

Taxation & Representation, March 5, 2019
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Client Alert

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IN THIS ISSUE

- Tax Tidbit
 - Meet Sen. Maggie Hassan (D-NH)
 - Meet the Chiefs
 - IRS Chief Counsel Michael Desmond
 - Deputy Treasury Secretary Justin Muzinich
 - IRS Commissioner Charles Rettig
- Legislative Lowdown
 - TIGTA: Mnuchin Sprinkling Some SALT
 - Paper Chase
 - QIP: Quick Improvement Please
 - Taxing the Crown Juul
 - This is Air Traffic Control to Major Funding Shortage, Is Anyone There?
 - Love and Taxes
 - W&M, Meet T&I
- 1111 Constitution Avenue
 - It Takes Two, Baby
 - All is Not Quiet on the Withholding Front
 - Democrats: If It Moves, Tax It
- Global Getdown
 - Facebook Me
- At a Glance
- Brownstein Bookshelf
- Regulation Station

TAX TIDBIT

*Editor's Note: Last week, one of our eagle-eyed readers pointed out that the Brownstein Tax Team forgot Maggie Hassan (D-NH) in our "Meet the Members—New to Senate Finance" section. We apologize for our oversight, but are glad to know we aren't writing into the void! Our lucky reader will be the recipient of the most coveted cup in D.C. since the Caps won the Stanley Cup—the Brownstein Cup (err...mug). As always, please send comments, criticisms, compliments and questions **our way**...especially compliments! You may be the lucky winner of some Brownstein merch too.*



Meet Sen. Maggie Hassan (D-NH). Hassan has represented New Hampshire in the Senate since 2017. During her tenure, she has prioritized curbing drug abuse, protecting Social Security and Medicare, defending women's rights, and bolstering national security and



cybersecurity. She voted against the *Tax Cuts and Jobs Act* (P.L. 115-97) and has introduced one major tax bill, the *Middle Class Tax Break Act* (S.1840), in addition to cosponsoring nearly 80 pieces of tax legislation. She belongs to the bipartisan Congressional TRIO Caucus, which helps low-income, first-generation and disabled students, and veterans, achieve their educational potential. She also belongs to the Senate Career and Technical Education Caucus and the Congressional Caucus for Women's Issues, among others. Before being elected to the Senate, Hassan served as Governor of New Hampshire from 2013 to 2017 and as a member of the New Hampshire State Senate from 2004 to 2010.

Meet the Chiefs. Now that we've met the newbies on the House and Senate tax writing committees, it's time to meet the Treasury Department's top tax chiefs—Deputy Treasury Secretary Justin Muzinich, Internal Revenue Service (IRS) Commissioner Charles Rettig and IRS Chief Counsel Michael Desmond.



Michael Desmond



Justin Muzinich



Charles Rettig

Deputy Treasury Secretary Justin Muzinich. As second-in-command to Treasury Secretary Steven Mnuchin, Muzinich will play a central role in essentially all policy decisions at the agency. Muzinich was approved 55-44 by the Senate on Dec. 11, 2018, despite a few roadblocks. After passing through the Senate Finance Committee on a party-line vote, committee Ranking Member Ron Wyden (D-OR) stonewalled Muzinich due to the guidance issued by the Treasury Department ending a requirement for certain tax-exempt organizations to provide the IRS with the names and addresses of significant donors on annual forms. Since February 2017, Muzinich has served in the Treasury Department, advising Treasury Secretary Steven Mnuchin. He was also heavily involved in the effort to pass the *Tax Cuts and Jobs Act* (P.L. 115-97). Before serving in the Trump administration, Muzinich was a Wall Street executive at Morgan Stanley and president of his family investment firm, Muzinich & Company.

