U.S. Congress back in session, possible tax agenda

NOTE: Reflects developments as of 11 AM EDT on September 10, 2019. See *TaxNewsFlash-Legislative Updates* page for subsequent developments.

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Introduction

Both chambers of the U.S. Congress are back in session this week, and they have work to do. To avoid a full or partial government shutdown, the House, Senate, and president need to agree on legislation funding the government before October 1 (the beginning of the government's next fiscal year). Thus, legislation funding the federal government past September 30 can be expected to be front and center on the legislative agenda—and there's a good chance that Congress and the president may agree to one or more short-term funding bills (known as continuing resolutions or "CRs") to buy time to reach consensus on thorny issues associated with particular appropriations bills.

From a tax perspective, the big questions are: (1) whether tax provisions might be attached to "must pass" legislation (such as a CR) or otherwise make it through the legislative process and become law; and (2) if so, what those tax provisions might be. These issues are discussed in this report.

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Executive summary

Although there's a possibility that some tax legislation that has broad bipartisan support in both the House and the Senate could move forward on its own, the best chance for tax legislation to be enacted in what's left of 2019 appears to be for a negotiated "consensus package" of tax provisions to be attached to a larger "must pass" vehicle—like a CR. Nonetheless, there's no guarantee that this will happen—particularly if larger politics result in efforts to keep any CRs free of extraneous, non-spending provisions.

If there is an opportunity to enact tax legislation this year, tax activity in the House and Senate earlier this year provides some indication of at least some of the issues that might be in play. So far, the House, the Senate, and/or the tax-writing committees have "teed up" tax legislation addressing matters such as:

- Extending expired or expiring tax preferences (commonly called "extenders")
- Disaster relief
- Retirement savings
- Provisions that were enacted as part of Pub. L. No. 115-97 (commonly called the "Tax Cuts and Jobs Act" or "TCJA") relating to the "kiddie tax" as well as the unrelated business income tax (UBIT) treatment of fringe benefits
- Tax treatment of legally married same-sex couples
- The so-called "Cadillac tax" on high-cost employer-sponsored health coverage
- The so-called "PCORI fee"
- Expanding the earned income tax credit ("EITC"), child tax credit, and dependent care assistance
- Tax treatment of investment income of certain private foundations

Indeed, based just on activity that already has taken place, there appears to be common ground (at least so far) between the House and the Senate on possibly doing *something* on extenders, disaster relief, retirement security, and the TCJA "kiddie tax" provision.

Moreover, if a tax package is negotiated, the issues that ultimately might be raised could end up being even broader than the issues considered by the House, Senate, or tax-writing committees so far. For example, other issues that ultimately might be addressed could include: some of the most popular proposed technical corrections to the TCJA; the fate of the medical device excise tax ("MDET"); other issues that are priorities to particular members; and additional "revenue-raising" provisions. It also is possible that the president might put additional tax proposals on the table at some point in the process.

Recap of recent activity

Shortly before the August recess, Congress approved significant legislation that affects two budget-related matters. First, the legislation suspended the federal debt limit for two years—through July 31, 2021. Second, the legislation increased the previously imposed limits on discretionary spending over the next two fiscal years. With these "top line" numbers for discretionary domestic and defense spending for the upcoming fiscal year having been set, the House and Senate now can move forward with funding bills that would divide these agreed upon spending amounts among various government functions.

Although there had been speculation earlier in the year that legislation addressing the debt limit and the spending caps might provide a vehicle for some tax provisions, no tax provisions were included in the recently enacted debt limit and "caps" legislation. This leaves a "must pass" funding bill as the most likely vehicle for further action on tax legislation this year.

As discussed below, there already has been considerable legislative activity on the tax front this year—including the enactment of one tax bill, Senate approval of four tax treaty

protocols, and movement in the House and Senate on some tax issues that are "in the pipeline" but have not made it through the entire legislative process. Some of these "pipeline" issues might foreshadow possible future developments.

Completed actions

An IRS administration bill—the "Taxpayer First Act"—was enacted on July 1, 2019. Among other things, this legislation provides for the establishment of an Internal Revenue Service ("IRS") independent Office of Appeals, changes to the IRS organizational structure, an increase in the failure-to-file penalty, mandatory e-filing by exempt organizations, and new requirements before revocation of tax-exempt status for failure to file returns. Read more in *TaxNewsFlash*.

In addition, on July 17, 2019, the Senate approved protocols to treaties with Spain, Switzerland, Luxembourg, and Japan. The Senate, however, has not yet scheduled action on new income tax treaties with Hungary, Poland, and Chile. Read more below and in *TaxNewsFlash*.

House bills in the pipeline

As indicated in the summary of recent House and House Ways and Means Committee actions in Exhibit A, the House and/or the House Ways and Means Committee before the August recess advanced several tax bills that have not yet made it through the entire legislative process. These bills shed some light on the House's tax legislative priorities and what some of its negotiating positions might be if the House and Senate put together a consensus bill later this year. Some of these bills would make substantive changes to the TCJA; however, none includes "technical corrections" to the TCJA. (Read more about technical corrections later in this report.)

