

December 14, 2018

## Washington Update

### This Week in Congress

- **House** – The House passed H.R. 3008, the **George W. Bush Childhood Home Study Act**; S. 3029, the **PREEMIE Reauthorization Act**; and the **Agriculture and Nutrition Act of 2018 (Farm Bill)**.
- **Senate** – The Senate confirmed **Justin George Muzinich** to be Deputy Secretary of Treasury; **Jonathan A. Kobes** to be United States Circuit Judge for the Eighth Circuit; the **Agriculture and Nutrition Act of 2018 (Farm Bill)**; S. 1029, the **Interstate Transport Act of 2018**; H.R. 6964, the **Juvenile Justice Reform Act**; H.R. 1872, the **Reciprocal Access to Tibet Act**; H.R. 5759, the **21st Century IDEA**; H.R. 3996, the **Protecting Access to the Courts for Taxpayers Act**; S. 1580, the **Girls’ Access to Education**; H.R. 1222, the **Congenital Heart Futures Reauthorization** and S. 3031, the **Federal Personal Property Management Act of 2018**.

### Next Week in Congress

- **House** – The House is expected to consider appropriations measures.
- **Senate** – The Senate is expected to consider the **criminal justice reform bill**.

## TAX

### Treasury/Internal Revenue Service Release Proposed BEAT Regulations

#### Key Points:

- *The Treasury and IRS issued proposed regulations for the Base Erosion and Anti-abuse Tax that address section 59A of the Internal Revenue Code enacted in the Tax Cuts and Jobs Act*
- *The proposed regulations also state that an applicable taxpayer for the BEAT is a corporation that satisfies the gross receipts test and the base erosion percentage test*
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- *The regulations are proposed to apply to tax years beginning after December 31, 2017*

On Thursday, the Internal Revenue Service (IRS) issued proposed regulations ([REG-104259-18](#)) that provide guidance on the Base Erosion and Anti-abuse Tax (BEAT). The Tax Cuts and Jobs Act (TCJA), passed last year, added section 59A, which imposes a tax equal to the base erosion minimum tax amount for

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the tax year (at a rate set at 5% in 2018, 10% in 2019 and thereafter) and also added reporting obligations for that tax for 25 percent foreign-owned corporations subject to 6038A as well as foreign corporations subject to section 6038C. For section 59A, the regulations address the application to partnerships and provide guidance for banks, registered securities dealers, and insurance companies. The proposed regulations also provide rules to prevent taxpayers from inappropriately avoiding section 59A and describe the applicable reporting and recordkeeping requirements.

The proposed regulations also provide rules that help determine if a taxpayer is an applicable taxpayer for which the BEAT may be imposed. Specifically, the proposed regulations state that an applicable taxpayer is a corporation that satisfies the gross receipts test and the base erosion percentage test. In addition, the regulations provide rules for computing the base erosion percentage for a taxpayer with deductions taken into account under a mark-to-market method of accounting. The regulations are proposed to apply to tax years beginning after December 31, 2017.

### Senate Finance Committee 2019 Outlook

#### Key Points:

- *Incoming Senate Finance Committee Chairman Grassley (R-IA) said he looks to work with Democrats to make sections of the TCJA permanent, including marginal tax rate cuts for individuals and families, the \$2,000 child tax credit, the 20-percent deduction for small businesses, and the ability of businesses to quickly recover the cost of investments in property and equipment*
- *Senators Catherine Cortez Masto (D-NV) and Maggie Hassan (D-NH) were added to the Finance Committee to replace Senators Bill Nelson (D-FL) and Claire McCaskill (D-MO)*

Incoming Senate Finance Committee Chairman Chuck Grassley (R-IA) stated his priorities for next year: bipartisanship when possible, but resistance if Democrats try to undo the 2017 Tax Cuts and Jobs Act or attempt to obtain President Trump's tax returns. Grassley added that the Committee would work to make sections of the TCJA permanent, including marginal tax rate cuts for individuals and families, the \$2,000 child tax credit, the 20-percent deduction for small businesses, and the ability of businesses to quickly recover the cost of investments in property and equipment. Grassley stated; “[t]o the extent there are legitimate efforts to perfect the tax law, I’m all ears....We should be focused on examining how the law is affecting individuals, families, and businesses in our respective states or districts.” He also indicated that he would like to work on IRS reform, retirement savings, protection of taxpayer rights, education, renewable energy, and encouragement of research and development.

