

## Tax Policy Update

March 13, 2018

### BILL OF THE WEEK: FY 2018 Omnibus



Source: David Rosen/Public Citizen

The March 23 government-funding deadline is just around the corner. Lawmakers are trying hard to wrap up their work on the FY 2018 omnibus spending bill, which would fund the government for the rest of this fiscal year. House Majority Leader Kevin McCarthy (R-CA) has been pushing appropriators to get a bill out by March 14 to avoid the possibility of having to do another short-term continuing resolution.

Negotiations stalled last week due to the GOP's attempt to drop a few family planning policy riders (e.g., defunding Planned Parenthood) into the \$1.3 trillion spending package. Democrats are vehemently opposed to such poison-pill additions. More than 100 riders are still under consideration according to House Minority Whip Steny Hoyer (D-MD).

The omnibus is almost certain to include [a fix for Sec. 199A](#). There may even be a short-term extension for the FAA — reauthorization is due on March 31. An updated version of the [Retirement Enhancement and Savings Act](#) or RESA (S.2526) and the [Bipartisan HSA Improvement Act](#) (H.R. 5138) are also in play for the final package.

The fate of extenders, however, is anybody's guess at this point. The *Tax Policy Update* team would be pleasantly surprised if the omnibus included another one-year extension. The House is aiming to release the text of the omnibus on March 14 with the goal of holding a vote on March 16.

## LEGISLATIVE LANDSCAPE

**Universities Fight Endowment Tax.** As part of the *2017 Tax Act*, Republicans enacted a controversial 1.14 percent excise tax on endowment returns. The tax is imposed on private universities with at least 500 students and \$500,000 of assets per student. Last year, university presidents and other industry groups unsuccessfully rallied against the tax, noting that tax would not address the cost of college or student indebtedness.

In a March 7 letter to congressional leaders, universities recycled many of the same arguments in an attempt to persuade lawmakers that the endowment tax will not have the desired effect. University presidents noted that the endowment tax “will constrain the resources available to the very institutions that lead the nation in reducing, if not eliminating, the costs for low- and middle-income students, and will impede the efforts of other institutions striving to grow their endowments for this very purpose.”

In the letter, university presidents did not offer an alternative to the tax, though universities are currently working on a proposal that would provide them with a tax credit for the amount of grants and scholarships provided to students, allowing them to attend free of cost. Some in the GOP, like Rep. Tom Reed (R-NY), have indicated a willingness to work with these educational institutions to modify the endowment tax so that it only affects universities that do not spend enough of their endowment dollar on financial assistance.

Several hurdles lie ahead for the universities. For starters, the proposal hasn't been scored, but it's likely to cost over \$1 billion. Universities also need a vehicle to attach their legislation to — top contenders are the FY 2018 omnibus and the FAA reauthorization bill. Additionally, Republicans will need support from Senate Democrats to move the endowment tax proposals.

**A Prime Opportunity for Online Sales Tax Bill.** Rep. Kristi Noem (R-SD) has been pushing to include an online sales tax measure in the forthcoming omnibus. Senate Finance Committee Ranking Member Ron Wyden (D-OR) has accused Republicans of “plotting to sneak a massive Internet tax increase into a completely unrelated federal spending bill.”

Rep. Noem's bill, the *Remote Transactions Parity Act* or RTPA ([H.R. 2193](#)), would create sales and use tax collection obligations for remote sellers, with special carve outs for small sellers.

The Supreme Court is set to hear a case on taxing remote sellers in *South Dakota v. Wayfair*. For those who have not been following closely, the *Wayfair* case would allow the Supreme Court to revisit its 1992 decision in *Quill Corp. v. North Dakota*. In *Quill*, the Court held that the states may require retailers to collect use taxes only if it has a physical presence in that state.

Of course, in subsequent decisions, given the changing e-commerce landscape, the Supreme Court has hinted towards a change in opinion. In *DMA v. Brohl*, Justice Kennedy invited Congress to pass legislation on online sales taxes. Justice Kennedy wrote, "The Internet has caused far-reaching systemic and structural changes in the economy...a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the word."

House Speaker Paul Ryan (R-WI) is gauging whether the RTPA has enough support for inclusion in the FY 2018 omnibus. This issue is not a partisan one — support depends on whether a given state levies a sales tax or not. Congressional Democrats have previously supported legislation like the RTPA. However, for members like Wyden, this bill is problematic since Oregon doesn't have a sales tax.

**One, Two, Three, Red Light.** The House Transportation and Infrastructure Committee held hearings last week on funding options for the administration's \$1.5 trillion infrastructure investment plan. It didn't take long for the gas tax issue to move into the spotlight.

Transportation Secretary Elaine Chao told lawmakers that no decisions have been made on how to pay for the proposal. She added that all funding options, including a gas tax increase, are on the table. Ranking Member Peter DeFazio (D-OR) criticized the lack of progress on identifying pay-fors.

Both DeFazio and Chairman Bill Shuster (R-PA) called on the president to engage more on infrastructure and resolve the funding question since states cannot be expected to shoulder all the costs. In DeFazio's view, without a gas tax increase, the infrastructure plan is dead in the water. Rep. Sam Graves (R-MO) argued that raising the gas tax is simply not politically feasible.