Recent House-passed bills

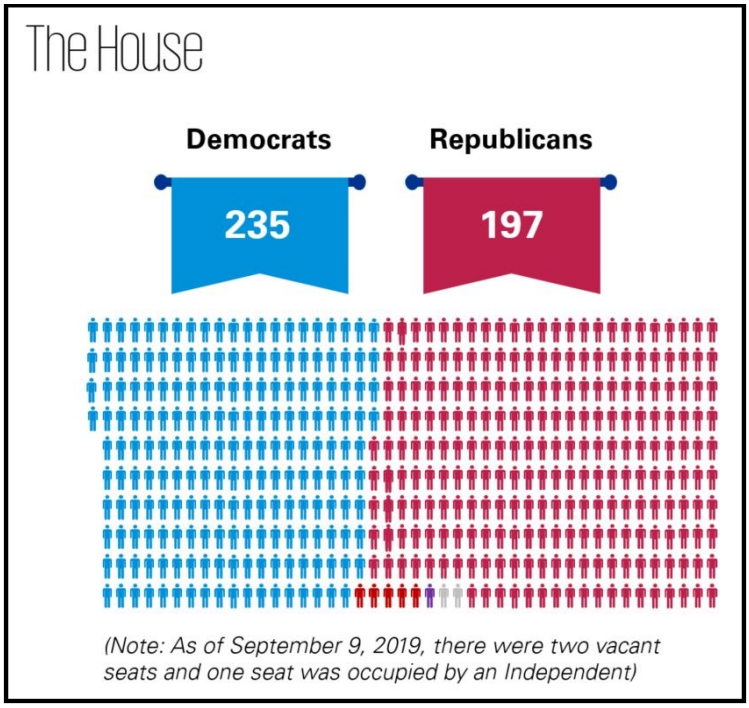
Bills that recently have passed the House address matters such as:

- Expanding retirement savings provisions (the "SECURE Act")
- Providing certain multiemployer pension plans ("MEPS") that are facing insolvency or that are insolvent with certain loans—a spending bill that includes tax law changes as partial revenue offsets
- Repealing the so-called "Cadillac tax" on high-cost employer-sponsored health coverage[1]
- Repealing certain "kiddie tax" measures that had been added to the Code by the TCJA (included in the SECURE Act)
- Clarifying the tax treatment of legally married same-sex couples and allowing them to change their filing status outside the statute of limitations (the "PRIDE Act")

[1] The "Cadillac" excise tax under section 4980I was enacted as part of the Affordable Care Act to apply to "expensive" health care and related expenses paid for by employers. The excise tax rate is 40% for such health care coverage. The excise tax is currently scheduled to apply beginning in 2022. Originally scheduled to take effect in 2018, the implementation of the tax has been delayed twice, most recently in the "Extension of Continuing Appropriations Act of 2018."

As a procedural matter, it's worth noting that the Cadillac tax bill was not previously considered by Ways and Means. Instead, House leadership bypassed committee action and placed the bill directly on the House calendar under special rules that allow some measures with broad support (over 290 cosponsors) to proceed directly to the House floor.

Also, the MEPS bill, the SECURE Act and the PRIDE Act were modified after they were reported by Ways and Means but before they were voted on by the House. This is unusual from a historical perspective and raises the prospect that, now that Congress has returned from recess, additional modifications might be made to other bills approved by Ways and Means before those measures are considered on the House floor.



Recent Ways and Means bills not yet considered by the House

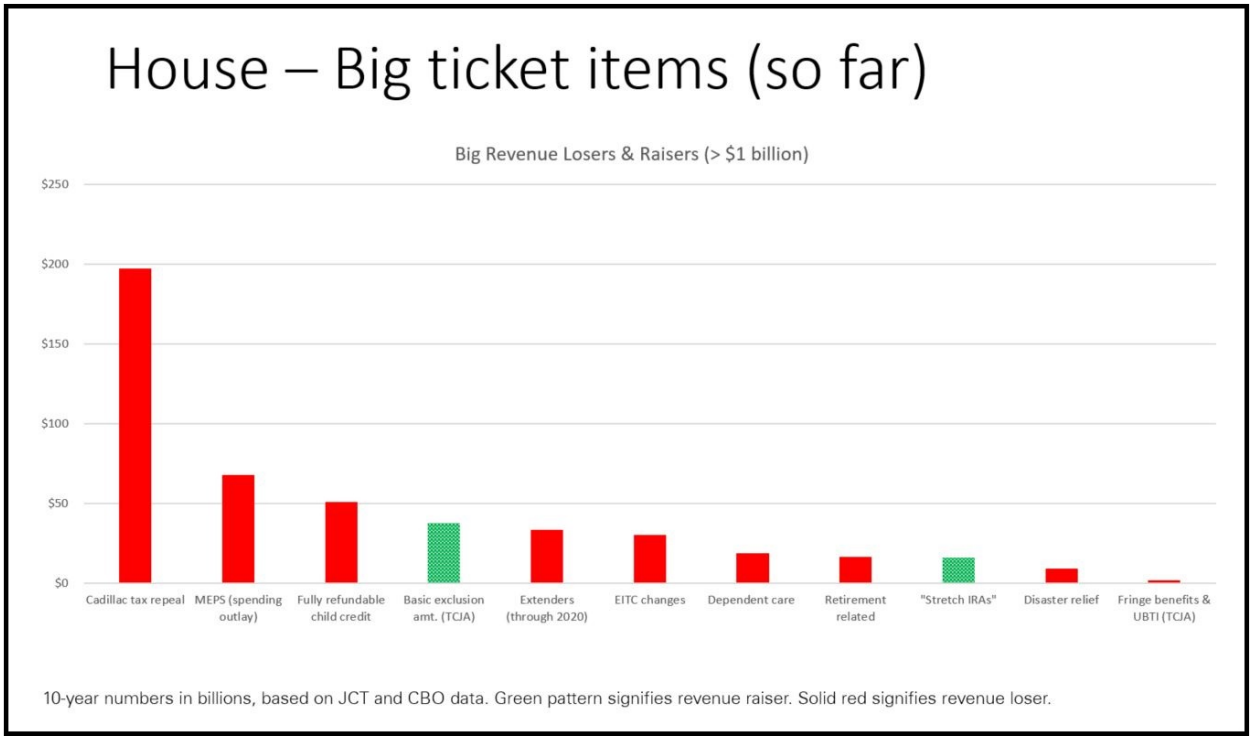
Prior to the recess, Ways and Means approved several bills that have not yet been considered by the full House. These bills address the following issues:

- Temporarily extending through 2020 more than 30 tax preference provisions that have already expired or that are scheduled to expire at the end of 2019 (excluding the provisions relating to cost recovery for race horses or the production credit for Indian coal facilities). These provisions are generally known as the "extenders."[2]
- Providing disaster tax relief (packaged in the same bill with the extenders)
- Expanding the EITC, making the child tax credit fully refundable for some taxpayers, and expanding dependent care assistance tax incentives ("Economic Mobility Act")
- Changing the current two-tiered excise tax rate applicable to investment income of certain private foundations (part of disaster relief title of the extenders bill)
- Repealing the TCJA provision that requires the inclusion of certain fringe benefit expenses in unrelated business income (part of the Economic Mobility Act)
- Extending the healthcare inflation-adjusted excise taxes imposed by Code sections 4375 and 4376 (the "PCORI fee")[3]

[2] The Ways and Means bill does not address the upcoming end of the MDET moratorium. Under Code section 4191(c), the MDET does not apply to sales for the period beginning on January 1, 2018, and ending on December 31, 2019. A prior moratorium applied to sales for the period beginning on January 1, 2016, and ending on December 31, 2017. Note that, in the prior Republican-controlled Congress, a bill to repeal the tax passed by a vote of 283-132, with 57 Democrats voting in support. Read *TaxNewsFlash.*
[3] The bill would extend the PCORI fee on health insurance policies and self-insured health plans through 2026. These taxes are currently scheduled to expire for policy years and plan years ending after September 30, 2019.

House revenue-raisers

Although some of the bills that passed the House or that have been approved by the Ways and Means Committee include revenue-raising provisions, the costs of some of the bills currently are not offset at all or are only partially offset.[4] In addition, some revenue raisers have been used multiple times for different bills.[5] As a result, if all the "big ticket" proposals the House or the Ways and Means Committee have approved thus far were packaged together into a single bill, the total revenue costs would appear to significantly exceed the total revenue raised. However, there has been discussion of possibly adding some revenue raisers to the Economic Mobility Act prior to House floor consideration to offset some of that bill's over $101 billion projected 10-year revenue cost. It is also possible that the House might throw other revenue raisers into the mix as well if a tax package is negotiated later this year.[6]



Two large (over $1 billion) revenue-raising provisions currently are in bills that have been approved by the House or Ways and Means:

- Modifying an estate, gift, and generation-skipping transfer (GST) tax change made by the TCJA to accelerate the sunset date for the increased basic exclusion amount. The approximately $37.561 billion raised over 10 years by this provision would more than offset the approximately $33.190 billion revenue cost of temporary extensions of expired and expiring provisions.

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[4] House "PAY/GO rules" generally establish a point of order against entitlement or revenue bills that would increase the deficit; in other words, revenue offsets generally are required for bills that would lose revenue over a 5-year or 10-year budget window. The rule, however, can be waived, resulting in bills that may not be offset at all or that may be only partially offset.

[5] The same revenue raiser can be used in multiple bills as those bills move through the legislative process; however, the same revenue-raising provision cannot be used more than once in the same bill and, once a bill including a raiser becomes law, an identical raiser is no longer available as an offset for other proposals that are still in the legislative pipeline.

[6] Note that, on the Senate side, Democrats included several revenue raisers, including some changes to the TCJA, in the *Senate Democrats' Jobs & Infrastructure Plan for America's Workers* [PDF 926 KB], released on March 7, 2018 (read *TaxNewsFlash*). It is possible that House or Senate Democrats might propose some of these raisers as part of the "horse trading" associated with putting together a possible tax bill.

- Changing the after-death required minimum distribution rules for designated beneficiaries of individual retirement accounts (IRAs)—i.e., restricting the rules for so-called "stretch IRAs." The approximately $15.749 billion raised over 10 years would offset some of the costs in both the MEPS and the retirement savings bills.

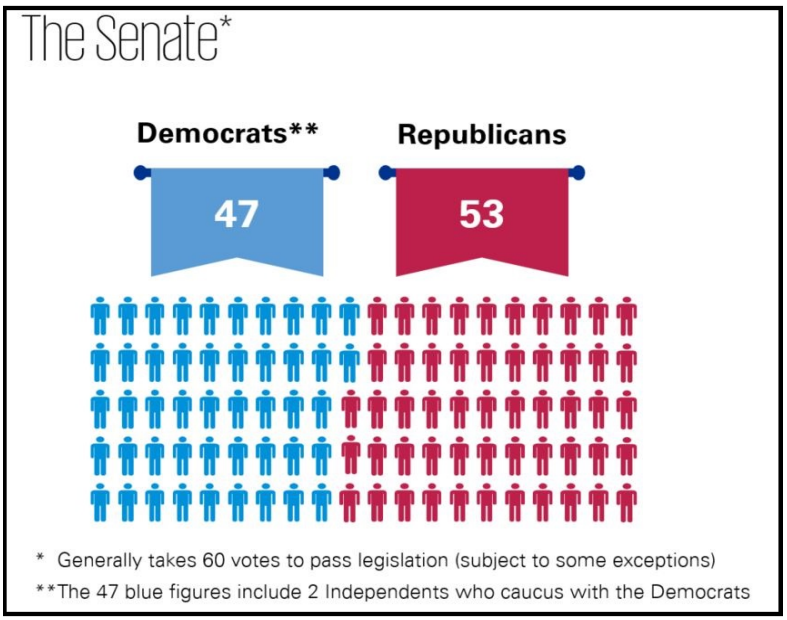
A few significantly smaller revenue-raising provisions are also included in bills that have passed the House. These relate to:

- Increasing certain information sharing to enhance administration of the heavy vehicle excise tax (with the approximately $162 million raised used to offset some of the costs of both the MEPS and the retirement savings bills)
- Increasing the section 6651 failure-to-file penalty beyond the current level (with the relatively small amount of revenue raised used in the PRIDE bill, as well as the MEPS and the retirement savings bills)[7]
- Increasing failure-to-file penalties for retirement plans (with the revenue raised used to offset some of the costs of the MEPS and the retirement savings bills)[8]

As discussed below, the Chairman and the ranking member of the Senate Finance Committee introduced a bi-partisan retirement security bill in April 2019 that includes similar raisers to those in the House retirement savings and MEPs bills (i.e., stretch IRAs, increases in failure-to-file penalties, and increased excise tax information sharing). This might suggest possible common ground for using these raisers to offset some of the costs of retirement legislation.

Senate issues in the pipeline

The Senate also has been exploring some of the same tax legislative issues as the House.



TCJA "Kiddie tax"

For example, on May 21, 2019, the Senate passed S. 1370, the "Gold Star Family Tax Relief Act," a bill that would provide some taxpayer relief by retroactively treating certain military survivor benefits received by a child as earned income for purposes of the "kiddie tax" of Code section 1(g). The bill addresses issues similar to those addressed in the House proposal to repeal the TCJA's "kiddie tax" measures; however, the Senate bill is narrower in scope. S. 1370 passed the Senate by unanimous consent, reflecting broad and

[7] The Joint Committee on Taxation (JCT) has scored the proposed increases in the failure-to-file penalty as raising relatively little revenue compared to the billions raised by the proposed TCJA estate, gift, and GST tax and stretch IRA changes. Note, however, that JCT estimates for the retirement savings bill were done prior to the recent enactment of an increase in the failure-to-file penalty as part of the Taxpayer First Act. Also, the amount raised can differ depending upon the amount to which the penalty is proposed to be "dialed up." Thus, revenue estimates for increasing failure-to-file penalties may vary in different bills.

[8] The JCT scored the SECURE Act's proposed increase in the failure-to-file penalty for retirement plans as raising approximately $260 million over 10 years. See note 3 supra.

deep support from both Republicans and Democrats for resolving the treatment of certain unearned income of children expeditiously. Read *TaxNewsFlash*.

Extenders and disaster relief

The Senate Finance Committee also has been examining, on a bipartisan basis, tax provisions that recently expired or that are scheduled to expire, as well as natural disaster tax policies.

For example, in February 2019, Finance Committee Chairman Grassley (R-IA) and ranking member Wyden (D-OR) introduced bipartisan legislation (S. 617) to restore the tax provisions that expired at the end of 2017 and 2018 through the end of 2019 and to provide disaster tax relief benefits to individuals and businesses affected by major disasters occurring in 2018. The bill also addressed the medical expense deduction floor, the oil spill liability trust fund rate, and the black lung liability trust fund excise tax. Read *TaxNewsFlash*. Chairman Grassley has expressed a particularly strong interest in extending the biodiesel tax incentives included in this bipartisan legislation.

In addition, in May 2019, Senators Grassley and Wyden announced the formation of several bipartisan taskforces on "extenders" as well as disaster relief. These task forces received significant input from stakeholders. During the August recess, several taskforce reports were released summarizing issues and input received.

Although the reports made few concrete recommendations with respect to specific expired (or expiring) provisions, Senators Crapo (R-ID) and Cardin (D-MD), the co-chairs of the task force on cost recovery, suggested that both the short-line railroad credit and the section 179D deduction for energy efficient commercial buildings merit being extended permanently, while some other provisions should be extended temporarily pending discussion by the Finance Committee. That task force also recommended that: (1) the committee find a permanent solution for the extenders; (2) some cost recovery provisions be reviewed in light of other legislative changes, such as the TCJA's current 100% expensing provision; and (3) the extenders be considered by the Finance Committee in "regular order," with consideration being given to certain changes relating to section 179D (relating to retrofits, nonprofits, and energy standards), as well as to provisions relating to motorsports and to qualified film, television, and theatrical productions. Read *TaxNewsFlash*.

Additionally, the task force on employment and community development recommended that: (1) in the event of a retroactive or prospective reinstatement of the Indian employment tax credit, the credit should use a moving average of qualified wages and health insurance costs from a set number of preceding years for measuring the credit amount; and (2) in the event of a retroactive or prospective reinstatement of the American Samoa economic development credit, the legislative language for the credit should be moved into the Internal Revenue Code (rather than existing through amendments to Code provisions that have since been repealed). Read *TaxNewsFlash*.

In conjunction with the release of the first set of task force reports, Chairman Grassley indicated that the "next step will be to put together a legislative package based on the proposals that the taskforces received, the areas of consensus among the taskforce members and continued bipartisan discussions."

Retirement savings

Chairman Grassley and ranking member Wyden introduced bipartisan retirement security legislation—S. 972 [PDF 368 KB], the "Retirement Enhancement and Savings Act" or "RESA"—in April 2019. This bill is similar (but not identical) to the House SECURE Act, and includes similar revenue raisers relating to stretch IRAs, increasing penalties for failure to file returns (including retirement plan returns), and increasing excise tax information sharing.

Some Republican Senators have raised concerns about the fact that, before the House voted on its SECURE Act, a provision expanding the definition of qualified section 529 expenses to include some homeschooling and secondary school expenses that had been in the bill Ways and Means approved was removed.[9]

Looking ahead

In general

Given the rapidly approaching beginning of the government's next fiscal year on October 1, government funding legislation can be expected to be among the issues on the front burner for both the House and the Senate upon returning from recess. So far, no appropriations bills for any federal government functions in the upcoming fiscal year have been enacted.