Senate Democratic Leader Chuck Schumer (D-NY) announced on Thursday committee memberships for the upcoming Congress. The new changes will have Senators Catherine Cortez Masto (D-NV) and Maggie Hassan (D-NH) being added to the Finance Committee. The two new Democratic additions will be replacing Senators Bill Nelson (D-FL) and Claire McCaskill (D-MO), both of whom lost their reelection bids. Republicans will have seats to add as well to replace Senators Hatch (R-UT) and Heller (R-NV), but haven't announced their picks yet.

### Update on Lame-Duck Tax Bill

#### Key Points:

- *Ways and Means Chairman Kevin Brady (R-TX) removed tax extenders from H.R. 88 and replaced them with longer ACA tax delays, a repeal of the ACA indoor tanning*

*tax, and a partial roll back on the nonprofit politicking known as the Johnson Amendment*

- *The House did not vote on the package this week, and it is currently unclear whether the bill will receive a vote in the lame-duck session or if the tax package could be moved together with any end-of-the-year spending package*

House Ways and Means Committee Chairman Kevin Brady (R-TX) made changes to [H.R. 88](#) week that replaced tax extenders with Republican priorities such as delaying various Affordable Care Act (ACA) taxes, repealing the ACA's indoor tanning tax, and partially rolling back the ban on nonprofit politicking known as the Johnson Amendment. The bill also includes disaster tax relief measures, retirement savings proposals, technical corrections to the TCJA, and nonprofit relief such as a reversal of a TCJA tax increase on qualified employee transportation fringe benefits. While House Republicans were encouraged by the recent changes, it is still unclear whether the package will receive a vote or not in the coming weeks. Ways and Means Committee Ranking Member Richard Neal (D-MA) said that he has yet to have a discussion with Chairman Brady on the bill.

At this point, enactment of the full package not likely and it is possible no action is taken on tax measures this lame duck session. A third possibility is that the more controversial pieces are left out (tax extenders, technical corrections, proposals involving ACA taxes or the Johnson Amendment) and a slim package with retirement, IRS reform and disaster relief as its main pieces is enacted. The exact process Congress may take on any tax package remains very opaque, though Congress can and has passed an end-of-the-year tax package that travels with a spending package (but not included in the package to preserve jurisdictional and other prerogatives involving revenue measures).

*For more information about tax issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Henry Homans contributed to this section.*

## **FINANCIAL SERVICES**

### ***White House Announces Intent to Nominate FHFA Director and CFTC Chairman***

#### *Key Point:*

- *The White House announced that President Trump intends to nominate Mark Anthony Calabria to be Director of FHFA and Heath Tarbert to be Chairman of the CFTC.*

On December 11, the White House issued a [press release](#) announcing that President Trump intends to nominate Mark Anthony Calabria to serve as Director of the Federal Housing Finance Agency (FHFA) for a five year term. Calabria currently serves as the Chief Economist for Vice President Pence. His other government service includes being economist for the Senate Banking Committee and Deputy Assistant Secretary for Regulatory Affairs at the Department of Housing and Urban Development (HUD). FHFA Director Mel Watt's term expires on January 6, 2019, so an acting FHFA director is expected to be named to serve until the nominee is confirmed by the Senate.

Additionally, the White House also announced the President's intent to nominate Heath Tarbert to serve as Chairman of the Commodity Futures Trading Commission (CFTC) for a five year term. Tarbert is currently serving as Assistant Secretary for International Markets at the Treasury Department. The Senate approved Tarbert's nomination as Assistant Secretary by a vote of 87-8. CFTC Chairman J. Christopher Giancarlo's term expires on April 13, 2019.

Neither nomination is expected to be formally submitted to the Senate until after the 116<sup>th</sup> Congress begins.

### ***SEC Holds Forum on Small Business Capital Formation***

*Key Point:*

- *The event focused on the capital formation options available to small businesses.*

On December 12, the Securities and Exchange Commission (SEC) hosted its [2018 Government-Business Forum on Small Business Capital Formation](#) at the Ohio State University Max M. Fisher College of Business. The event included two panels: (1) How Capital Formation Options Are Working for Small Businesses, Such As Those in the Midwest; and (2) Diversity and Capital Formation. The event also included afternoon breakout sessions which were not broadcast. Chairman Jay Clayton said small business access to capital is a priority for the SEC. He stated that as chairman he has hosted small business groups from multiple states and held events across the country. He stated that Columbus has been rated one of the top rising cities for startups. His [prepared remarks](#) describe a number of initiatives at the SEC meant to help small businesses.

Commissioner Robert Jackson noted that he visited Ohio State University earlier in the year to discuss the challenges small and medium-sized businesses face in going public. He commended the work of the Center on the Middle Market, stating that they provide valuable research on the importance of small companies to the economy. He stated that the Commissioners understand how difficult it is to start a new company.