IRS Commissioner Charles Rettig. Charles Rettig became the 49th Commissioner of the Internal Revenue Service (IRS) after the Senate confirmed him 64-33 on Sept. 12, 2018 to serve a term that expires in November 2022. Prior to his confirmation, the role of IRS Commissioner was vacant, leaving Acting Commissioner and Assistant Secretary for Tax Policy David Kautter to fill the position. Since assuming the role, Rettig has been addressing a number of issues that have plagued the tax collection agency, including defending against tax identity theft, refund fraud and improving customer service. Rettig joined the IRS after more than 30 years in private practice at Hochman, Salkin, Rettig, Toscher & Perez, P.C.

IRS Chief Counsel Michael Desmond. Michael Desmond was confirmed 83-15 by the Senate on Feb. 27 to serve as Chief Counsel at the Internal Revenue Service (IRS). The position was vacant for nearly two years. Desmond was nominated by President Trump in March 2018 and endured a year-long Senate confirmation process. Senate Finance Committee Ranking Member Ron Wyden (D-OR) held up Desmond's nomination over the Treasury Department's rule that relaxed donor reporting requirements on the grounds that it would allow "dark money" linked to special interest groups to influence U.S. elections. In addition to Wyden, fellow Senate Finance Committee member Sen. Bob Menendez (D-NJ) also placed a hold on Desmond due to the Treasury Department and IRS's guidance on the \$10,000 SALT-cap created by the *Tax Cuts and Jobs Act*

(P.L. 115-97). Before his confirmation, Desmond served as tax legislative counsel at the Treasury Department and as a trial attorney at the Department of Justice. Desmond was also solo practitioner tax controversy attorney in Santa Barbara, California.

LEGISLATIVE LOWDOWN

TIGTA: Mnuchin Sprinkling Some SALT. According to an unredacted **watchdog report** released Wednesday by House Ways and Means Committee Chair Richard Neal (D-MA), Treasury Secretary Mnuchin had a direct hand in a May 2018 **Internal Revenue Service (IRS) notice** that upended state efforts to circumvent the \$10,000 cap on the federal deduction for state and local taxes.

The unredacted version of the report from the Treasury Inspector General for Tax Administration (TIGTA) found that Mnuchin was involved in reviewing and approving the guidance, a detail that was redacted from the initial report. Last year, Neal requested a TIGTA report to review the process the IRS went through in issuing the notice. More specifically, Neal asked agency watchdogs to determine whether the review process was free from political influence. The report also revealed that about 10.9 million taxpayers in high tax states are expected to be negatively affected by the *Tax Cuts and Jobs Act* (P.L.115-97) SALT deduction cap.

Paper Chase. Earlier last week, Rep. Bradley Byrne (R-AL) and Sen. Ted Cruz (R-TX) introduced the *Education Freedom and Scholarship Opportunity Act* (S.634). The legislation would provide a federal tax credit to encourage individuals and businesses to donate to nonprofit scholarship funds. Specifically, the bill would authorize a 100 percent credit for individual and corporate contributions to state-sanctioned scholarship funds. This would allow donors to recuperate their entire donation through federal taxes. The maximum credit amount would be set at 10 percent of an individual's Adjusted Gross Income (AGI) or a business's net taxable income.

This type of program is hardly new--tax credit scholarship programs are on the books in 18 states. While each state takes a slightly different approach, the programs are generally designed to give money to parents for expenses such as private-school tuition, books, computers, tutors and transportation.

The federal program mirrors existing state efforts by giving a federal tax break for similar contributions. The programs remain optional and each state would decide whether to participate.

Last year, these state scholarship funds came into prominence as several blue states attempted to use these programs to **circumvent the \$10,000 State and Local Tax (SALT) cap** imposed by the *Tax Cuts and Jobs Act* (P.L. 115-97).

Education Secretary Betsy DeVos co-wrote an **op-ed** in USA Today with the bill's sponsors supporting the proposal. The bill is expected to face intense backlash from both Democrats and Republicans. Following the announcement last week, the conservative Heritage Foundation said the approach "poses a threat to education choice in the states, and undermines the goal of a streamlined federal tax code.

Liberals are concerned that this program will funnel more money away from the public school system.