With the recent enactment of legislation resolving the "top line" numbers for discretionary domestic and defense spending, it is possible that funding legislation for some government departments, agencies, and functions might be enacted soon—prior to October 1. Nonetheless, as evidenced by the 35-day partial government shutdown earlier this Congress, reaching consensus on issues associated with government funding can be difficult. This can be particularly true in a divided government with the president, Democratic-controlled House, and Republican-controlled Senate having different views on some spending issues (including, but by no means limited to, immigration and the potential addition of provisions on policy matters, such as the diversion of appropriated funds to other purposes). Thus, it might not be possible to reach consensus on all spending bills before October 1.

To the extent all or some federal government functions are not funded by October 1, there could be a full or partial government shutdown beginning as of that date. Thus, for example, the IRS and Treasury Department (Treasury) could be subject to a shutdown if a funding bill for Financial Services and General Government (which governs spending for the IRS and Treasury) is not enacted by October 1.

Although there's no certainty, it seems likely that the Congress and the president ultimately might agree to one or more short-term CRs to buy time to negotiate agreements on difficult issues associated with some appropriations bills. It is also possible that funding issues for all government functions might not be resolved until shortly before the December holidays.

[9] This provision (along with several others) had been stricken from the TCJA as that bill moved through the legislative process after the Senate parliamentarian concluded it ran afoul of budget reconciliation requirements used to move the TCJA in the Senate with fewer than 60 votes.

In the past, CRs have been viewed as "must pass" legislation and have sometimes served as "vehicles" upon which tax provisions can "hitch a ride." As is explained below, although there is no certainty, that could be the case again this year.

The possible post-recess tax agenda

In what's left of 2019, the House and Senate might continue to address some of the tax issues that were put into play earlier this year, while also considering additional issues both publicly and behind the scenes. For example, it is possible that: (1) the House might consider some of the bills the Ways and Means has previously approved, perhaps with modifications (such as the possible addition of revenue raisers to the Economic Mobility Act); (2) the Ways and Means Committee might consider other tax measures (such as, possibly, measures relating to clean energy as well as the TJCA's temporary limit on the state and local tax deduction); and (3) the Senate Finance Committee might mark up a proposal that addresses extenders and natural disasters—and possibly other tax priorities as well.

It is also possible that the president might push for the enactment of legislative tax law changes to encourage economic growth, either later this year or in 2020. Further, various presidential candidates are likely to continue to release tax proposals.

From a big picture perspective, however, the key question is whether any further tax proposals will make it to the legislative "finish line" and become law before the end of this year. And, if tax legislation is enacted, how might it move forward and what might be in it?

Possible negotiated tax package

There is considerable pressure from various constituencies on both Democrats and Republicans, and both the House and Senate, to address an array of tax issues—with that pressure being magnified by concerns that the chances for tax legislation being enacted may diminish substantially next year, given the upcoming November 2020 elections.

Although there's a possibility that some tax legislation that has broad bipartisan support in both the House and the Senate (like retirement legislation) could move forward on its own (as the Taxpayer First Act did prior to the recess), the likelihood of that happening is diminished both by the number of tax issues members of Congress (and, possibly, the president) are interested in addressing and the limited amount of time left on the legislative calendar for the year. Instead, the best chance for tax legislation to move forward to enactment in what's left of 2019 appears to be for a negotiated consensus package of tax provisions to be attached to a larger "must pass" vehicle—like a CR. Nonetheless, there's no guarantee that this will happen—particularly if larger politics associated with the CR result in an effort to keep the CR free of extraneous, non-spending, provisions.

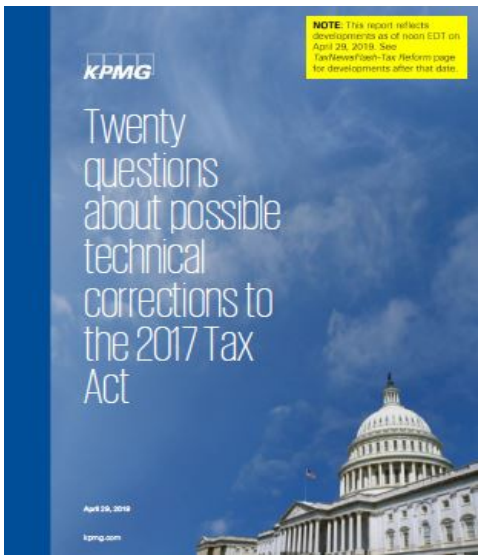
In addition, if the White House does push for tax cuts or other measures designed to stimulate economic growth this year, evaluating the prospects of a tax package could become more complicated. This calculus depends upon what specific proposals the White House might push for and how strongly the president might insist that those proposals be addressed as part of the same package as other tax issues the House and Senate have been addressing.

What issues might be in play?

If there is a legislative vehicle for a tax package later this year, for that package to become law, bipartisan consensus would have to be reached on its substance among the Democratic-controlled House, the Republican-controlled Senate (where Democratic support also would likely be required, given the usual need for at least 60 votes), and the president.

