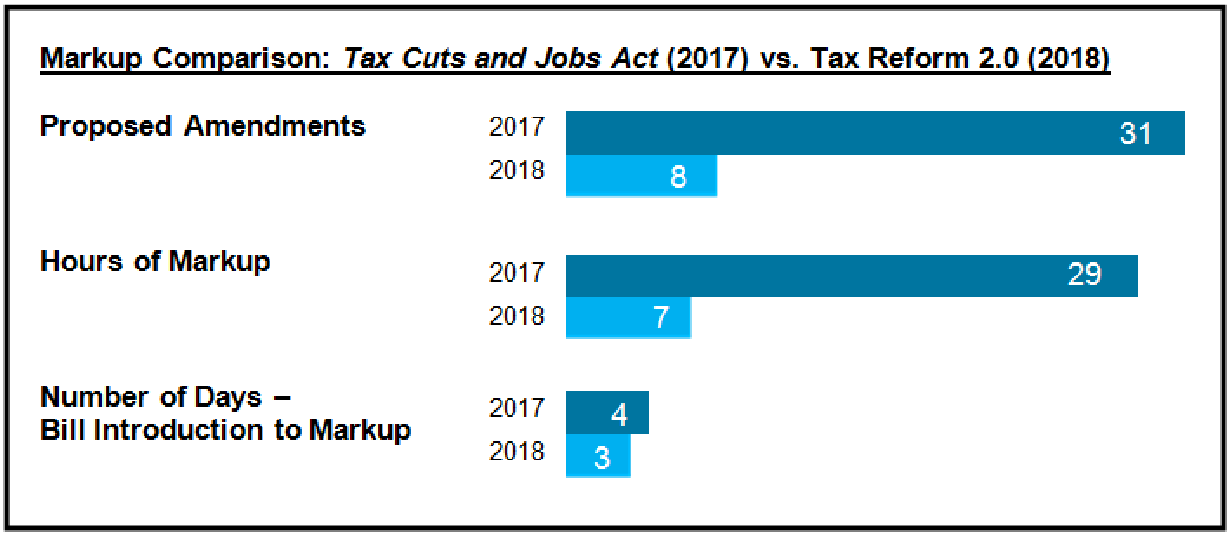
Tax Tidbit

"So what do we have? Caddyshack II, Weekend at Bernie's II, Jaws: The Revenge… The sequel is just about never as good as the original. In this case, I sure hope this Tax Scam 2.0 is just as popular as the first one." 34% popularity – can't imagine anyone in the movie business backing a sequel that's such a flop." – **The ever entertaining Bill Pascrell (D-NJ)**

Never a dull moment in the House Ways and Means Committee: On Sept.13, the tax writing committee marked up Tax Reform 2.0. While no one expected the same amount of enthusiasm for Tax Reform 2.0 as the original, even Democrats couldn't muster the same energy to attack the sequel.



After a seven hour markup, Democrats offered only eight amendments, pushing for further expansions of provisions to help lower- and middle-income Americans, paid for by modest increases on the corporate income tax rate and restoring the top marginal rate for the highest income bracket. Of course, no tax markup would be complete without an amendment demanding that the president release his tax returns.

Committee Democrats also accused Republicans of using the same tactics from last year's expedited process, focusing on the GOP's "lack of transparency" and the cost of the provisions.

Ultimately, the committee approved the Tax Reform 2.0 package. A brief breakdown of the markup and prospects for the legislation is discussed below.

Sullivan's Picks

1. ***Tax Reform: The Sequel**: We break down the important takeaways and projections following last week's House Ways and Means Tax Reform 2.0 markup.*

2. ***Just A Little GILTI**: The U.S. Treasury released its first batch of proposed rulemaking on the Global Intangible Low-Taxed Income (GILTI) provisions last Thursday, and we take the temperature on the reactions.*

3. ***The (Digital) Tax Man Cometh**: Following the consequential South Dakota v. Wayfair Supreme Court decision in June, a slew of federal legislators have introduced bills to standardize what will soon become a new frontier in online taxation. See our analysis below.*

Legislative Lowdown

TAX REFORM: THE SEQUEL. On Sept. 13, the House Ways and Means Committee marked up and approved three bills on "Tax Reform 2.0:"

- *Protecting Family and Small Business Tax Cuts Act of 2018* (H.R.6760): Would make permanent the *Tax Cuts and Jobs Act*'s individual and small business tax cuts set to expire at the end of 2025.