QIP: Quick Improvement Please. Due to a drafting error in the *Tax Cuts and Jobs Act* (P.L. 115-97), the final text fails to provide a recovery period for qualified improvement property (QIP) and unintentionally makes such improvements ineligible for bonus depreciation. As a result, the QIP provision enacted by the TCJA does not have a clearly defined recovery period, meaning that investments will default to the 39-year recovery

period and be ineligible for the 100 percent write-off.

This mistake will increase the tax burden of many businesses. To rectify the problem and allow businesses to recover the costs of investing in their businesses, those in the restaurant, retail and hospitality industries, among others, are urging lawmakers to enact a speedy technical correction. Republicans and Democrats alike have highlighted the negative economic ramifications that will ensue if the provision is not fixed.

The Brownstein Tax Team takes a deep dive into the QIP problem and how lawmakers can rectify the issue.

Taxing the Crown Juul. Last week, Sen. Jeanne Shaheen (D-NH) introduced the ***E-Cigarette Youth Protection Act***, a bill that would require e-cigarette companies to financially assist government efforts to slow the growing trend of e-cigarette use among children and teens. Shaheen's bill would be similar to traditional cigarette taxes, in that it would impose a user fee on e-cigarette manufacturers. The revenue from the tax, which would be based on companies' U.S. market share, would fund enforcement regulations and public awareness programs that highlight the negative health consequences of e-cigarettes. In a press release accompanying her legislative proposal, Shaheen said that "manufacturers bear responsibility for reversing this dangerous trend, and should be required to assist prevention efforts" because they market flavored and easily-concealable products to children. The bill follows November regulations from the Food and Drug Administration (FDA) that banned the sale of most flavored e-cigarettes in convenience stores. Next, the FDA is expected to target age verification requirements for purchasing e-cigarette products online.

This is Air Traffic Control to Major Funding Shortage, Is Anyone There? House Transportation and Infrastructure Committee Chair Peter DeFazio (D-OR) and Rep. Rick Larsen (D-WA), chair of the panel's aviation subcommittee, have an idea to solve air traffic control (ATC) system funding shortcomings: increase airport fees. In order to address the expected \$128 billion in financial needs over the coming years, the duo have pitched increasing the airport upgrade cap, which currently sits at \$4.50 per-segment, to \$8.50—an 89 percent increase. The bill would also ensure all Federal Aviation Administration (FAA) programs remain funded at normal levels during government shutdowns. In an effort to support the aviation industry during a government shutdown, Larsen's bill would require operations to continue at normal levels by using funds from the Aviation Trust Fund (ATF). The ATF brings in about \$16 billion every year and currently has about \$15 billion in reserves.

With support from the subcommittee and full committee chair, the bill will almost certainly be approved for full House consideration. However, like many other Democratic proposals this session, it will likely endure a quick death in the Republican-controlled Senate.

Love and Taxes. On Valentine's Day, House Ways and Means Committee Chair Richard Neal (D-MA) and Oversight Subcommittee Chair John Lewis (D-GA) wrote a **letter** to IRS Commissioner Charles Rettig requesting information about outside analysis on the operability of the new IRS Form 1040 and its six accompanying schedules. In the letter, the committee leaders laid out concerns that not enough research was done on the usability of the new individual income tax return and that the form would present a number of challenges for taxpayers.

These concerns were echoed in the National Taxpayer Advocate's **Annual Report to Congress**. The report stated that the new schedules will increase "the potential for errors to occur since the tax information is dispersed over many pages and needs to be tracked down and reported on different schedules and forms." The report prompted Democratic leaders to request the following information from the IRS: information on third party studies of the usability of the postcard; reports that were completed regarding any studies; a description of what was done in response to any studies; and an explanation of why party study results were not shared with the public. The committee leaders requested that their questions be answered by Feb. 27.

After receiving a cold shoulder, the two sent a **follow-up letter** last Wednesday reiterating their request. The pair also asked for more specifics on the mysterious disappearance of the “Form 1040 Usability” survey from the IRS website. The two lawmakers gave Rettig until March 7 to respond.