Commissioner Hester Peirce said she cares deeply about capital formation and the

Midwest. She expressed concern that capital formation policy discussions tend to focus only on tech startups along the coasts. She said those companies need a system that works, but stressed that the regulatory regime must work for a wide diversity of companies. She said the SEC has a responsibility to allow small companies to access capital without undue burdens. She questioned how the capital raising process can be simplified for small companies, suggesting that the offering exemptions are complex. She said accessing capital should not require Ohio companies to move to other states. Peirce questioned whether Section 404(b) of the Sarbanes-Oxley Act discourages companies from going public. She also questioned what role concerns about litigation or pressure to focus on short-term performance play in decisions about whether to go public.

Commissioner Elad Roisman described small businesses as the “life blood” of America. He stated that entrepreneurs face great challenges in starting new businesses. He said the SEC plays a key role in facilitating capital formation. He said he wants investors to have the opportunity to invest in small businesses at an early stage of growth.

### ***Democrats Announce Senate Banking Committee Membership***

*Key Point:*

- *Senators-elect Tina Smith (D-MN) and Kyrsten Sinema (D-AZ) will join the Committee, replacing Senators Heidi Heitkamp (D-ND) and Joe Donnelly (D-IN) who lost their reelection bids.*

On December 13, Senate Democratic leadership issued a [press release](#) announcing their committee assignments for the 116<sup>th</sup> Congress. The following will be the

Democratic members of the Senate Banking Committee for the 116<sup>th</sup> Congress:

Senator Sherrod Brown (D-OH) – *Ranking Member*

Senator Jack Reed (D-RI)

Senator Bob Menendez (D-NJ)

Senator Jon Tester (D-MT)

Senator Mark Warner (D-VA)

Senator Elizabeth Warren (D-MA)

Senator Brian Schatz (D-HI)

Senator Chris Van Hollen (D-MD)

Senator Catherine Cortez-Masto (D-NV)

Senator Doug Jones (D-AL)

Senator Tina Smith (D-MN)

Senator Kyrsten Sinema (D-AZ)

Senators-elect Smith and Sinema will be the new members of the Committee, replacing Senators Joe Donnelly (D-IN), and Heidi Heitkamp (D-ND) who lost their reelection bids.

Senate Republicans have not yet announced their committee assignments for the 116<sup>th</sup> Congress.

***SEC Investor Advisory Committee Meeting***

*Key Points:*

- *Chairman Jay Clayton suggested the disclosure framework based on materiality is the right framework but what goes into the framework is something they need to continually reassess.*
- *Clayton stated the SEC has set up a FinHub and they want to help people deploy technology to add efficiency in the marketplace.*

On December 13, the Securities and Exchange Commission’s (SEC) Investor Advisory Committee (IAC) convened a [meeting](#) to discuss three items: (1) the SEC’s rulemaking and regulatory efforts in 2018 and the agenda for 2019; (2) disclosures on sustainability and environmental, social and governance (ESG)

topics; and (3) unpaid arbitration awards. Chairman Jay Clayton [stated](#) disclosures on sustainability and environmental, social, and governance (ESG) topics, and unpaid arbitration awards are issues that he has been thinking about as he focuses on ensuring that the Commission carries out its mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Clayton noted that disclosure is at the heart of the country’s and the SEC’s approach to both capital formation and secondary liquidity. He suggested the concepts of materiality, comparability, flexibility, efficiency and responsibility (i.e., liability) are the linchpins of the SEC’s approach. He explained the SEC is increasingly seeing disclosure of ESG information by issuers in the marketplace and requests for ESG information by investors. Clayton stated as third-party standards have evolved and been discussed by market participants, he has seen investor-company dialogue around certain issues and in certain sectors improve. Related to unpaid arbitration awards, Clayton stated this issue is important to him given its potential impact on Main Street investors. He noted the SEC has a number of initiatives focused on protecting Main Street investors, including: a rulemaking package regarding standards of conduct for investment professionals, which is a key priority for 2019; the development of resources designed to educate retail investors and assist them in making informed investment decisions and avoiding financial fraud; the Retail Strategy Task Force designed to develop proactive, targeted initiatives to identify and deter misconduct affecting retail investors; and the list goes on.

Commissioner Kara Stein noted that this will be her last meeting as a Commissioner. She noted that many of the Committee recommendations have shaped the SEC’s actions. She expressed interest in ESG and

sustainability factors. Stein stated these factors were not traditionally included in financial statements but investors have become increasingly interested in ESG matters. She stated 43 percent of shareholder proposals in the last proxy season focused on these matters. She stated investors feel there are connections between ESG matters and a company's performance and management.