  The Committee approved the bill 21 – 15.

  Cost: $631 billion over 10 years.

- *Family Savings Act of 2018* (H.R.6757): Would help small businesses pool together to provide retirement plans to employees (Multiple Employer Plans) and simplify the rules for participation in employer plans. The bill also creates a new Universal Savings Account, a flexible savings tool for families. On the education front, the bill expands upon the education savings provisions of the TCJA by allowing 529 accounts to be used to pay for apprenticeship fees, home schooling, and student debt.

  The Committee approved the bill 21 – 14.

  Cost: $21 billion over 10 years.

- *American Innovation Act of 2018* (H.R.6756): Would allow new businesses to write off more of their initial startup and operational costs. It also encourages startups to expand by bringing in new investors without triggering limits on access to tax benefits like the R&D credit.

  The Committee approved the bill by voice vote.

  Cost: $5 billion over 10 years.

According to an estimate by the Joint Committee of Taxation, the full package is expected to cost $657 billion over 10 years. This is in addition to the TCJA's $1.5 trillion price tag, though the GOP has argued that the score does not account for economic growth as a result of the bill.

Speaker Paul Ryan (R-WI) indicated the House is planning to hold a floor vote on the package of bills the last week of September, giving Republicans another tax package to tout ahead of midterm elections. However, a vote on Tax Reform 2.0 may place vulnerable members of the GOP in a bind. Several Republicans from high-tax states, such as New York and New Jersey, have already indicated that they plan to vote against the package due to the inclusion of the $10,000 cap on state and local tax (SALT) deductions that will heavily impact their constituents.

Despite some members threatening to withhold their support, Tax Reform 2.0 is expected to pass in the House. However, the legislation has a zero percent chance of passage in the Senate. Without the luxury of reconciliation, at least nine Democrats would have to vote for the bill in order for it to pass in the upper chamber. On Monday, White House economic adviser Larry Kudlow noted that while making personal tax cuts permanent is a "very good idea," it is unlikely that the provision will make it all the way through Congress before midterm elections.

While Tax Reform 2.0 as a whole may be going nowhere fast, the BHFS tax team isn't writing off the entire bill just yet. The individual provisions of the *Family Savings Act of 2018* have broad bipartisan support and may be considered during the lame duck session.

For a full summary of the Tax Reform 2.0 Markup, check out the BHFS Tax Team's Alert.

LAST MAN STANDING – 2.0'S FAMILY SAVINGS ACT. Tax policy watchers should pay close attention to H.R. 6757, the *Family Savings Act of 2018*, which was marked up by the House as part of Tax Reform 2.0.

Parts of H.R. 6757 may be combined with other retirement savings measures that the Senate is interested in moving during the lame duck session this winter.

The baseline for H.R. 6757 is the House and Senate's *Retirement Enhancement and Savings Acts of 2018* (RESA), which has broad bipartisan support. Both RESA and H.R. 6757 include the following provisions, which are popular amongst the retirement community:

- **MEPS:** Enhanced flexibility for small employers to offer retirement plans for their employees by banding together through pooled employer plans. This includes eliminating the unpopular "one bad apple" penalty that would penalize or disqualify the entire arrangement if only one employer failed to meet tax and ERISA requirements. Under H.R. 6757, only the non-compliant employer would face penalties.

- **Age Limits:** Repeal of the maximum age limit of 70 ½ for making IRA contributions.

- **Income-Based Exemption:** Exemption for individuals having total defined contribution and/or IRA account balances of $50,000 or less from taking minimum annual distributions at 70 ½.

Not included in H.R. 6757, but included in RESA, was a provision that would have allowed some cooperative and small employer charity groups to benefit from lower Pension Benefit Guaranty Corporation (PBGC) premiums. The exclusion of this provision was met with heavy criticism. Instead, H.R. 6757 includes a provision that would commission an independent study of the PBGC single-employer insurance program's finances.