W&M, Meet T&I. House Transportation and Infrastructure Committee Chair Peter DeFazio (D-OR) and Ranking Member Sam Graves (R-MO) will testify before the House Ways and Means Committee next week on U.S. infrastructure needs. The witnesses, who serve as the top members on infrastructure issues in the House, will face their tax writing counterparts to provide details on infrastructure financing legislation.

The hearing, titled “Our Nation’s Crumbling Infrastructure and the Need for Immediate Action,” will take place on March 6 at 10:30 a.m. After DeFazio and Graves testify, the following witnesses will appear before the committee: AFL-CIO President Richard Trumka; U.S. Chamber of Commerce President and CEO Thomas Donohue; American Trucking Associations President and CEO Chris Spear; Gregory DiLoreto, Managing Director for Government Relations and Infrastructure Initiatives at the American Society of Civil Engineers; and Marc Scribner, Senior Fellow at the Competitive Enterprise Institute.

During this meeting of the minds, DeFazio and Graves are likely to discuss a federal gas tax hike, which has been floated as one of the only viable short-term solutions for the quickly fading Highway Trust Fund (HTF), and a vehicle miles traveled (VMT) tax, which has gained traction as a source of funding for a comprehensive infrastructure package.

DeFazio is also likely to present a relatively controversial solution—the revival of earmarks, or what he has dubbed “Article I projects.” He said bringing back earmarks, which were outlawed by Congress in 2011, will help build support for raising the federal gas tax. Last week, DeFazio asked “Why shouldn’t elected representatives, through a transparent process, be able to spend a small amount of money, bring it home, and show people what they’re going to get for a small increase in their gas tax?” Graves is expected to voice support for the VMT fee.

Over in the world’s **greatest deliberative body**, Senate Environment and Public Works Committee Chair John Barrasso (R-WY), head of the Senate’s primary committee of jurisdiction, has yet to bless a particular source of funding for the HTF or a specific timeline for considering the measures. His Democratic counterpart on the committee, Ranking Member Tom Carper (D-DE), has thrown his support behind a fuel tax increase. The most recent convert to the gas tax hike team is Senate Commerce Committee Chair Roger Wicker (R-MS), who said he would support the idea if President Trump agrees to the proposal.

There is a strong chance that could happen. In the infrastructure debate last year, President Trump endorsed an increase to both the 24.4-cents-per-gallon diesel tax and the 18.4-cents-per-gallon gas tax. However, aside from a **lone sentence** in this year’s State of the Union address, the White House has remained silent on policy proposals, preferring to leave the details to Congress. It appears that Presidential Advisor Ivanka Trump and White House Director of Legislative Affairs Shahira Knight have taken lead on the issue for the White House.

Fun Fact: The U.S. Senate is known as the “World’s Greatest Deliberative Body.” According to the *Traditions of the U.S. Senate* publication, no one knows who coined the phrase and many have “questioned the accuracy” of the descriptor—mostly folks in lower chamber, also known as the House of Representatives.

It Takes Two, Baby. On Feb. 28, Senate Finance Chair Chuck Grassley (R-IA) and Senate Finance Ranking Member Ron Wyden (D-OR) **released legislation** that would renew expired tax extenders. **The bill** also includes language for disaster relief and medical expenses. The extenders package has been long-awaited by taxpayers. The over two dozen provisions have tried to hitch a ride on several government spending bills and technical corrections packages over the last several months. After the extenders expired in 2016, they were retroactively renewed for 2017 in the ***Bipartisan Budget Act of 2018***.

All is Not Quiet on the Withholding Front. The Treasury Department fired back on accusations from Senate Democrats that it manipulated tax withholdings prior to the 2018 midterm elections, calling the claims “misinformed, baseless, and false.” Democrats alleged in a **letter** earlier this month that unnecessary manipulations led to a “phantom windfall” in advance of the elections last year and lower refunds this season. In its **response**, the Treasury Department and Internal Revenue Service (IRS) denied any politically motivated tampering and credited all changes to the withholding tables released in early 2018 in compliance with the *Tax Cuts and Jobs Act* (P.L. 115-97).

