Congress Returns to Washington: The Fall 2023 Tax Agenda

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Today, September 12, 2023, the House of Representatives returns to Washington, joining their Senate colleagues who returned last week. As members of Congress settle back into the Capitol after the extended August recess, they face an unavoidable reality that there is much work to do and little time to do it.

While the highest priority items are not driven by tax matters, a number of tax items are under consideration and could be in play by year end. As we've seen repeatedly, taxes can simultaneously complicate year-end negotiations and grease the gears to allow a larger compromise. In the following, we outline the major issues facing Congress this fall and how congressional action in the coming months could implicate tax policy.

State of play

To date, congressional progress in addressing scheduled tax increases enacted in 2017's *Tax Cuts and Jobs Act (TCJA)* has been modest, at best. In June, the Republican-controlled Ways and Means Committee approved H.R. 3938, the *Build it in America Act,* which would defer (in some cases, retroactively) the tax increases that have already taken effect on research and experimentation (R&E) deductibility, interest deductibility, and bonus depreciation. However, it is unclear if, when, or whether, the full House of Representatives will consider the legislation.

Instead, the current focus of Congress is on annual appropriations to fund the government (and prevent a government shutdown) beyond the end of the 2023 fiscal year on September 30, 2023. Also under consideration are the needed reauthorizations of vital defense, agriculture and nutrition, air transportation, and health programs. If there is to be meaningful tax legislation enacted this year, the most likely vehicle appears to be a potential "year-end" bipartisan deal which is most likely to be seen late in the fourth quarter of the year.

With the end of the fiscal year edging closer, the possibility of a government shutdown and the expiration of some programs looms as congressional leaders and the Administration work to achieve the bipartisan agreement that will be needed to meet the deadline.

Appropriations

Congress has not yet passed any of the 12 bills necessary to fund the government for the 2024 fiscal year, which begins October 1, 2023. Partisan and House-Senate differences are substantial on many key issues, including spending levels. The narrow ten-vote Republican majority in the House and two-vote Democratic majority in the Senate complicate the path to resolution of these issues and require bipartisan agreement. The prospect of short-term extensions of government funding levels ("continuing resolutions") and a potential government shutdown looms.

The Senate Appropriations subcommittees have approved and reported all 12 annual spending bills based on spending levels agreed last year as part of the debt ceiling legislation, the *Fiscal Responsibility Act of 2023*, passed and signed in June. Just as importantly, the Senate bills were all approved by their respective subcommittees on a bipartisan basis and include no policy riders.

The House Appropriations Committee, on the other hand, has proceeded on a more partisan basis to set spending levels for its subcommittees that are more than $100 billion below the levels previously agreed to in the *Fiscal Responsibility Act of 2023*, with all the cuts directed to nondefense discretionary spending. Some Republican members of the House have expressed an interest in including policy changes addressing potentially controversial matters such as abortion rights, immigration, gender affirming care, and Justice Department programs in spending measures. Many of these spending levels and policy changes would be problematic in a Democratically controlled Senate even if bills containing these items were to gain sufficient support to pass the House.

Further complicating discussions surrounding annual appropriation matters is an Administration request for more than $40 billion in supplemental funding above and beyond annual levels for a number of items including disaster relief and additional aid to Ukraine. Although these supplemental spending requests enjoy a level of bipartisan support, resistance to additional funding for Ukraine has been growing in some congressional corners.

Other non-tax legislation

The list of other matters under congressional consideration this fall includes authorizations for a number of agriculture programs (including nutrition programs for low-income families), pandemic and all-hazards preparedness programs, and air transportation programs (FAA) which expire on September 30, 2023, and authorization for numerous defense programs scheduled to expire on December 31, 2023. Historically, reauthorization of these programs has been relatively noncontroversial.

Further crowding the fall legislative agenda are several other programs are also due for reauthorization prior to September 30, 2023, expirations, including the National Flood Insurance Program, Temporary Assistance for Needy Families (TANF), the President's Emergency Plan for AIDS Relief (PEPFAR), and the Pandemic and All Hazards Preparedness Act (PAHPA).

