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In this issue:

‘Omnibus’ spending deal includes ‘grain glitch’ fix, low-income housing credit boost, pre-2017 tax technical corrections 1
Trump administration committed to making individual tax relief permanent, Hassett says 4
A note on our publication schedule 5

‘Omnibus’ spending deal includes ‘grain glitch’ fix, low-income housing credit boost, pre-2017 tax technical corrections

Republican and Democratic leaders in Congress struck a deal March 21 on a sweeping appropriations bill that funds the government for the remainder of fiscal year 2018, but also provides a fix for the so-called “grain glitch” in the 2017 tax legislation, expands the low-income housing tax credit, and – in a bit of a surprise – makes technical corrections to the Protecting Americans from Tax Hikes Act of 2015, the partnership audit rules, and other pre-2017 tax laws.

Despite opposition from conservative Republicans opposed to the bill’s spending increases and some Democrats frustrated by its failure to provide a path to citizenship for the so-called “Dreamer” population, lawmakers cleared the bill in short order – the House on March 22 by a vote of 256-167 and the Senate in the early hours of March 23 on a 65-32 tally – before departing Washington for a two-week recess.

President Trump signed the bill into law on March 23, ahead of a scheduled lapse in spending authority at midnight. But the bill signing only came *after* the president dangled an early morning veto threat on Twitter that blasted the agreement for not including a Dreamer deal or funds for his proposed wall along the southern US border.

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Big picture

The bill – dubbed the Consolidated Appropriations Act, 2018 – fills in the details of a budget pact enacted last month that set top-line appropriations levels for the remainder of fiscal 2018 (which ends September 30) and for all of fiscal 2019. (For prior coverage of the Bipartisan Budget Act of 2018, see *Tax News & Views*, Vol. 19, No. 6, Feb. 9, 2018.)
URL: http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf
URL: http://newsletters.usdbriefs.com/2018/Tax/TNV/180209_1.html

Passage of the appropriations package brings to a close the series of stop-gap funding bills – or "continuing resolutions" – that have served to keep the government's doors open most of this fiscal year (that is, aside from two brief shutdowns which occurred on January 20 and February 9 when funding legislation was not enacted in time).

Last month's budget deal lifted the statutory "sequester" caps on discretionary spending by a total of $143 billion in fiscal 2018, split between an $80 billion increase for defense accounts and a $63 billion increase for domestic accounts. (In fiscal 2019, the yet-to-be-allocated cap increases are divided between $85 billion for defense and $68 billion for domestic.)

Dems support 'grain glitch' fix to secure low-income housing credit boost

The only tax change in the omnibus bill aimed at patching up the massive tax legislation (P.L. 115-97) that was signed into law at the end of last year is language addressing the so-called "grain glitch" in new tax code section 199A that further expanded incentives for farmers to sell their products to agricultural cooperatives rather than other buyers (in general, by offering a deduction based on gross co-op sales as opposed to net income).

At a very high level, the changes in this area – laid out in Division T of the omnibus – are generally aimed at returning the relative tax advantages of sales to cooperatives versus private companies to something that more closely resembles pre-2018 law. A technical explanation of this provision and other tax provisions in the spending bill is available from the Joint Committee on Taxation (JCT) staff.
URL: https://www.jct.gov/publications.html?func=startdown&id=5064

Notably, Division T is distinct and separate from Division U, which lays out the bill's tax technical corrections (more on those below) – indicating that Democrats did not view the grain-glitch fix as a technical correction, per se, but rather a discrete policy change. Indeed, the JCT scored the provision as raising $108 million over the next decade. By precedent, technical corrections do not have any budget effect as they reflect the intent of drafters of the original statute.
URL: https://www.jct.gov/publications.html?func=startdown&id=5065

Low-income housing credit: Although congressional Democrats generally have taken a firm stand against working with the GOP to make changes to last year's tax legislation because they were not consulted during its drafting, the grain glitch brought enough Senate Democrats from agriculture-reliant states – several of whom are running for re-election this fall – to the table in search of a solution.

That said, Democrats also demanded concurrent changes to the low-income housing tax credit as a condition of their support for fixing the grain glitch – a dynamic that raises potentially interesting legislative possibilities should it become a precedent for future bipartisan cooperation on changes to the new tax law.

Specifically, the omnibus deal provides a four-year boost (through 2021) in the per capita state housing credit ceiling (and small state minimum) and adds a third optional test – the "average income test" – that taxpayers can use to determine whether a housing project is a qualified low-income housing project under section 42(g). The latter change would be enacted on a permanent basis.

According to the JCT, these changes would decrease federal receipts by roughly $2.83 billion over the 10-year budget window.

