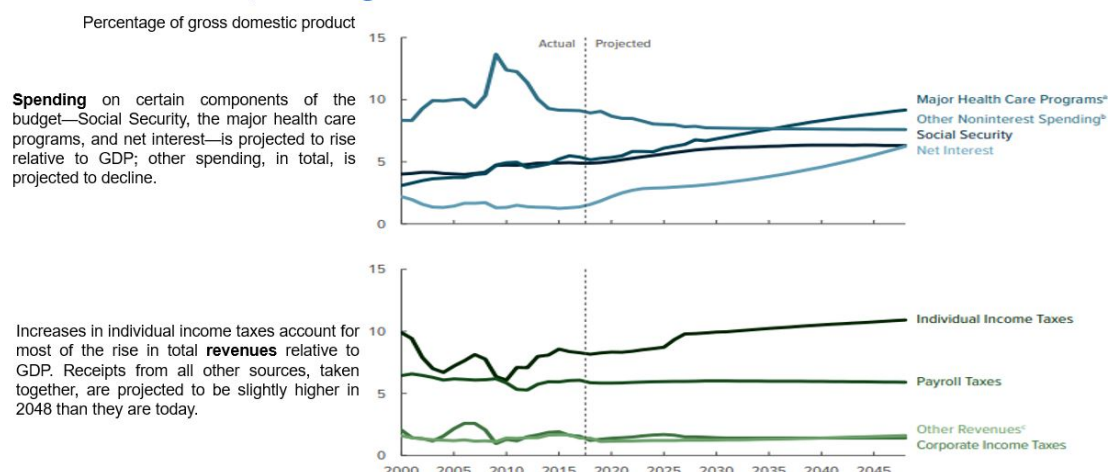
Percentage of Gross Domestic Product



Source: Congressional Budget Office, *The 2018 Long-Term Budget Outlook* <https://www.cbo.gov/system/files?file=2018-06/53919-2018lbo.pdf>

A reason for this, in addition to recent legislation reducing taxes, is projected increases in spending associated with entitlements programs. The rates of increases in spending for Social Security, Medicare, and Medicaid are expected to exceed the rate of growth in the economy significantly because of the aging of the population and the rate of inflation in the cost of health care, which has also exceeded the rate of growth in the economy.

Federal debt, spending, and revenues



- Consists of spending for Medicare (net of premiums and other offsetting receipts), Medicaid, and the Children's Health Insurance Program, as well as outlays to subsidize health insurance purchased through the marketplaces established under the Affordable Care Act and related spending.
- Consists of all federal spending other than that for Social Security, the major health care programs, and net interest.
- Consists of excise taxes, remittances to the Treasury from the Federal Reserve System, customs duties, estate and gift taxes, and miscellaneous fees and fines.

Source: Congressional Budget Office, *The 2018 Long-Term Budget Outlook* <https://www.cbo.gov/system/files?file=2018-06/53919-2018ltbo.pdf>

These projected increases in annual deficits and the national debt can present an obstacle to increased spending even for agreed national priorities, such as spending for improvements in infrastructure. Similarly, they can increase pressure both to reduce current spending and to increase revenues (either by finding new sources of revenue or by increasing current tax rates). It is this debt dynamic that leads many observers to believe that an additional source of revenue, such as a value-added tax ("VAT") or carbon tax, may be inevitable. Like most significant tax proposals, however, enactment of something as revolutionary as a VAT or carbon tax seems highly unlikely in the 116th Congress.

What about *Wayfair*—and other state-tax related legislation?

It is possible that Congress might address state taxation of online sales in light of the U.S. Supreme Court's *Wayfair* decision. In fact, on

January 3, 2019, Rep. Bob Gibbs (R-OH) reintroduced "[The Protecting Businesses from Burdensome Compliance Costs Act](#)," [40 KB] a bill that would set requirements for states with sales tax collection obligations on remote sellers and ban retroactive collection.

Nonetheless, state taxation of online sales raises difficult issues that do not necessarily break on partisan lines—and the odds of such legislation making it all the way through the legislative process and being enacted appear low. For example, many states and localities as well as other key groups contend that there is no need for federal intervention at this time. Indeed, it is not even clear that the chairman of the House Judiciary Committee (which has jurisdiction over state and local taxation) would bring legislation on this issue in front of that committee.

In addition, keep in mind that there are a variety of other state tax-related bills that have been around for a number of years. These include Mobile

Workforce Simplification, Digital Goods (setting up a uniform sourcing regime and some standard definitions), and the Business Activity Tax Simplification Act (restricting state tax authority generally by requiring a super-physical presence for sales and income taxes). These bills likewise face opposition from some key constituencies and might face a difficult path to enactment.

Rand Paul (R-KY). Tax treaties and protocols pending before the Senate Foreign Relations Committee include agreements with: Chile, Spain, Poland, Japan, Hungary, Luxembourg, and Switzerland. (Note that a treaty and protocol with Vietnam was signed in 2015 but had not been transmitted by the Administration to the Senate as of publication date.)

What about tax treaties?

It is not clear whether the impasse which has caused a years-long delay in Senate approval of a number of pending tax treaties in prior Congresses will be broken in the 116th Congress. A number of tax treaties continue to await Senate approval but have been put on “hold” by Senator



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