Senate Finance Committee Ranking Member Ron Wyden (D-OR) has called for the IRS to issue **additional penalty waivers** for individuals who underpaid on their taxes during the year, describing the altered withholding tables as “tax penalty entrapment.” After preliminary tax-refund data revealed a downturn in the average amount of and overall population percentage receiving returns over last year, the most recent statistics show that the average refund jumped to \$3,143 from \$2,640 the week before—a 1.3 percent increase over last year. **In fact**, top tax writing committee Republicans—Senate Finance Chair Chuck Grassley (R-IA) and Ways and Means Ranking Member Kevin Brady (R-TX) wrote an **opinion piece** in USA Today to refute early conclusions on refunds this filing season. The pair cited a Morgan Stanley report estimating that total refunds will actually increase this year by 26 percent or \$62 billion.

Democrats: If It Moves, Tax It. Sen. Brian Schatz (D-HI) will roll out a financial transactions tax (FTT) proposal today that would impose a 0.1 percent tax to the sale of stocks, bonds and derivatives. The proposal, which could curb short-term market speculation and computer-assisted high-frequency trading, is estimated to raise about \$777 billion in federal revenue over the next decade, according to a Joint Committee on Taxation estimate of a similar proposal. House Transportation and Infrastructure Committee Chair Peter DeFazio (D-OR) will introduce the measure in the lower chamber. DeFazio had previously proposed a 0.03 percent FTT in 2016. The FTT may be a potential offset for infrastructure legislation.

In a February interview with Vox, Schatz said that “roughly half of the 8 billion daily trades now are high-frequency trades, and that is increasing volatility in the market; it is allowing a certain category of traders to essentially skim profit off the top.” He added that “on a more basic level, it is turning the stock market into a true casino, in which you are making a bet that has very little to do with the fundamentals of a company.” Question is—Is it just a messaging document to appeal to the Left, or does it have legs?

GLOBAL GETDOWN

Facebook Me. After a long period of deliberation, France will levy as much as a 5 percent on major internet companies such as Amazon.com Inc., Google and Facebook. The stated purpose of the tax is preserve “fiscal justice” and is expected to raise €500 million or \$565 million. Last week, Treasury Secretary Steve Mnuchin said while the U.S. can appreciate digital taxation and would like to solve the issue within the year, the proposal likely goes beyond a digital tax and therefore the U.S. does not support France’s plan. France has

said it would abolish the digital tax once there is a global solution at the OECD.

AT A GLANCE

- **Cadillac Tax Repeal “Escaladed” Quickly.** In a **letter** to members of Congress, almost 600 organizations, companies, insurers and nonprofits urged lawmakers to repeal the tax on employer health plans, colloquially known as the “Cadillac Tax,” that was passed under the *Affordable Care Act* as a funding mechanism.
- **So Long, Olson.** After 18 years of service as the first and only National Taxpayer Advocate, Nina Olson announced last week she will be retiring on July 31. Olson hopes to help name her successor.
- **Mnuchin to Finally Testify.** Treasury Secretary Steven Mnuchin is expected to appear before the House Ways and Means Committee within the next two weeks. He will provide testimony on the administration’s budget proposal.
- **IRS Hearings: Foreign Tax Credit, GILTI and BEAT.** The Internal Revenue Service announced it will hold a public hearing on its guidance related to the foreign tax credit on March 14 at 10:00 a.m. On March 25, the agency will hear public comments on the Base Erosion and Anti-Abuse Tax (BEAT).
- **LIFT Act.** Sens. Chris Coons (D-DE) and James Lankford (R-OK) and Rep. Mark Walker (R-NC) reintroduced the *Lessening Impediments from Taxes (LIFT) for Charities Act*. The bill would repeal requirements that force certain tax-exempt organizations to pay federal taxes on employee benefits, such as parking, meals or transportation benefits.

