

TUESDAY, SEPTEMBER 25, 2018

BHFS Federal Tax Policy Team

TAX TIDBIT

With the midterm elections just weeks away, both parties have been hitting the campaign trail hard, strutting their stuff to win over voters.

Below are the issues candidates are talking about most:

House				Senate			
Democrat	% of Airings	Republican	% of Airings	Democrat	% of Airings	Republican	% of Airings
Healthcare	63%	Pro-Trump	35%	Healthcare	28%	Taxes	32%
Anti-Trump	38%	Taxes	27%	Jobs	25%	Pro-Trump	22%
Medicare	19%	Immigration	25%	Energy & Env	16%	Corruption	20%
Pro-ACA	16%	Budget	15%	Corruption	15%	Healthcare	19%
Gun policy	15%	Healthcare	15%	Manufacturing	13%	Budget	18%

Source: Kantar Media/CMAG with analysis by the Wesleyan Media Project. June 5 through July 29, 2018.

Although House Republicans are advertising their success on cutting individual and corporate taxes, internal polling conducted by the Republican National Committee reveals that 61% of respondents believe “large corporations and rich Americans” have largely benefited from the GOP tax plan, as opposed to 30% who think “middle class families” have come out on top.

Listen to the BHFS Tax Policy Group discussed Tax Reform 2.0, the midterm elections, and more in their latest [podcast](#).

SULLIVAN'S PICKS

1. ***Paying the Bills:*** *The House and Senate have been rushing to pass funding measures to avoid a partial government shutdown; with less than a week to go, only one minibus has been cleared for the Roosevelt Desk.*
2. ***A Boatload of Safe Harbor Provisions:*** *We've got you covered on the new guidance released regarding modified explanations of safe harbor provisions and eligible retirement rollover distributions under IRC section 402(f).*

THE DEEP DIVE

Legislative Lowdown

Paying The Bills. After months of trying to pass spending packages, we've made it to the final stretch with Congress pushing through the final week before the Sept. 30 deadline. Let's clear the dust a bit—where do we stand?

Following a Sept. 12 agreement, only one minibus—the *Energy and Water Development, Legislative Branch, and MilCon-VA Appropriations Act* (H.R. 5895)—has been cleared for the Roosevelt Desk. The president signed the spending package on Friday.

Last Tuesday, before the upper chamber left for the week, the Senate adopted an agreement on the second minibus—the *Defense, Labor, Health and Human Services, Education, and Related Agencies Appropriations Act* (H.R.6157)—to avoid a partial government shutdown. The stopgap measure provides funding for all agencies not agreed upon through Dec. 7, affording lawmakers time to finalize an agreement. The House is expected to vote on and pass the extension this week.

Last, but certainly not least, it seems as though the *Interior, Environment, Financial Services, and General Government Appropriations Act* (H.R.6147) minibus will likely see action after the midterm elections. Funding for the IRS is expected to remain relatively the same as fiscal year 2018. That assumes incoming IRS Commissioner Charles Rettig, who is set to be sworn in on Oct. 1, can't whip up additional funding for his cash-hungry agency—something he proposed during his confirmation hearing.

Title	House	Senate
Agriculture-FDA	<i>H.R.5961: Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2019</i> Passed committee 5/16, 31-20	<i>S.2976: Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2019</i> Passed as part of H.R.6147 8/1, 92-6
Commerce, Justice, Science	<i>H.R.5952: Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019</i> Passed committee 5/17, 32-19	<i>S.3072: Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019</i> Passed committee 6/14, 30-1
Defense	<i>H.R.6157: Vehicle for the Fiscal 2019 Defense and Labor-HHS-Education Appropriations Minibus</i> Passed 6/28, 359-49	<i>S.3159: Department of Defense Appropriations Act, 2019</i> Agreement on H.R.6157 adopted 9/18, 93-7
Energy and Water Development	<i>H.R.5895: Fiscal 2019 Energy and Water Development, Legislative Branch, and MilCon-VA Appropriations Minibus</i> Agreement on H.R.5895 adopted 9/13, 377-20; signed into law 9/21	<i>S.2975: Energy and Water Development and Related Agencies Appropriations Act, 2019</i> Agreement on H.R.5895 adopted 9/12, 92-5; signed into law 9/21
Financial Services and General Government	<i>H.R.6258: Financial Services and General Government Appropriations Act, 2019</i> Passed in H.R.6147 7/19, 217-199	<i>S.3107: Financial Services and General Government Appropriations Act, 2019</i> Passed as part of H.R.6147 8/1, 92-6
Homeland Security	<i>Draft Bill</i> Passed committee 7/25, 29-22	<i>S.3109: Department of Homeland Security Appropriations Act, 2019</i> Passed committee 6/21, 26-5
Interior,	<i>H.R.6147: Interior, Environment,</i>	<i>S.3073: Department of the Interior,</i>