If there is an opportunity to move tax legislation, the tax activity in the House and Senate earlier this year provides some indication of at least some of the issues that might be in play. Indeed, that earlier activity to some extent might indicate that the House and Senate are publicly gearing up for the possibility of negotiating a tax package. As discussed above, so far the House, Senate, and/or tax-writing committees have "teed up" the possibility of addressing among the following tax matters in some manner:

- Extenders
- Disaster relief
- Retirement savings
- TCJA provisions relating to the "kiddie tax" and the UBIT treatment of fringe benefits that were drafted consistent with what was intended at the time but that produced undesirable results once in effect (i.e., "technical regrets" as opposed to "technical corrections")
- Tax treatment of legally married same-sex couples
- The Cadillac tax
- Expanding the EITC, child tax credit, and dependent care assistance
- Tax treatment of investment income of certain private foundations
- The PCORI fee



Moreover, as indicated above, the House, the Senate, and the tax-writing committees might formally consider additional tax issues after the recess, adding even more issues to the mix of items potentially on the table. Further, other issues ultimately might be raised if a tax package is negotiated—even if those issues have not been formally acted on by the House, Senate, or one of the tax-writing committees beforehand. Thus, for example, if there is an effort to put together a negotiated tax package:

- Some proposed technical corrections to the TCJA can be expected to be raised at some point in the process, with those that are most popular standing the best chance of ultimately being included in a consensus package. These include corrections relating to the depreciation of qualified improvement property ("QIP"), the effective date of net operating loss ("NOL") deduction changes, and the deduction of legal fees in connection with sexual misconduct. For more on technical corrections (including what constitutes a technical correction), read the KPMG report: *Twenty questions about technical corrections to the 2017 Tax Act.*

- Although the medical device excise tax—or MDET—is not addressed in the Ways and Means or Grassley/Wyden extenders bills, there is considerable bipartisan support in both the House and Senate for addressing the MDET, either by temporarily extending the current moratorium on the tax beyond 2019 or by repealing the tax completely. Thus, it is possible (although not certain) that an MDET provision might be included if there is a tax package this year, particularly if other health-

related tax measures make it into a consensus package. If so, extending the moratorium temporarily may be more likely than repealing the tax outright, both based on past precedent and possible revenue concerns.[10]

- Members of Congress can also be expected to raise other tax issues that are priorities to them—such as expanding the definition of qualified section 529 expenses to include some home-schooling and secondary school expenses. This is particularly likely in the Senate where the need to get 60 votes to secure passage of the legislation can give each individual Senator considerable leverage to push particular legislative priorities.

Further, as mentioned above, it is possible that the president might put additional tax proposals on the table at some point in the process.

As a result, the issues that ultimately might be raised in negotiations could end up being even broader than the many issues considered by the House, Senate, or tax-writing committees so far and the dynamic of putting together a bill might be complicated even further.

Similarities, differences, and possible common ground?

While it is impossible to predict the outcome of possible negotiations at this time, just by looking at the many tax issues considered in the House, Senate, or the tax-writing committees so far this year, it is possible to make a couple general observations.

As a threshold matter, there appears to be common ground (at least based on activity so far) between the House and the Senate showing a desire to possibly do *something* on at least four issues—extenders, disaster relief, retirement security, and the TCJA "kiddie tax" provision. For example:

- The House Ways and Means extenders bill, the Grassley/Wyden bill, and the Senate Finance Committee task forces indicate an interest in at least temporarily extending many expired or expiring provisions. Further, as indicated above, Senate Finance Committee Chairman Grassley has a strong interest in extending biodiesel incentives—and can be expected to push hard for an extenders package that includes these incentives if there is an opportunity for tax legislation to move forward. Further details as to where the Senate may be on the scope of extenders legislation may emerge if the Finance Committee meets to mark up such legislation soon.
- On retirement savings, the House and the Senate appear to be close to consensus on substantive retirement tax issues, given the similarities between the SECURE Act and the Grassley/Wyden RESA.[11] Notably, the SECURE Act passed the House with broad and bi-partisan support.
- The fact that both the SECURE Act and RESA use similar revenue offsets—including the "stretch IRA" provision and procedural changes—enhances the likelihood that those offsets ultimately might be included in a tax package that addresses retirement savings.
- The House and Senate have both passed legislation dealing with the TCJA "kiddie tax" provision with broad bi-partisan support (with the House addressing that issue as part of its SECURE Act). Although the House bill's "solution" to the issue is broader than that passed by the Senate, there appears to be bipartisan and bicameral consensus that the issue needs to be resolved in some form.

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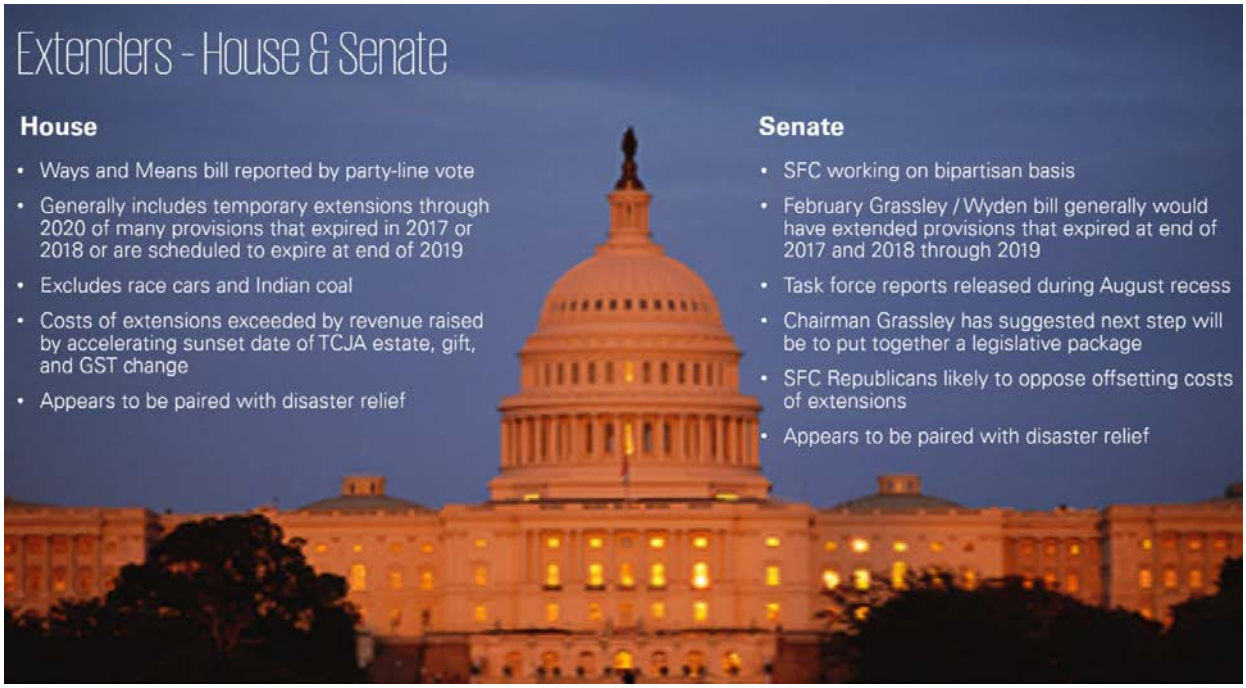
[10] See footnote 2, supra. Note that the current MDET moratorium expires at the end of 2019. Unless the moratorium is extended beyond year-end or the MDET tax is repealed entirely prior to that date, the tax would apply to applicable sales occurring after the end of this year. By contrast, the Cadillac tax is currently not scheduled to apply until 2022.