Check out the BHFS Tax Policy Team's detailed comparison of the House *Retirement Enhancement and Savings Act of 2018* (H.R. 5282), the Senate *Retirement Enhancement and Savings Act of 2019* (S. 2526), and the *Family Savings Act of 2018* (H.R. 6757).

MINI-BUSES, BIG SPENDING. Congress continued to hammer away at appropriations bills in the lead-up to the fast-approaching Sept. 30 fiscal year deadline.

Last week, both the Senate and the House passed the first of three FY 2019 minibus spending packages – H.R. 5895, the *FY 2019 Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act*. Both chambers also filed a conference report for H.R. 6157 – a two-bill minibus that funds the Defense, Labor, Health and Human Services (HHS), and Education Departments for FY 2019. These bills would fund almost 70 percent of federal discretionary spending for FY 2019.

For agencies that will not receive funding in the first tranche of spending bills, lawmakers on Thursday included text for a continuing resolution (CR) in H.R. 6157. The CR is a stopgap measure that would allow the government to operate at current funding levels from Oct. 1 to Dec. 7. The heads of both the House and Senate Appropriations Committees announced bipartisan support for the agreement.

Earlier this afternoon, the Senate approved H.R. 6157 by a 93 – 7 vote. The bill will now go to the House for a vote the last week of September.

The odd minibus out – H.R. 6147 – remains in conference for the Interior, Environment, Financial Services, Agriculture, and THUD appropriations bills. On Thursday, Senate Appropriations Chairman Richard Shelby (R-AL) indicated that debate over partisan House language has been a roadblock for the conference committee in reaching a consensus on the package.

Even with only four legislative days when both chambers are simultaneously in session before the end of the fiscal year, Congress will likely pass at least five out of 12 appropriations bills before the deadline. Given the recent trend of passing short-term stopgap measures to keep the government funded, this is a *major* bipartisan accomplishment for Congress.

Of course, it may be too early to breathe a sigh of relief. If the president decides to veto H.R. 6157 over funding for a border wall, a shutdown may be inevitable. However, given the large amount of funding for the Department of Defense intentionally included in this package by lawmakers, this scenario is highly unlikely.

RegWatch

JUST A LITTLE GILTI. On Sept. 13, the Treasury Department and IRS released the first of three rounds of proposed regulations on the *Tax Cuts and Jobs Act's* Global Intangible Low-Taxed Income (GILTI) provisions. Broadly, GILTI is an anti-base erosion measure that targets U.S. corporations that own Controlled Foreign Corporations (CFCs). Under Internal Revenue Code Section 951A, U.S. shareholders of CFCs must include their share of GILTI in gross income for the taxable year, effective Jan. 1, 2018.

The 157-page proposed regulations offer guidance on which assets are subject to the tax and include details on how to calculate the tax. The proposed regulations also clarify that domestic shareholders of foreign corporations will be addressed as a consolidated group, not as individual shareholders. The proposed regulations note "shareholders face uniform tax treatment on their GILTI-relevant investments, regardless of ownership or organizational structure, thus encouraging market-driven, as opposed to tax-driven, structuring decisions."

The proposed regulations do not include information on the Foreign Tax Credit (FTC) or expense allocation issues. As a result, corporations will struggle to file tax returns and other important documents. Guidance on these issues is expected in the second and third installments of the GILTI regulations.

Although it has been almost a week since their release, the proposed GILTI regulations have garnered little criticism from industry groups. Most notably, representatives from the U.S. Chamber of Commerce have indicated that they are encouraged by the new proposed rules.

OPPORTUNITY COMES ONCE IN A LIFETIME. On Thursday, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) received proposed regulations from Treasury on "Capital Gains Invested In Opportunity Zones," hinting the proposed regulations may soon be released.

According to OIRA, the proposed regulations were received for review on Sept. 12. The U.S. Treasury Department and IRS will release the proposed regulations once OIRA's review is completed.

The TCJA's opportunity zones incentivize investment in economically distressed regions of the country by outlining special tax incentives, including exclusions from capital gains taxes, for investors. Earlier this year, governors in each state identified a certain number of census tracts eligible to receive private investment through the Opportunity Zone Program over the next 10 years.