Environment	<i>Financial Services, and General Government Appropriations Act, 2019</i> Passed 7/19, 217-199	<i>Environment, and Related Agencies Appropriations Act, 2019</i> Passed as part of H.R.6147 8/1, 92-6
Labor, HHS, Education	<i>H.R.6470: Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019</i> Passed committee 7/11, 30-20	<i>S.3158: Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2019</i> Agreement on H.R.6157 9/18, 93-7
Legislative Branch	<i>H.R.5894: Legislative Branch Appropriations Act, 2019</i> Agreement on H.R.5895 9/13, 377-20; signed into law 9/21	<i>S.3071: Legislative Branch Appropriations Act, 2019</i> Agreement on H.R.5895 9/12, 92-5; signed into law 9/21
Military Construction, VA	<i>H.R.5786: Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019</i> Agreement on H.R.5895 adopted 9/13, 377-20; signed into law 9/21	<i>S.3024: Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019</i> Agreement on H.R.5895 adopted 9/12, 92-5; signed into law 9/21
State, Foreign Operations	<i>H.R.6385: Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019</i> Passed committee 6/20, 30-21	<i>S.3108: Department of State, Foreign Operations, and Related Programs Appropriations Act, 2019</i> Passed committee 6/21, 31-0
Transportation, HUD	<i>H.R.6072: Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2019</i> Passed committee 5/23, 34-17	<i>S.3023: Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2019</i> Passed as part of H.R.6147 8/1, 92-6

The Hour is Near... After months of anticipation, the three bills comprising “tax reform 2.0” are expected to be taken to a floor vote this week in the House. A House Rules Committee meeting is scheduled for Wednesday to formally consider the bills, with the expectation that the full chamber will take to a vote as early as Thursday. At present, the legislation is expected to be offered as three standalone bills in order to strengthen their prospects in the Senate for lame duck action at the end of the 115th Congress.

On September 13, the legislation – comprised of the *American Innovation Act* (H.R. 6756), *Family Savings Act* (H.R. 6757), and *Protecting Family and Small Business Tax Cuts Act* (H.R. 6760) – passed out of the House Ways and Means Committee following a seven-hour markup. The markup and subsequent committee vote proceeded along a predominantly partisan trajectory, with all eight of the Democrats proposed amendments being voted down and persistent bickering between committee Democrats and Republicans. The bill subject to less partisan grandstanding was the *Family Savings Act*, which creates and expands access to retirement, household, and education savings vehicles.

The total package is expected to pass the House, although Senate Republicans are not planning to bring the measure to a floor vote given the required 60-vote threshold and robust Democratic resistance to the package. Nevertheless, the BHFS tax team believes the prevalent bipartisan support for many of the *Family Savings Act*’s provisions gives it a realistic opportunity for consideration during the lame duck session following the midterms.

RegWatch

Ways and Means Asks for Cryptocurrency Oversight. A group of five House Ways and Means Republicans this week urged acting IRS Commissioner David Kautter to clarify how the IRS enforces and monitors tax collection on cryptocurrency assets. Committee Chairman Kevin Brady (R-TX) – along with Oversight Subcommittee Chairwoman Lynn Jenkins (R-KS), Reps. David Schweikert (R-AZ), Darin LaHood (R-IL), and

Brad Wenstrup (R-OH) – [sent the letter](#) to the IRS on Wednesday, requesting that the IRS issue updated guidance that reflects higher clarity for taxpayers “seeking to better understand and comply with their tax obligations” regarding the use of various virtual currencies. Citing the “ever-evolving” nature and inherent complications of virtual currencies, the committee members alluded to concerns that the IRS is advancing enforcement guidance that “does not adequately advise taxpayers of their tax obligations when using virtual currencies,” adding that it’s the agency’s role as the federal tax administrator to help taxpayers understand their compliance requirements. The letter requested that the General Accounting Office (GAO) conduct an independent audit of the effectiveness of applicable tax regulations on cryptocurrencies.

A Boatload of Safe Harbor Provisions. On Sept. 18, 2018, the IRS issued two modified safe harbor explanations of eligible retirement rollover distributions. In addition to making some clarifying changes, the modifications reflect laws enacted and guidance issued since Dec. 8, 2014, which was the last time the IRS had revised these safe harbor explanations.