[11] As indicated above, some Senators are concerned that the House SECURE Act dropped a provision that had been in the Ways and Means Committee bill relating to expanding the definition of qualified section 529 expenses. If there is a tax package, this provision could be expected to be raised as part of the negotiations.

However, there are other issues on which the House and Senate are likely to have different positions and there can be expected to be significant "horse trading" in putting together a package.

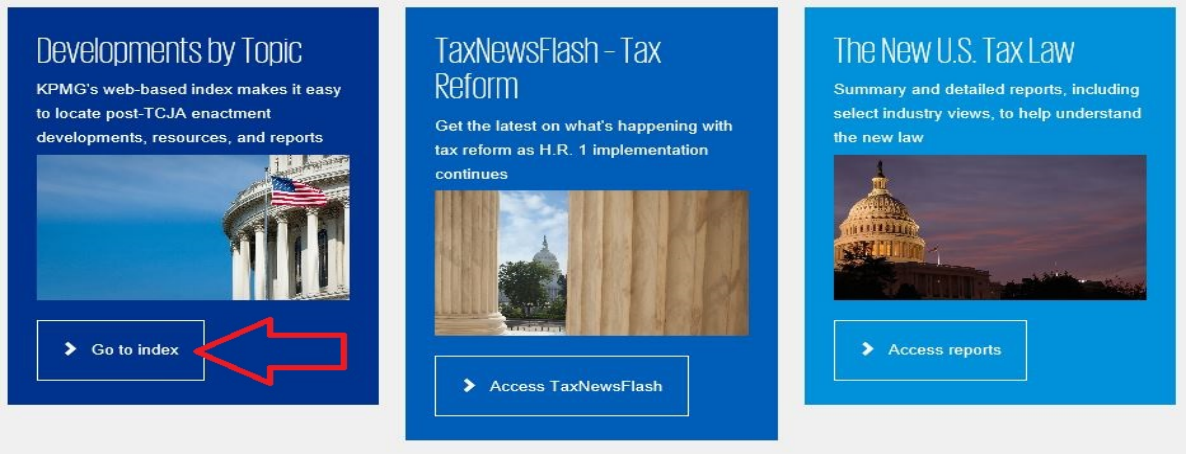
For example, perhaps the most notable difference that has emerged so far relates to whether the costs of extenders should be offset. The House Ways and Means bill that includes extenders and disaster relief) includes an approximately $37.56 billion revenue-raising provision to accelerate the sunset date of an estate, gift, and GST tax change made by the TCJA that more than offsets the approximately $33.19 billion cost of the extenders title (but not the additional $9.265 billion cost of the attached disaster tax relief provisions). The Senate, however, is likely to strongly oppose both: (1) using a substantial "cutback" in a TCJA provision as a revenue offset; and (2) offsetting the costs of extenders.[12] Although it's not certain how this difference ultimately might be resolved, one possibility might involve the House "getting" some provisions that would expand the EITC, child credit, and/or dependent care assistance in exchange for agreeing not to offset the costs of extenders.



Regulatory matters

Treasury and the IRS continue to issue regulatory guidance with respect to the TCJA. For more information about guidance that has been issued so far (including observations and analysis), read KPMG's *Tax Reform: Developments and Analysis Guide*. This guide is organized by topic, making information easy to find.

[12] Senate Republicans might be expected to cite past historical "precedent" in both Democratic and Republican Congresses for not offsetting the costs of extenders and to argue that "extenders" is a bipartisan issue, not a Republican "ask." House Democrats, however, might contend that the costs of extenders were not included in previous estimates of the costs of enacting or extending temporary provisions and that, as a practical matter, offsetting the costs is important to a significant number of House Democrats.



In addition, there has been on-and-off speculation that the Trump Administration might move to index capital gains through administrative action. Prior to the recess, 21 Senate Republicans (including five members of the Senate Finance Committee) signed a letter [PDF 3.1 MB] dated July 29, 2019 to Treasury Secretary Mnuchin urging him to eliminate inflationary gains from Treasury's calculation of capital gains tax liability. By contrast, Senate Democrats wrote two letters urging the Secretary *not* to index capital gains by administrative action; the more recent of the letters is dated August 7, 2019, and was signed by 42 Senate Democrats (including all the Democratic members of the Senate Finance Committee). Read the letter [PDF 693 KB]

The George H.W. Bush Administration considered this issue in 1992 and decided it did not have authority to make such a change without legislation.[13] Further, even if the Treasury were to determine that such authority exists, the change would involve complex technical issues. It is, therefore, quite uncertain whether the Trump Administration might decide to act on this front.