Technical corrections to pre-2017 tax laws tag along

While most observers were watching intently to see what, if any, modifications lawmakers might make to last year's tax legislation, few anticipated the omnibus spending package would be the vehicle that would carry long-stalled

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technical corrections related to the Protecting Americans from Tax Hikes (PATH) Act of 2015 (that is, the 2015 tax extenders bill) and the partnership audit rules originally enacted as part of the Bipartisan Budget Act of 2015.

These corrections – as well as corrections addressing provisions in other legislation enacted prior to 2017 – are enumerated in Division U of the bill and are described in detail in the JCT's technical explanation of the appropriation bill's revenue provisions.
URL: https://www.jct.gov/publications.html?func=startdown&id=5064

IRS gets a budget bump

The Consolidated Appropriations Act allocates a portion of the fiscal 2018 nondefense funding increase to the Internal Revenue Service. In total, the IRS will get about $11.4 billion in fiscal 2018 funding, up $196 million from last year's level, with increases targeted toward improving customer service, fraud prevention, and cybersecurity. Within that $11.4 billion amount, the bill provides authority for the IRS to spend $320 million – available until September 30, 2019 – on taxpayer services, enforcement, and operations support related to implementation of last year's tax law. Before those funds can be made available to the IRS, however, the Commissioner would have to submit a spending plan to the House and Senate Appropriations committees.

FAA programs, taxes also punted to September 30

The appropriations deal also extends expenditure authority from the Federal Aviation Administration's Airport and Airway Trust Fund along with related taxes on tickets, freight, and fuel – which were otherwise scheduled to lapse after March 31, 2018 – through September 30, 2018.

Left on the cutting room floor

There had been talk on Capitol Hill in recent weeks of using the appropriations package to address other anomalies in the 2017 tax legislation in addition to the grain glitch – for example, by clarifying that the cost of qualified improvement property is recoverable over 15 years (rather than 39) and eligible for bonus depreciation and by clarifying the effective date of the bill's net operating loss provisions to provide equity to fiscal year filers which generated losses in fiscal 2017. But those tweaks did not make it into the final agreement.

The omnibus bill also excludes language championed by House Ways and Means Committee Republican Kristi Noem of South Dakota as laid out in legislation (H.R. 2193) she introduced in April of last year that would allow states to require on-line sellers to collect and remit sales tax on remote sales in states where the sellers lack physical presence (subject to a phased-out small seller exception).

Noem argued to GOP leadership that a congressional solution should be adopted as soon as possible in the wake of the Supreme Court's decision to hear arguments later this spring in the case of *South Dakota v. Wayfair, Inc.*, which revolves around the legality of a South Dakota law that generally requires collection and remittance of sales tax by remote sellers regardless of whether they have physical presence in the state (a direct challenge to the current precedent of *Quill v. North Dakota* which requires such physical presence in the absence of a legislative solution).

But her arguments fell short, in large part because policymakers remain deeply divided on the issue. Noem's proposal – like similar proposals that have been introduced in recent years – attracted opposition from some conservative Republicans who view it as a tax increase (setting aside states' current-law use tax requirements) and from lawmakers in both parties who represent states that do not impose sales taxes.

Last train? Well, maybe...

From a legislative perspective, this week's appropriations deal has come to be regarded by some in Washington as "the last train to leave the station" ahead of the 2018 mid-term congressional elections scheduled for November 6 – which helps to explain the myriad unrelated policies that lawmakers attempted, successfully or not, to attach to the bill.

But the "last train" moniker may not be entirely accurate since, as already noted, the spending deal only covers the remainder of fiscal year 2018. Another round of appropriations legislation – whether it be another omnibus bill or a continuing resolution – will need to be enacted prior to the mid-terms in order to avoid a government shutdown when

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fiscal year 2019 commences on October 1. That deadline, along with the next scheduled sunset of the FAA's spending authority – also on October 1 – may give lawmakers at least one more pre-election opportunity to address unrelated tax priorities.

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Trump administration committed to making individual tax relief permanent, Hassett says

White House Council of Economic Advisers Chairman Kevin Hassett confirmed this week that the Trump administration supports a permanent extension of the tax relief for individuals, estates, and passthrough entities included in the major tax legislation (P.L. 115-97) that was signed into law at the end of last year.

As enacted, those provisions generally are set to expire at the end of 2025. But in response to a question from Senate Budget Committee member Ron Johnson, R-Wis., at a March 21 committee hearing, Hassett stated that the administration wants to make them permanent, adding that it was "a key assumption" of the fiscal year 2019 budget package that the White House sent to Congress last month.