Specifically, the modified safe harbor explanations can be used by plan administrators with respect to eligible rollover distributions as required under IRC section 402(f). These safe harbors apply to section 401(a) qualified plans, 403(a) plans, 403(b) plans, and eligible 457(b) governmental plans. The guidance consists of two model safe harbors: one for distributions that are not from a designated Roth account, and one for distributions from a designated Roth account. As an alternative option, instructions are also included to amend the previous safe harbor explanations contained in [Notice 2014-74](#), bringing these up to date.

In general these modifications cover the extended rollover deadline for qualified plan loan offset amounts under the *Tax Cuts and Jobs Act of 2017* (TCJA), changes made to the application of the additional tax under section 72(t) for various distributions, an explanation of how the rollover rules apply to governmental 457(b) plans, and treatment of extended deadlines due to federally- declared disasters and other events. Self-certification procedures under [Rev. Proc. 2016-47](#) for claiming eligibility for a waiver of the 60-day deadline for making rollovers are also included.

Check out the [BHFS client alert](#) from our Employee Benefits and Executive Compensation Team for more information!

1111 Constitution Avenue

TIGTA Report on IRS Enforcement Revenue, Staff Reductions. The Treasury Inspector General for Tax Administration (TIGTA) released a [report](#) late last week highlighting a dichotomous trend at the IRS of a steady reduction in collection and examination staff running parallel to an increase in revenues from IRS enforcement operations. The report, entitled “*Trends in Compliance Activities Through Fiscal Year 2017*,” was part of an audit that examined and provided statistical backing on the effectiveness of the collection and examination functions within the IRS.

Specifically, the report underscored that there has been a 23 percent decrease in collection and examination staff at the agency since FY13, and that this reduction has consequently decreased the number of examinations and assessments “that the IRS is capable of conducting each year,” potentially disincentivizing voluntary compliance from taxpayers. Meanwhile, the report highlighted that enforcement revenues in the same time period increased by \$3.6 billion, with \$2.6 billion of that coming between FY16 and FY17, on the backs of ongoing assessments and a few larger corporate cases generating roughly \$2 billion in revenue. The report further highlighted that 51 percent of total enforcement revenues were generated by automated collection notices that alert taxpayers to voluntarily pay. Altogether, the report made no formal recommendations for the agency, but instead served as an assessment for senior staff to evaluate discrepancies in appropriations and the effectiveness of internal departments.

Oversight Hearing on IRS Taxpayer Authentication. The House Ways and Means Committee will hold a hearing on Wednesday, September 26, entitled “*IRS Taxpayer Authentication: Strengthening Security While Ensuring Access*.” The hearing will consider how the agency verifies taxpayer identities through online applications and platforms, in addition to exploring any vulnerabilities in the IRS’ current vetting process. Separate audits by the Treasury Inspector General for Tax Administration (TIGTA) and Government

Accountability Office (GAO) recently identified discrepancies between the agency’s online taxpayer identification process and the existence of strong preventative controls. Witnesses for the hearing include Gina Garza, IRS Chief Information Officer, Edward Killen, IRS Director of Privacy, Michael McKenney from TIGTA, and James McTigue, Jr. from the GAO.

GAO: LIHTC At Risk for Abuse. According to a GAO report released last week, the Low-Income Housing Tax Credit (LIHTC) is in jeopardy of increased contractor abuse due to insufficient IRS oversight. The LIHTC was created as part of the 1986 tax law changes to incentivize multifamily housing for those in need of affordable rental home options. Lawmakers created LIHTC, a \$9 billion program under which the IRS provides tax credits to state housing agencies, who then distribute them to low-income rent housing developers. The developers then generally swap these tax credits with contractors for funding or equity to reduce their overall tax burden.

The GAO report, requested last year by Senate Judiciary Chairman Chuck Grassley (R-IA), found that there is no federal agency that actively screens or evaluates LIHTC development costs, a central determinant of the program’s success. Because of this, GAO determined that the program is subject to heightened risk. To address the lack of oversight, the government watchdog recommended that Congress create an agency to maintain and analyze LIHTC cost data. The report also suggested three recommendations to the IRS to strengthen its oversight abilities, all of which the agency refuted on the basis that it doesn’t have adequate data collection authority.

W-4 Revamp. The IRS announced this week that the W-4 withholding form rework will be delayed a year, and won’t be implemented until 2020. The IRS proposed a first draft of the form alterations in June, but that was met with criticism that the changes did not decrease the complexity of the form and risked under-withholding for taxpayers. The Treasury Department said that the next proposed form “will make the withholding system more accurate and more transparent to employees,” and added that the IRS will release related guidance and information in early 2019 so that employers and processors have adequate time to adjust.