In order to take advantage of Opportunity Zones, an investment vehicle, known as an Opportunity Fund (OF), must be created by the individual or business and be organized as a corporation or partnership. The OF must be used for the purpose of investing and must hold at least 90 percent of its assets in qualified Opportunity Zone property.

Qualified opportunity funds are determined by the Community Development Institutions Fund (CDIF) within the Treasury Department. The process for allocations OFs is similar to that used by the New Markets Tax Credit (NMTC) to certify community development entities.

In anticipation of the proposed regulations, mayors from around the country met with Treasury Secretary Steven Mnuchin, requesting that the anticipated regulations not conflict with already-existing incentives to bolster investment.

Stay tuned, the BHFS Tax Policy Team will be following the release of the proposed regulations closely!

A Pinch of SALT

THE (DIGITAL) TAX MAN COMETH. On Friday, Reps. Jim Sensenbrenner (R-WI), Jeff Duncan (R-SC), Anna Eshoo (D-CA), and Zoe Lofgren (D-CA) rolled out the *Online Sales Simplicity and Small Business Relief Act*. The bill would limit state efforts to require remote sellers to collect sales tax from their customers, introduce an exemption for retailers with less than $10 million in sales nationwide, and prevent the enforcement of new sales tax collection laws before June 21, 2018, the date of the *South Dakota v. Wayfair* decision. This would effectively prevent the retroactive collection of sales tax on out-of-state remote sellers.

Rep. Sensenbrenner noted that his bill is a starting point for reining in state sales tax collection efforts in the wake of *Wayfair*.

Earlier this month, Rep. Bob Gibbs (R-OH) also released a bill aimed at easing the burden on online retail vendors. The bill – the *Protecting Small Business from Burdensome Compliance Costs Act* – would effectively prevent states from retroactively collecting sales tax from out-of-state vendors, enable vendors to pay taxes to a single jurisdiction, and require states to establish a uniform sales tax rate that cannot be higher than the highest combined rate of all local and state taxes. Rep. Gibbs noted that while the ruling leveled the playing field for many businesses, the unintended consequences of the *Wayfair* decision has "opened the door for a complex web of state and local sales taxes that would be impossible for small businesses to navigate."

For now, despite recent legislative activity, Congress does not seem inclined to move any related legislation before the end of the year. However, the bills join a growing chorus of lawmakers hoping to institute guidelines on online sales taxation. The issue may be ripe for action next Congress.

CARRY ON MY WAYFAIR, SON. It has been two months since the Supreme Court ruled in *South Dakota v. Wayfair* that states have the authority to collect sales tax from out-of-state retailers, or remote sellers. The decision, which altered *Quill Corp. v. North Dakota's* physical-presence requirement, included some suggestions for states seeking to enact legislation or regulations. This "Wayfair checklist" was intended to set up threshold requirements to help states avoid constitutional issues.

Below are the seven items recommended by the Court:

1. Businesses with limited transactions in the state should be exempt.
2. Collection cannot apply retroactively.
3. States should have only one sales tax, which is administered at the state level.
4. Products and services must have uniform definitions.
5. States should adopt a simplified tax rate structure.
6. States should ensure access to tax administration software.
7. If any errors arise from use of the tax administration software, businesses must be granted immunity.

According to a recent report released by the Tax Foundation, 32 states are in the process of enacting measures that would require sales tax collection by remote sellers. However, they are not all at the same point in the process.

For example, only ten states — Georgia, Indiana, Iowa, Kentucky, New Jersey, North Dakota, Utah, Vermont, and Wyoming — currently meet all seven of the standards outlined by the Court and are poised to proceed with their proposed measures. Thirteen states — Arkansas, Kansas, Michigan, Minnesota, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Rhode Island, Washington, West Virginia, and Wisconsin — have made less progress, completing only items three through seven on the checklist. Many of these states have yet to pass legislation exempting businesses that engage in limited transactions within the state and protecting businesses from retroactive collection.