Senate Democrats have unveiled their own [\\$1 trillion infrastructure plan](#), which proposes to roll back some of the tax cuts enacted last year to help pay for investments in the country's roads, waterways, broadband network, and transit systems. The top revenue-raisers in the plan include the following:

- Restore 2017 parameters to the Alternative Minimum Tax (raises \$429 billion)
- Increase the corporate tax rate to 25% (raises \$359 billion)
- Return the top individual tax rate to 39.6% (raises \$139 billion)
- Eliminate the exemption increase for the estate tax (raises \$83 billion)
- End the preferential tax treatment of carried interest (raises \$12 billion)

Committee hearings may be the only legislative action that infrastructure proponents can get in 2018. House Ways and Means Chairman Kevin Brady (R-TX) has no near-term plans to work

on an infrastructure package — he wants to wait until there are actual pay-fors on the table. So unless some serious financing options crop up soon, lawmakers are unlikely to move legislation this year.

## LINE ITEMS

1. The IRS and Treasury released [Notice 2018-21](#) providing guidance on how to claim the payments for biodiesel mixtures and alternative fuels. It also provides guidance on the alternative fuel mixture credit and on the safe harbor for the oil spill liability tax. These provisions expired at the end of 2016 but were retroactively extended through 2017 in the *Bipartisan Budget Act of 2018*.
2. Brenda Zent, special adviser to Treasury Department's Office of Tax Policy, indicated that the IRS and Treasury are working on a second notice to address non-publicly-traded partnerships and withholding, but no specific timeframe was given. The GOP tax law imposes a withholding requirement when a foreign individual or entity sells a partnership interest. The first notice, [Notice 2018-08](#), delayed the withholding requirement with respect to publicly traded entities.

## COMMANDER-IN-TWEET



**Donald J. Trump**   
@realDonaldTrump

Follow



Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service! Gina Haspel will become the new Director of the CIA, and the first woman so chosen. Congratulations to all!

5:44 AM - 13 Mar 2018

25,309 Retweets 59,412 Likes



24K

25K

59K

## IN THE QUEUE

### Congressional Activity

*Wednesday, 3/14*

**Joint Select Committee on Solvency of Multiemployer Pension Plans**

The new joint select committee will hold an open session to organize the panel.

**House Financial Services Committee**

Subcommittee to hold a hearing on “Examining the Cryptocurrencies and ICO Markets.”

**House Budget Committee**

Hearing on “CBO Oversight: Perspectives from Outside Experts.”

**House Ways and Means Committee**

Subcommittee hearing on “Post Tax Reform Evaluation of Recently Expired Tax Provisions.”

**House Oversight Committee**

Committee hearing on the federal regulatory process.

**House Budget Committee**

Hearing on “CBO Oversight: Perspectives from Outside Experts.”

*Thursday, 3/15*

**House Financial Services Committee**

Subcommittee hearing on “Evaluating CFIUS: Administration Perspectives.”

**House Financial Services Committee**

Subcommittee hearing on “After the Breach: the Monetization and Illicit Use of Stolen Data.”

**House Appropriations Committee**

Subcommittee hearing on the FY 2019 budget request from the Department of Transportation.

**House Appropriations Committee**

Subcommittee hearing on the FY 2019 budget request from the Department of Health and Human Services.

*Friday, 3/16*

**House Financial Services Committee**

Subcommittee hearing on “Oversight of the SEC’s Division of Enforcement.”

## **Agency Activity**

*Wednesday, 3/14*

### **SEC**

Open meeting to discuss whether to propose a rule under Regulation NMS to conduct a transaction fee pilot in NMS stocks and whether to propose amendments to Form N-PORT and Form N-1A related to disclosures of liquidity risk management for open and management investment companies.

## **Other Activity**

*Friday, 3/16*

### **Heritage Foundation**

Discussion on the national security implications of withdrawing from NAFTA.

---

## **McGuireWoods Tax Policy Group:**

### **Russell Sullivan**

Partner

[rsullivan@mcguirewoods.com](mailto:rsullivan@mcguirewoods.com)

### **Rosemary Becchi**

Partner

[rbecchi@mcguirewoods.com](mailto:rbecchi@mcguirewoods.com)

### **Harold Hancock**

Partner

[hhancock@mcguirewoods.com](mailto:hhancock@mcguirewoods.com)

### **Charlie Iovino**

Vice President

[ciovino@mwcllc.com](mailto:ciovino@mwcllc.com)

### **Lai King Lam**

Assistant Vice President

[llam@mwcllc.com](mailto:llam@mwcllc.com)

### **Radha Mohan**

Assistant Vice President

[rmohan@mwcllc.com](mailto:rmohan@mwcllc.com)

### **Anne C. Starke**

Research Associate

[astarke@mwcllc.com](mailto:astarke@mwcllc.com)

### **Daniel Chung**

Associate

[dchung@mcguirewoods.com](mailto:dchung@mcguirewoods.com)