REGULATION STATION

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Debt-Equity Documentation	Sept. 24	REG-130244-17	89 Days	
Dividend Equivalency 871(m)	Sept. 20	Notice 2018-72	No Comment Period	Washington Update
GILTI I	Sept. 13	REG-104390-18	60 Days After Federal Register Publication	
SALT	Aug. 23	REG-112176-18	16 Days	Washington Update
Executive Compensation	Aug. 21	Notice 2018-68	45 Days	Washington Update
Passthrough Businesses	Aug. 8	REG-107892-18 Notice 2018-64	5 Days	Washington Update
Full Expensing	Aug. 3	REG-104397-18	12 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
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REGULATIONS ON-DECK

Regulation	Insight
Opportunity Zones	OMB's Office of Information and Regulatory Affairs (OIRA) recently 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."
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.
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.
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.
FDII	The Foreign-Derived Intangible Income (FDII) provision gives corporations partial tax deductions for goods and services employing 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.

AT-A-GLANCE

- *President Trump announced last Wednesday that retiring **Rep. Darrell Issa (R-CA) will be nominated to become the director of the U.S. Trade and Development Agency**. Issa announced his retirement from the House in January effective at the end of his term. If confirmed, Issa would head the government agency responsible for helping companies create domestic jobs by exporting U.S. goods and services to development initiatives in emerging economies.*
- *The IRS and Treasury Department on Thursday announced **plans to amend the dividend equivalency Section 871(m) regulations** to delay the effective date of certain provisions of regulations subject to the specific code. Section 871(m) is aimed at preventing foreign investors from using derivative instruments to avoid paying withholding taxes on certain U.S. equities. See our alert [here](#).*
- *Draft legislation from several New Jersey state lawmakers leaked this week that would **cap a 10 percent tax rate on recreational marijuana sales**. If approved, the state would have one of the lowest effective tax rates for recreational marijuana in the country. Previous versions of the bill called for a progressive tax increase up to 25 percent.*
- *On Friday, the IRS and Treasury Department also proposed **rollbacks on debt equity documentation requirements** under Section 385 regulations that would designated certain types of internal company debt as stock equity. These requirements were previously delayed by the Treasury Department to allow an extended comment period to assess the vitality and impacts of the proposed regulations.*

BROWNSTEIN BOOKSHELF



Brownstein Bookshelf

- Always on the forefront of financial policy happenings, the BHFS team has [outlined](#) the latest developments in the cryptocurrency space.
- While the U.S. Treasury may feel a bit guilty about releasing only a third of the GILTI regulations, the BHFS Tax Team feels great about our analysis. Read it [here](#).
- Read the BHFS [alert](#) on whether pooled investment entities such as sports betting funds constitute securities.

WEEK AHEAD

Congressional Activity

Wednesday, September 26

House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection
Built in America: Jobs and Growth in the Manufacturing Sector

House Financial Services Subcommittee on Capital Markets, Securities, and Investment
Oversight of the SEC's Division of Investment Management

Senate Finance Committee
Impact of Tariffs on the U.S. Automotive Industry

House Ways and Means Subcommittee on Oversight
The Internal Revenue Service's Taxpayer Online Authentication Efforts

House Committee on Rules
H.R. 6756-American Innovation Act of 2018; H.R. 6757-Family Savings Act of 2018; H.R. 6760-Protecting Family and Small Business Tax Cuts Act of 2018

Thursday, September 27

Senate Homeland Security and Governmental Affairs Committee
Examination of the Effects of Regulatory Policy on the Economy and Business Growth

House Committee on Financial Services
Oversight of the Federal Housing Finance Agency's role as conservator and regulator of the Government Sponsored Enterprises

House Ways and Means Subcommittee on Social Security
The State of Social Security's Information Technology

Friday, September 28

House Financial Services Subcommittee on Financial Institutions and Consumer Credit
Examining Opportunities for Financial Markets in the Digital Era

Agency Activity

Tuesday, September 25

Office of the Comptroller of the Currency
Mutual Savings Association Advisory Committee

Wednesday, September 26

Securities and Exchange Commission
Roundtable on Combating Retail Investor Fraud

Consumer Product Safety Commission
Fiscal Year 2019 Operating Plan

Thursday, September 27

Bureau of Consumer Financial Protection

The Community Bank Advisory Council and Credit Union Advisory Council will discuss financial technology policy

Other Activity

Tuesday, September 25

Bloomberg Government

OIRA Administrator Neomi Rao

Center for Strategic and International Studies

Putting FIRREA into Practice: What CFIUS Reform Means for Foreign Investment in the United States

Wednesday, September 26

Peterson Institute

The Impact of Blockchain Technology on Finance

Friday, September 28

American Bar Association

Connecting the Dots: Governance... Artificial Intelligence... and Blockchain

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