Treaties

The Senate has not yet scheduled action on possible ratification of new income tax treaties with Hungary, Poland, and Chile that have been pending for several years. It is not clear whether the Senate will address these treaties this year. One complication is that provisions of these full treaties could arguably conflict with provisions of the TCJA, such as the base erosion and anti-abuse tax (the "BEAT"). In the event of any conflict between the treaty provisions and the TCJA, the treaties would prevail because they would be later in time. It is possible that the addition of reservations might be required to clarify such a situation, and it is unclear whether Treasury has settled on language that would achieve the desired result.

[13] See, e.g., the Department of Justice opinion dated September 1, 1992.

EXHIBIT A

In the pipeline: Recent House floor and Ways & Means actions (as of September 9, 2019)

Key issues addressed	Is it paid for?	Recent action and links for more information
H.R. 397, the "Rehabilitation for Multiemployer Pensions Act"		
Provide certain distressed MEP plans with loans Revenue-raisers relating to: • "stretch IRAs" – over $15 billion • increasing failure-to-file penalties (including for retirement plans) • increasing information sharing for heavy vehicle use tax.	Partially. According to CBO [PDF 245 KB], direct spending outlays (approximately $67.7 billion) would be partially offset by revenue-raising provisions (approximately $19.1 billion), for a **net increase in the deficit of approximately $48.5 billion** over 10 years.	Passed House (264 to 169) on July 25, 2019. Revenue-raisers were added after Ways and Means reported the bill but before floor consideration. For more information, read *TaxNewsFlash*.
H.R. 3299, the "Promoting Respect for Individuals' Dignity and Equality (PRIDE) Act"		
Clarify that Code applies to legally married same-sex couples in same manner as other married couples and allow those same-sex couples to change federal income tax filing status outside statute of limitations. Revenue-raiser would increase failure-to-file penalty.	Partially. The JCT scored the bill as having a **net revenue cost of approximately $18 million** over 10 years, with the approximately $57 million costs of the "PRIDE" provisions partially offset by increasing failure-to-file penalty.	Passed House by voice vote on July 25, 2019. The revenue-raiser was added after Ways and Means reported the bill but before floor consideration. For more information, read *TaxNewsFlash*.
H.R. 748, the "Middle Class Health Benefits Tax Repeal Act"		
Repeal excise tax on high-cost employer-sponsored health coverage (commonly referred to as the "Cadillac tax")	No. No revenue raisers in bill. The JCT scored the bill as having a **revenue cost of approximately $197 billion** over 10 years.	Passed House (419 to 6) on July 17, 2019 under "Consensus Calendar." No Ways and Means markup For more information, read *TaxNewsFlash*.
H.R. 1994, the "Setting Every Community Up for Retirement Enhancement Act" (the "SECURE Act")		
Retirement provisions include: • Increase required minimum distribution age for some • Portability of lifetime income options Repeal certain "kiddie tax" measures added by the TCJA (Code section 1(j)(4)). Same revenue-raisers as H.R. 397 (i.e., stretch IRAs and procedural provisions).	Mostly. The JCT estimated that most of the cost of expanding retirement savings and other revenue-losing provisions would be offset by approximately $16.4 billion of revenue raisers, with the bill **losing approximately $389 million** over 10 years.	Passed House (417 to 3) on May 23, 2019. Modified after Ways and Means action but before floor consideration to: • Add "kiddie tax" provision • Remove provision related to 529 plans and homeschooling and secondary school expenses For more information, read *TaxNewsFlash.*

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H.R. 3301, the Taxpayer Certainty and Disaster Tax Relief Act		
Extend through 2020 many temporary tax provisions that expired in 2017 or 2018 or that are scheduled to expire at end of 2019 Disaster relief title with tax provisions relating to disasters as well as unrelated provision changing two-tiered excise tax rate applicable to investment income of certain private foundations Revenue-raiser would modify an estate, gift, and GST tax change made by TCJA to accelerate the sunset date for the increased basic exclusion amount.	Partially. The JCT estimated that: • Accelerating sunset date for increased basic exclusion amount would raise approximately $37.56 billion, **more than offsetting the approximately $33.19 billion cost of "extenders"** title of bill • But, **bill as a whole would lose over $4.5 billion** over 10 years (taking into account removal of Indian coal production credit during markup).	Ordered reported by Ways and Means (party-line vote) on June 21, 2019 For more information, read *TaxNewsFlash*.
H.R. 3300, the Economic Mobility Act		
Expand EITC, make child tax credit fully refundable for some families, and expand tax incentives for dependent care assistance. Repeal TCJA provision that requires inclusion of certain fringe benefit expenses in unrelated business income (Code section 512(a)(7)).	Not now. As reported by Ways and Means, bill does not include revenue offsets; however, raisers might be added before House consideration. Not taking into account changes made during Ways and Means markup, JCT estimated that, over a 10-year period: • EITC, child tax credit, and dependent care assistance changes would **cost over $99 billion,** and • TCJA fringe benefit provision would **cost approximately $1.93 billion.**	Ordered reported by Ways and Means (22-19) on June 21, 2019. All "aye" votes were from Democrats, but 3 Democrats voted against the bill. For more information, read *TaxNewsFlash*.
H.R. 3439, the "Protecting Access to Information for Effective and Necessary Treatment and Services Act" (PATIENTS Act)		
Extend through 2026 the "PCORI fee" on health insurance policies and self-insured health plans.	No official revenue information available from JCT or CBO.	Ordered reported by Ways and Means on June 26, 2019. For more information, read *TaxNewsFlash*.

Contact us

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