In addition to the checklist, the Court recommended states adopt the Streamlined Sales and Use Tax Agreement (SSUTA). About half of US states have already implemented standards that follow SSUTA, which would greatly reduce the need for federal action. If Congress elects to step in and prematurely legislate on the issue, some state tax agencies have warned that this could result in additional confusion or poorly crafted federal standards.

As of now, most lawmakers are approaching the issue with caution, giving states a chance to analyze the potential consequences of *Wayfair* and craft their own legislation.

1111 Constitution Avenue

IRS EITC AUTOMATED RETRIEVAL PROCESS MAY BE A DUE PROCESS VIOLATION. On Sept. 13, the National Taxpayer Advocate, Nina Olson, released a blog post on a June report to Congress: "The IRS Has Expanded Its Math Error Authority, Reducing Due Process for Vulnerable Taxpayers, Without Legislation and Without Seeking Public Comments."

Olson noted that the math error issue highlighted in the report became an issue after the Treasury Inspector General for Tax Administration (TIGTA) found that the Internal Revenue Service (IRS) improperly paid refundable credits, including the Earned Income Tax Credit (EITC), to several taxpayers. In response, the IRS began using an automated process to retrieve improper payments of the EITC. This disproportionately impacts low-income taxpayers.

As a result, Olson's office responded that automated enforcement procedures to retroactively recover refundable EITC payments do not afford low-income taxpayers enough due process, especially for those who depend on these payments to survive. The automatic procedures fail to take into account that low-income taxpayers move frequently and often do not receive notice letters denying EITC refunds. Additionally, many impacted households also have language barriers, or may lack access to technology. Consequently, Olson argued that EITC recipients would be at a disadvantage in providing needed responses "to retain the[ir] EITC or to obtain a hearing before the Tax Court." Olson recommended that the IRS reconsider its automated procedures and instead design a more tailored solution.

RETTIG CONFIRMED AS IRS COMMISSIONER. In a rare display of Senate expediency, the upper chamber confirmed Charles Rettig to be the next Commissioner of the Internal Revenue Service (IRS). Despite Senate Finance Ranking Member Ron Wyden's (D-OR) persistent urging for his Democratic colleagues to vote against the nominee, Rettig was overwhelmingly confirmed by a vote of 64 to 33.

Commissioner Rettig will take control of an agency that has not had a permanent leader since former Commissioner John Koskinen's term expired in November 2017. Rettig will face considerable challenges ahead, including outdated technology, a lack of resources, the implementation of the *Tax Cuts and Jobs Act*, restoring trust among the public, and combating the nearly 2 million daily cyber-threats against the agency.

At A Glance

1. Last week, lawmakers in the South Dakota state legislature passed the first national online sales tax bill in the wake of the Supreme Court's landmark *South Dakota v. Wayfair* decision this past June. Signed by the governor last Wednesday, the new law would allow the state to begin tax collection on out-of-state online vendors beginning Nov. 1, and would also require marketplaces that handle payments to collect sales taxes for the sellers that use their platforms.

2. Congress has had a busy summer on the healthcare front, between a 12-bill House Ways and Means markup in July and the passage of several health tax bills by the full House. This includes the passage of several Health Savings Accounts related measures and the repeal of the medical device tax. When the House returns from recess on Sept. 25, the chamber is expected to vote on the *Save American Workers Act of 2018*, which includes a repeal of the employer mandate and a further delay of the Cadillac Tax. For a detailed overview of what Congress has been up to on the healthcare front, check out the BHFS Tax Team's write up.

3. The Senate Finance Committee approved Michael Faulkender to be an Assistant Secretary of the Treasury by a 25 – 2 vote.