BROWNSTEIN BOOKSHELF

- **QIP Drafting Error.** In case you missed it, **check out our dive** into the drafting error included in the *Tax Cuts and Jobs Act’s* (P.L. 115-97) qualified improvement property provision.
- **Opportunity Zones are Inn.** Brownstein’s Nicole Ament and Erik Jensen **discuss** the benefits of opportunity zones for hotel developers and owners.
- **Finance to the Highnance.** Milan Dalal **commented** on the politics of legal marijuana and banking.

REGULATION STATION

INTERNATIONAL

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Sec. 965 Transition Tax	Feb. 5, 2019 Final Regulations	84 FR 1838	Deadline Passed Oct. 9	
Certain Hybrid Arrangements	Dec. 28, 2018	REG-104352-18	Deadline Passed Feb. 26	
BEAT (Sec. 59A)	Dec. 21, 2018	REG-104259-18	Deadline Passed Feb. 19	
Foreign Tax Credit	Dec. 7, 2018	REG-105600-18	Deadline Passed Feb. 5	
Sec. 956	Nov. 5, 2018	REG-114540-18	Deadline Passed Dec. 5	
GILTI	Oct. 10, 2018	REG-104390-18	Deadline Passed Nov. 26	
GILTI	Sept. 13, 2018	Rev. Proc. 2018-48	N/A	

199A

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Qualified Business Income Deduction (Sec. 199A)	Feb. 8, 2018	REG-134652-18	35 Days	
Qualified Business Income Deduction (Sec. 199A)	Feb. 8, 2019 Final Regulations	84 FR 2952	Deadline Passed Oct. 1	
W-2 Wages for Qualified Business Income Deduction (Sec. 199A)	Jan. 18, 2019	Rev. Proc. 2019-11	N/A	
Trade or Business Safe Harbor: Rental Real Estate (Sec. 199A)	Jan. 18, 2019	Notice 2019-07	N/A	Washington Update

DOMESTIC BUSINESS

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Interest Expense Deduction	Dec. 28, 2018	REG-106089-18	Deadline Passed Feb. 26	
Opportunity Zones	Oct. 29, 2018	REG-115420-18	Deadline Passed Dec. 28	
Debt-Equity Documentation (Sec. 385)	Sept. 24, 2018	REG-130244-17	Deadline Passed Dec. 24	
Sec. 162(m)	Aug. 21, 2018	Notice 2018-68	N/A	Washington Update
Full Expensing	Aug. 3, 2018	REG-104397-18	Deadline Passed Oct. 9	
Carried Interest	March 1, 2018	Notice 2018-18	N/A	

EXEMPT ORGANIZATIONS

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Excise Tax on Executive Compensation	Dec. 31, 2018	Notice 2019-09	N/A	
UBIT (Sec. 512(a)(7))	Dec. 10, 2018	Notice 2018-99	N/A	
UBIT (Sec. 512(a)(6))	Aug. 21, 2018	Notice 2018-67	N/A	Washington Update
Higher Education Excise Tax	June 8, 2018	Notice 2018-55	Deadline Passed Sept. 6	

OTHER

Regulation	Latest Action	Regulation Link	Comment Countdown	Brownstein Commentary
Estate and Gift Taxes	Nov. 23, 2018	REG-106706-18	Deadline Passed Feb. 21	
Sec. 451(b) Market Discount Guidance	Sept. 27, 2018	Notice 2018-80	N/A	Washington Update
Safe Harbor of Eligible Rollover Distributions	Sept. 20, 2018	Notice 2018-74	N/A	Washington Update
SALT	Aug. 27, 2018	REG-112176-18	Deadline Passed Oct. 11	Washington Update
Education Savings	July 30, 2018	Notice 2018-58	N/A	Washington Update

Health Savings Accounts	March 5, 2018	Rev. Proc. 2018-18 Rev. Proc. 2018-27	N/A	
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