His remarks came just a few days after both President Trump and House Ways and Means Committee Chairman Kevin Brady, R-Texas, made public comments about extending these provisions later this year. (For prior coverage, see *Tax News & Views*, Vol. 19, No. 10, Mar. 16, 2018.) And they echo comments Hassett made in a March 16 interview on CNBC that the administration is seriously considering a second round of cuts and that the temporary individual cuts could be made permanent as part of that effort.
URL: http://newsletters.usdbriefs.com/2018/Tax/TNV/180316_1.html

"America's workers are going to get that $4,000 pay hike because we passed a tax cut, and the pay hike will even be bigger if we can extend it and make it permanent," Hassett told CNBC.

Rehashing the 2017 tax debate

While the Budget Committee convened this week's hearing to consider the recently released Economic Report of the President, which explains the rationale for the administration's overall economic policies, most of the discussion was dominated by a partisan debate over the relative merits of last year's tax package.
URL: https://www.whitehouse.gov/wp-content/uploads/2018/02/ERP_2018_Final-FINAL.pdf

Republicans, along with Hassett, argued that the new tax law has already led to large gains in the US economy. Budget Committee Chairman Mike Enzi, R-Wyo., among others, offered various statistics touting the number of companies that have paid out bonuses, increased wages, or authorized share buybacks.

Buyback blowback: According to Hassett, share buybacks will lead to more capital accumulation at home, which over the longer term will boost wages. The argument comes from economic theory, which holds that increased capital investment boosts the productivity of labor and therefore results in higher wages. In a response to a question from Sen. Johnson, Hassett said that buybacks allow a more efficient reallocation of resources, as older firms tend to buy shares back and allow investors to send money to younger firms.

Democrats countered that the buybacks overwhelmingly benefit owners of capital over workers. Budget Committee member Ed Merkley, D-Ore., produced a chart that showed since the tax legislation became law, companies have poured some $227 billion into stock buybacks but spent only $5 billion on bonuses for workers. Democrats also argued that one-time bonuses are still not as beneficial to employees as actual wage increases.

Though she's no longer a member of the Budget Committee, Sen. Tammy Baldwin, D-Wis., introduced a bill the day after the hearing that would make it more difficult for corporations to buy back their own stock on the market, but would still allow tender offers for existing shareholders. In a news release, Baldwin argued the "surge in corporate

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buybacks is driving wealth inequality and wage stagnation in our country by hurting long-term economic growth and shared prosperity for workers."

About that $4,000 raise...: Democrats also took issue with the claim the administration made during the 2017 tax debate that the new law would result in a $4,000 raise for the average US family. Republicans, for their part, maintained that the figure was accurate but that the full effect of the legislation would be felt over time.

During questioning from Sen. Chris Van Hollen, D-Md., Hassett said that impact of buybacks would likely be front-loaded, as they are driven by the large cut in the corporate rate and a desire to bring capital back from abroad. And later in reply to a question from Enzi, Hassett said individuals would likely realize the benefits of the reform law over a period of three to five years.

No GOP love for Dem's tax reform rollback: Budget Committee member Cory Garner, R-Colo., asked Hassett what he thought would be the effect of a recent proposal from Senate Democrats to bump up the corporate tax rate to 25 percent (from its current level of 21 percent) to help pay for new infrastructure spending. (For details on the Democratic proposal, see *Tax News & Views*, Vol. 19, No. 9, Mar. 9, 2018.)
URL: http://newsletters.usdbriefs.com/2018/Tax/TNV/180309_1.html

Hassett replied it would still be better than what we had (prior to 2018), but on the margins an increase in the corporate rate would hurt investment.

Taxes and infrastructure

Another topic in the economic report – infrastructure – was the center of some debate, with lawmakers on both sides of the aisle disagreeing over how to pay for new spending projects.

Budget Committee member John Kennedy, R-La., argued that revenue from the newly enacted repatriation tax should be paired with infrastructure spending on the grounds that nonrecurring revenue needs to be applied towards nonrecurring expenses. Kennedy disagreed with the notion – supported by Treasury Secretary Steven Mnuchin – that this revenue should go into the general corporate revenue coffers.

Enzi asked Hassett if the administration was considering an increase in the excise tax on gasoline similar to one proposed by the Simpson-Bowles deficit reduction panel in 2010 that would hike the levy by five cents per gallon over each of several successive years. Enzi argued the gas tax is more like a user fee for infrastructure spending, in that only those who drive would pay the tax.

Hassett said an increase in the gas tax is among the options the administration is considering, but did not provide further details.

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A note on our publication schedule

The House and Senate will be out of session the weeks of March 26 and April 2 as lawmakers adjourn for their spring recess. Barring unexpected developments on the tax policy front, the next issue of *Tax News & Views* will be published the week of April 9, when the legislative session resumes.

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