Tax legislation in 2023

The resolution of these substantial House-Senate and partisan differences over spending matters is expected to be a difficult and time-consuming process. It is understood that some congressional leaders have expressed support for considering a continuing resolution to fund the government at current levels until later in the fall, potentially into December.

Meanwhile, tax legislation is generally stalled in the House and Senate. The timing of 2023 tax legislation, if any, will also likely be tied to the enactment of spending legislation—either included in it, or enacted simultaneously. It is not hard to imagine negotiations proceeding up to the December holidays.

TCJA suspensions and the child credit

The *TCJA* requires amortization of R&E expenses and limits the deduction for interest expense to 30% of EBIT beginning in 2022. It also reduces 100% bonus depreciation to 80% beginning in 2023. The House Ways and Means Committee has approved legislation, the *Build It in America Act,* to extend these provisions retroactively and also prospectively through 2025. The bill has an estimated 10-year revenue cost of $47.4 billion.

Deduction for R&E expenses	$25.4 billion
Extension of interest deduction based on EBIDTA	$18.9 billion
Extension of 100% bonus depreciation	$3.0 billion

There is some level of bipartisan support for a temporary extension of these provisions. The bipartisan support for expensing R&E, in particular, is quite strong.

Attempts to extend the more taxpayer-friendly versions of these three provisions failed last year when Congress fell short in attempts to negotiate a bipartisan tax package in December. In that year-end negotiation, congressional Democrats sought expansions of the child tax credit and earned income tax credit (EITC) as a condition for their support of a business tax extenders package. Republican and

Democratic negotiators were not able to reach a bipartisan deal, resulting in these tax matters being left out of the end-of-year spending package.

The 10-year cost of permanent extension of the expanded refundable child credit and expanded EITC for workers without qualifying children provided in 2021 by the America Rescue Plan Act (ARPA), is considerable. The Congressional Budget Office estimates the budget impact of the proposals at $1.6 trillion for the child credit and $135 billion for the EITC. A shorter extension or modified expansion of the proposals would, of course, have a smaller budgetary impact. One feature, which effectively eliminates income and work requirements, has proven particularly controversial.

A negotiated bipartisan compromise addressing both the business tax extenders and the individual provisions will likely be needed for these tax items to have any chance of inclusion in spending legislation under consideration in 2023. As in 2022, the negotiations may prove to be difficult, making inclusion of these tax matters in legislation far from certain again this year.

Other business extenders

The Joint Committee on Taxation has identified a number of tax provisions that expired in 2022 or expire in 2023 or 2024. Passage of these extenders is ordinarily routine, generally accompanying year-end legislation and without revenue offsets. It is unclear, however, if or how the negotiations over the *TCJA* provisions and the child credit could impact the potential inclusion of these other tax extenders in any 2023 spending legislation.

Taiwan

The U.S. does not have an income tax treaty with Taiwan, as it does not recognize Taiwan as a nation, part of its understanding with the Peoples Republic of China. Cross-border business can, therefore, be subject to double taxation. This problem has been highlighted recently by the *CHIPS Act*, designed to foster semiconductor production in the U.S. and contemplated investment by Taiwanese producers.

To address the problem, two solutions have been proposed by congressional leaders. The Senate Foreign Relations Committee has approved legislation that would authorize the president to negotiate a tax agreement with Taiwan, subject to approval by Congress. The Senate Finance Committee is considering legislation that would accomplish much the same result by direct changes to the Code, effective upon enactment of reciprocal legislation by Taiwan. Congressional leadership has not decided which approach is likely to move forward, but there is strong bipartisan support for the concept of addressing the U.S. taxing relationship with Taiwan.