Anne Simpson (California Public Employees' Retirement System) suggested the ESG acronym sends the discussion in the wrong direction. She suggested using the term sustainability instead. Clayton suggested the disclosure framework based on materiality is the right framework but what goes into the framework is something they need to continually reassess. Allison A. Bennington (ValueAct Capital) suggested updating the disclosure requirements and ensuring the SEC is not continually piling on disclosure. Clayton agreed with the need to review the disclosure regime. He stated the SEC has learned that what people want can be contained in a much shorter document.

## **UPCOMING EVENTS**

### **December 18**

***FDIC Open Meeting:*** The Federal Deposit Insurance Corporation (FDIC) will hold an open meeting. The agenda for the meeting includes: (1) Memorandum and resolution re: Proposed 2019 Operating Budget; and (2) Briefing: Update of Projected Deposit Insurance Fund Losses, Income, and Reserve Ratios for the Restoration Plan.

### **December 19**

***SEC Open Meeting:*** The Securities and Exchange Commission (SEC) will hold an open meeting to consider six items: (1) Public Company Accounting Oversight Board (PCAOB) 2019 Budget and Accounting Support Fee; (2) Request for Comment on

Earnings Releases and Quarterly Reports; (3) Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons to Effect or be Involved in Effecting Security-Based Swaps; (4) Risk Mitigation Techniques for Uncleared Security-Based Swaps; (5) Disclosure of Hedging by Employees or Directors; and (6) Rule and Amendments to Allow Fund of Funds Arrangements.

***FSOC Open Meeting:*** The Financial Stability Oversight Council (FSOC) will hold an open meeting to discuss the Council's 2018 annual report.

### **December 20**

***National Debt:*** The House Financial Services Committee will hold a hearing entitled "The Peril of an Ignored National Debt."

*For more information about financial services issues you may [email](#) or call Joel Oswald at 202-659-8201. Alex Barham and Rebecca Konst contributed to the articles.*

## **HEALTH**

### **HHS Seeks Information on Reducing the Burdens of HIPAA Rules**

#### *Key Points:*

- *The Department of Health and Human Services released a Request for Information on ways the Health Insurance Portability and Accountability Act (HIPAA) could be modified to better support coordinated and value-based health care.*
- *Comments are due February 11, 2019.*

On December 12, the Department of Health and Human Services (HHS) released a Request for Information" seeking public input on potential changes to the Health Insurance Portability and Accountability Act (HIPAA) rules. HHS is interested in learning of ways

HIPAA can be modified to support the HHS Secretary's goal of more coordinate, value-based health care. HHS Deputy Secretary Eric Hargan said the RFI "is another crucial step in our Regulatory Sprint to Coordinated Care."

The Office for Civil Rights (OCR) is interested in ways HIPAA rules could be modified to remove regulatory obstacles and decrease regulatory burdens. OCR also seeks comment on aspects it has identified for potential modification such as: (1) promoting information sharing for treatment and care coordination to encourage covered entities to share personal health information (PHI) to other covered entities; (2) encouraging entities to share treatment information with a patient's family or caregiver with focus on the opioid crisis; and (3) modifying the requirement for providers to obtain written acknowledgement of the Notice of Privacy Practices to so entities can free up resources to focus on coordinated care without compromising transparency.

Comments on the RFI are due February 11, 2019. Read the RFI [here](#).

## Upcoming Hearings and Meetings

### December 17-18

**Naloxone:** The Food and Drug Administration will hold a joint meeting of the Anesthetic and Analgesic Drug Products Advisory Committee and the Drug Safety and Risk Management Advisory Committee to discuss strategies to increase the availability of naloxone products.

*For more information about healthcare issues you may [email](#) or call Nicole Ruzinski Bertsch or George Olsen at 202-659-8201.*

## TRADE

### **USMCA Consideration in Congress and Prospects Remain TBD**

#### *Key Points:*

- Some Democrats have called on the U.S. Trade Representative (USTR) to reopen North American Free Trade Agreement (NAFTA) negotiations or make changes.
- Mexico is unlikely to be able to pass labor laws by the U.S.-Mexico-Canada Agreement's (USMCA) January 1 deadline.
- The Trump Administration is reportedly considering beginning the NAFTA withdrawal process next week to force Congress' hand.