Regulation Station

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
GILTI I	Sept. 13	REG-104390-18	60 Days After Federal Register Publication	
SALT	Aug. 23	REG-112176-18	23 Days	Washington Update
Executive Compensation	Aug. 21	Notice 2018-68	52 Days	Washington Update
Passthrough Businesses	Aug. 8	REG-107892-18 Notice 2018-64	12 Days	Washington Update
Full Expensing	Aug. 3	REG-104397-18	19 Days	
Education Savings	July 30	Notice 2018-58	No Comment Period	Washington Update
Higher Education Excise Tax	June 8	Notice 2018-55	Deadline Passed Sept. 6	
Carried Interest	March 1	Notice 2018-18	N/A	
Health Savings Accounts	March 5	Rev. Proc. 2018-18 Rev. Proc. 2018-27	N/A	
Opportunity Zones	Feb. 8	Notice 2018-48 Rev. Proc. 2018-16	No Comment Period	

Regulations-on-Deck

Regulation	Insight	Expected Release Date
Opportunity Zones	Last week, OMB's Office of Information and Regulatory Affairs (OIRA) specified it was reviewing proposed regulations on tax-advantaged Opportunity Zones, indicating regulations could be imminent. According to its website, the regulations will address "Capital Gains Invested In Opportunity Zones."	Week of Sept. 17
Interest Expense Limitation	Businesses with average gross receipts above $25 million must limit their net interest expense Deduction to 30% of its adjusted taxable income.	Late September
BEAT	The Base Erosion and Anti-Abuse Tax (BEAT) attempts to prevent companies from avoiding taxes by moving profits overseas to jurisdictions with lower tax rates.	Late October
GILTI II	Due to the complexity of the global intangible low-taxed income (GILTI) provisions, Treasury will release proposed regulations in three stages. The second phase, expected within the next two months, will likely include guidance on foreign tax credits and the allocation of business expenses.	November
FDII	The Foreign-Derived Intangible Income (FDII) provision gives corporations partial tax deductions for goods and services employing	Late November

	intellectual property that are made in the US and sold abroad.	
Subpart F	Last year's tax law imposes an obligatory Subpart F inclusion on shareholders with at least 10% of specified foreign corporations (SFC). Taxpayers must pay the higher of net post-1986 accumulated earnings and profits of the SFC as of Nov. 2, 2017 or Dec. 31, 2017.	Late December

Brownstein Bookshelf

1. Listen to the BHFS Tax Policy Group's inaugural podcast in which the team covers John McCain's tax legacy, Tax Reform 2.0, the Treasury Department's flurry of regulatory activity, and what to expect from Congress during the lame-duck session this fall.

2. In 2018, Brownstein is celebrating its 50th birthday. Learn more about our half century of policy expertise here.

3. Check out BHFS Tax Policy Team's detailed comparison of the House *Retirement Enhancement and Savings Act of 2018* (H.R. 5282), the Senate *Retirement Enhancement and Savings Act of 2019* (S. 2526), and the *Family Savings Act of 2018* (H.R. 6757).

4. **What We're Reading:** If Republicans are successful in passing Tax Reform 2.0, how will you make the most of the retirement provisions? Get CNBC's inside scoop on the best practices.

Poll of the Week

Chairman Kevin Brady (R-TX) made it abundantly clear during Thursday's markup that, for him, *Mission: Impossible* – *Fallout* exemplified the height of cinematic sequels. What about you? Vote on your favorite sequel from the Tax Reform 2.0 markup here.

The Week Ahead

Congressional Activity

Tuesday, September 18

Senate Banking, Housing, and Urban Affairs Committee
Fintech: Examining Digitization, Data, and Technology

Agency Activity

Tuesday, September 18

Department of the Treasury
The Federal Advisory Committee on Insurance will meet to discuss public sector risk and risk transfer and the activities and priorities of the Federal Insurance Office

Thursday, September 20

Securities and Exchange Commission
Roundtable on package of rulemakings and interpretations to enhance the quality and transparency of investors' relationships with investment advisers and broker-dealers while preserving access to a variety of types of advice relationships and investment products

Other Activity

Tuesday, September 18

American Bar Association
The Forgotten Transfer Tax: Generation-Skipping Transfer Tax

American Bar Association
Using Income Averaging in Low Income Housing Tax Credit (LIHTC) Projects - Current Industry Updates

Urban Institute
Credit in America: Myth Busting and Case Making to Expand Credit Building for Low-Income Americans

Thursday, September 20

Urban Institute
Costs and Benefits of Tax Regulations: Exploring Treasury's and OMB's New Responsibilities

American Bar Association
Understanding the New Guidance on Section 199A