The PGA and sovereign wealth funds

The proposed merger of the PGA with Saudi-funded LIV Golf has increased congressional interest in the favorable tax treatment of sovereign wealth funds. Finance Committee Chairman Wyden introduced two bills shortly before the August recess. The *Sports League Tax-Exempt Status Limitation Act* would end section 501(c)(6) tax exempt status for large sports organizations, including the PGA. The broader *Ending Tax Breaks for Massive Sovereign Wealth Funds Act* would end some tax-favored treatment of sovereign wealth funds with more than $100 billion invested globally, unless the country has a tax or free trade agreement with the U.S. and is not classified a “country of concern” by the State Department. According to the Finance Committee, the Wealth Funds Act would apply to six countries: China, Kuwait, Qatar, Russia, the UAE, and Saudi Arabia.

It is unclear how broad support may be for the Wyden bills, being introduced shortly before the Congressional recess.

Beyond 2023—TCJA increases and Green Book proposals and OECD BEPS

Many of the individual and business tax cuts and other changes in the *TCJA* were temporary and expire in 2025. These expiring tax cuts include individual tax cuts such as changes to the individual rates, an increase in the standard deduction, and an increase in the estate and gift tax exemption. They also include business tax increases, such as changes to the deduction for foreign-derived intangible income (FDII) and an increase in the rate applied to global intangible low-taxed income (GILTI). The cost of permanently extending the TCJA cuts would have a budgetary impact of almost $3.5 trillion over a 10-year period that begins in 2023, according to the Congressional Budget Office; once the tax cuts are fully phased out in 2025, the 10-year revenue cost of reinstatement could be considerably greater.

Preventing these increases will be on the legislative agenda in 2025, although discussion of them may begin in 2024.

So, too, will international tax changes proposed by the Biden Administration in its annual budget for FY2024, details of which are laid out in the **Treasury Green Book** [PDF 2.1 MB]. Most notably, the next Congress will grapple with proposed changes to the taxation of international income designed to accommodate the OECD's BEPS Pillar Two global minimum tax, including an undertaxed profits rule.

With deeply partisan divisions over how and whether to address these major changes to individual and business taxation, these matters are not currently part of the legislative agenda under discussion and are unlikely to be a serious part of the legislative agenda in 2024. The outcome of the November 2024 elections is going to significantly impact the approach to the OECD process and upcoming expiring tax provisions. Broad changes will likely require unified party control of both houses of Congress and the White House, as was the case in 2017 for the *TCJA* or in 2022 for the *Inflation Reduction Act*, to cite two recent examples. International progress—or lack of progress—on the OECD's Pillar Two plan will also be an important factor in future changes to U.S. taxation of international income.

Conclusion

As discussed above, there is a chance Congress could enact meaningful tax changes this year, notably on the so-called "TCJA extenders" such as R&E expensing. But how great that chance is hard to predict, especially this early in the legislative process. The final resolution of the 2023 legislative agenda may not materialize until December and there are likely to be many twists and turns along the way. Still, the environment may be right for a tax bill later this year, including:

- Government funding is viewed as a must-pass bill, thereby creating a vehicle upon which the tax items could ride.
- FAA reauthorization is also likely a must pass item looking to catch a ride on the government funding legislation. FAA reauthorization involves certain tax items (airline tickets taxes, etc.) that would create a tax title on the year end bill, thus possibly paving the way for additional tax provisions.
- The government funding bill may be very large and involve numerous other spending priorities of both parties. These other items could make temporary tax changes appear relatively small in comparison; at least partially mitigating concerns related to cost.
- A delay of a final deal until December provides the House and Senate, Republicans and Democrats, more time to negotiate a compromise on the tax package including Democratic priorities like the child tax credit.

To be clear, all best efforts around taxes could, in the end, fail to achieve consensus. Congress failed to get a deal on extenders in December of 2022 and could certainly fail to do so again in December of 2023. But if Congress does not act this year, the chances of expired items getting reinstated in 2024, an election year, is even more uncertain. This makes the legislative negotiations around the budget and taxes a high stakes event for taxpayers, and one worth watching this fall.

Contact us

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