Multiple Democratic lawmakers said Tuesday that the USMCA must undergo changes before it can get sufficient support in Congress. Senator Brown (D-OH) said he does not "think the negotiations are done... it's not the kind of improvement the president promised." Democrats have been especially critical of the deal's labor provisions and what they see as a lack of enforceability.

Senator Brown went on to say USTR should go "back to the table with Mexico and Canada... We have no business talking about implementing legislation until the agreement's done and the agreement is contingent in part on them passing their labor law." The USMCA requires Mexico to enact legislation that will establish "(i) an independent entity for conciliation and union collective bargaining agreement registration and (ii) independent Labor Courts for the adjudication of labor disputes." Some have questioned whether Mexico's labor legislation meets the criteria of the USMCA; the bigger concern is whether it will pass by January 1 given the impending

holiday recess. Some Members of Congress have suggested they will wait for Mexico before moving any implementing legislation in the U.S. on USMCA.

President Trump told reporters after the G20 summit that he “will be terminating NAFTA shortly.” NAFTA requires six months’ notice before the U.S. can formally withdraw from the agreement. This move by the Administration would attempt to force Congress to pass the USMCA, but Representative Sandy Levin (D-MI) pushed back, stating, “[s]care tactics of the President with threats to terminate NAFTA regardless of the consequences won’t fix the problem and will likely only lead to the defeat of its replacement as now presented.” Senator Toomey (R-PA) said in May that he would vote against the USMCA if President Trump triggers a NAFTA withdrawal.

### Trade Tensions and Discussions with China Continue

#### *Key Points:*

- China made significant soybean purchases this week, and have indicated other commodity purchases like corn are expected in the near future and will reduce auto tariffs as well.
- The Chinese delegation to negotiate is not expected to visit until early in January, so negotiations have been by phone.
- President Trump said he would consider intervening in the case of Huawei CFO Meng Wanzhou, who was arrested in Canada for allegedly violating U.S. sanctions against Iran.

Discussions between China and the U.S. have been occurring, though a formal delegation visit led by U.S. Trade Representative Robert Lighthizer is not expected until early January. In early evidence of the results, China has

purchased significant amounts of U.S. soybeans this week, and is looking to purchase other commodities like corn in the near future. They also announced a reduction in tariffs on U.S. autos. President Trump suggested that he thought the agreed upon changes from the G20 meeting could be translated onto “paper” but that if not, he could impose tariffs on the remaining \$267 billion of goods from China not subject to any tariff yet (i.e., so-called List 4).

Despite that apparent progress in talks and initial results, some of the other negotiating goals about changing the Chinese approach on structural issues like forced transfer of IP and the goals of the “Made in China 2025” initiative could prove to be much harder to achieve. One U.S. trade official suggested this week that they want to see evidence of changed practices, not just accept promises of change.

In the midst of these talks, Canada arrested Huawei CFO Meng Wanzhou for possible extradition to the U.S. on a U.S. charge relating to violating Iran sanction policy. In apparent response, China took into custody two Canadians, including one who was a former diplomat. The issue of the Huawei official has raised tensions, especially in China, and those tensions could spill over to trade issues, though both sides appear to be trying to avoid that outcome.

In a relatively unprecedented move (see actions on ZTE earlier this year), President Trump told reporters regarding the case of Huawei’s CFO that he would “certainly intervene if [he] thought it was necessary.” Senator Blumenthal (D-CT) criticized this proposed move during a Senate Judiciary Committee hearing on China’s espionage practices. He argued it would set a dangerous precedent and give the appearance that the Department of Justice can be used for trade purposes. Meanwhile, incoming Finance

Chairman Grassley (who has jurisdiction over trade in the Senate) suggested he was comfortable with a trade-off involving Huawei if it made a difference in China trade talks. USTR Lighthizer and U.S. Ambassador to Canada Kelly Craft also reiterated this week that the Huawei case remains separate from any trade negotiations.

## **UPCOMING EVENTS**

### **December 18**

**ITC - U.S.-EU Trade/Impacts of Duty-free Imports:** International Trade Commission (F.R. Page 59417) holds a meeting on the "U.S.-EU Trade Agreement: Advice on the Probable Economic Effect of Providing Duty-free Treatment for Currently Dutiable Imports."

### **December 20**

**ITA/DOC – Civil Nuclear Trade Initiative:** Commerce Department (DOC); International Trade Administration (F.R. Page 62837) holds a meeting by teleconference of the Civil Nuclear Trade Advisory Committee on activities related to the DOC's Civil Nuclear Trade Initiative.

*For more information on trade issues you may [email](#) or call Christopher Hatcher at 202-659-8201. Riyad Carey contributed to this section.*

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