

**NOMINATIONS OF MICHAEL N. NEMELKA,  
CHRISTIAN N. WEILER, AND ALINA I. MARSHALL**

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**HEARING**

BEFORE THE

**COMMITTEE ON FINANCE  
UNITED STATES SENATE**

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

ON THE

NOMINATIONS OF

MICHAEL N. NEMELKA, TO BE DEPUTY UNITED STATES TRADE REPRESENTATIVE FOR INVESTMENT SERVICES, LABOR, ENVIRONMENT, AFRICA, CHINA, AND THE WESTERN HEMISPHERE, WITH THE RANK OF AMBASSADOR, EXECUTIVE OFFICE OF THE PRESIDENT; CHRISTIAN N. WEILER, TO BE A JUDGE OF THE UNITED STATES TAX COURT; AND ALINA I. MARSHALL, TO BE A JUDGE OF THE UNITED STATES TAX COURT

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JULY 21, 2020  
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**NOMINATIONS OF MICHAEL N. NEMELKA,  
TO BE DEPUTY UNITED STATES TRADE  
REPRESENTATIVE FOR INVESTMENT  
SERVICES, LABOR, ENVIRONMENT,  
AFRICA, CHINA, AND THE WESTERN  
HEMISPHERE, WITH THE RANK OF  
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THE PRESIDENT; CHRISTIAN N. WEILER,  
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TO BE A JUDGE OF THE  
UNITED STATES TAX COURT**

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**TUESDAY, JULY 21, 2020**

U.S. SENATE,  
COMMITTEE ON FINANCE,  
*Washington, DC.*

The WebEx hearing was convened, pursuant to notice, at 10:14 a.m., in Room SD-215, Dirksen Senate Office Building, Hon. Chuck Grassley (chairman of the committee) presiding.

Present: Senators Enzi, Toomey, Cassidy, Lankford, Wyden, Cantwell, Carper, Cardin, Hassan, and Cortez Masto.

Also present: Republican staff: Mayur Patel, International Trade Counsel; Jeffrey Wrase, Deputy Staff Director and Chief Economist; and Nicholas Wyatt, Tax, Infrastructure, and Nominations Policy Advisor. Democratic staff: Michael Evans, Chief Counsel; Ian Nicholson, Investigator; Joshua Sheinkman, Staff Director; and Jayme White, Chief Advisor for International Competitiveness.

**OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.  
SENATOR FROM IOWA, CHAIRMAN, COMMITTEE ON FINANCE**

The CHAIRMAN. Welcome, everyone, to today's hearing on pending nominations. Today, we will have an opportunity to hear testimony from the President's nominees for positions with the U.S. Trade Representative, and of course also with the U.S. Tax Court.

We will hear from Michael Nemelka, who has been nominated to serve as a Deputy U.S. Trade Representative. We will also hear from Christian Weiler and Alina Marshall, both of whom have been nominated to be judges of the U.S. Tax Court for a 15-year term.

We congratulate the nominees and show our appreciation for their willingness to serve their country. The background of each of

these individuals is impressive. They are all very accomplished professionals, and of course we applaud the President for selecting people who are so well-qualified to be nominees for these positions.

I would also add that there is a clear need to fill these positions very quickly. The pandemic has taken a terrible economic toll on the country. Recovery requires an ambitious trade agenda to open markets and create new jobs for our citizens. The current U.S. Trade Representative, Ambassador Lighthizer, is trying to do exactly that, including by negotiating a trade agreement with Kenya. Mr. Nemelka would assist him with this important goal. That is why we need to get this nominee over to the U.S. Trade Representative to help Ambassador Lighthizer.

Today, we will also have nominees to the U.S. Tax Court. The Tax Court is especially important in that it gives ordinary taxpayers a place to challenge the IRS before they need to pay the disputed liability. In a disagreement that any citizen has with the IRS, these people can feel like they have no way to voice a disagreement with such a large and powerful government agency. The Tax Court then gives those taxpayers a place for their dispute with the IRS to be considered fairly. Like many other institutions, the Tax Court has been required to adapt to the COVID-19 situation and is conducting their proceedings remotely, as we are today. Even in this new environment, a delayed tax day finally came last week, and taxpayers will still need a forum for dispute resolution.

If the two nominees before us today are confirmed, we will have 18 of 19 positions for judges of the Tax Court being filled.

So I say “thank you” to everyone who is participating in today’s hearing, whether you are personally present or remotely. I hope that we will be able to take some steps today that will help economic recovery by advancing these nominees and letting the government serve the people according to their guidance.

I look forward to hearing the nominees’ statements and, hopefully, to working with them very soon.

[The prepared statement of Chairman Grassley appears in the appendix.]

The CHAIRMAN. Now we will hear from Senator Wyden.

[Pause.]

The CHAIRMAN. Senator Wyden?

**OPENING STATEMENT OF HON. RON WYDEN,  
A U.S. SENATOR FROM OREGON**

Senator WYDEN. Mr. Chairman? Can you hear me, Mr. Chairman?

The CHAIRMAN. Yes; thank you very much.

Senator WYDEN. And, Mr. Chairman, you should have the staff work on your system there because a lot of what you said at the end was pretty much garbled. So if they can correct it, I think that will help you and the committee.

The committee of course comes together today to discuss two nominations to the Tax Court and one for a position at the trade office. The Tax Court of course is all about fundamental fairness to taxpayers, giving taxpayers a venue to dispute potentially mistaken charges before they would have to pay.

The trade office of course faces big challenges: the Phase One China trade deal, the one the President says was the biggest and best anywhere, is already failing. The new NAFTA certainly is at risk of becoming only so many words on paper if the administration does not step up on implementing the labor obligations which Senator Brown and I and so many on our side of the committee fought for to dramatically change trade policy. In the fight against trade cheats, American workers and businesses need USTR to do better.

So these are both important roles. The nominees before the committee, in my view, are qualified to fill them.

With that said, this is the committee's first meeting after a recess that the Senate should not have taken. In the pandemic, virtually every new day is the worst day yet, with tens of millions of jobless Americans headed over an income cliff, literally losing a lifeline of supercharged unemployment benefits that were developed in the Finance Committee room.

So, while the nominations before this committee are important—and I very much look forward to discussing important issues with our witnesses—the committee quickly needs to move beyond business as usual. There are COVID hot spots all over the country. Just like in March and April, the testing cannot keep up with the spread of the virus. Health-care workers do not have adequate protective equipment.

You can count on one hand the States that literally have the pandemic under control. Parents, we're hearing—and I heard this in Oregon just over the past week—are afraid to send their kids back to school. And too many school districts do not know when or how they will be able to bring children back safely. It is a disaster for teachers and staff, for kids, and for parents—many of whom may have to drop out of the workforce in order to make sure their youngsters are taken care of.

And here are the facts with respect to the economic challenge. And of course our committee is front and center on those economic challenges. Consumer spending is dropping. Short-term furloughs are turning now into permanent furloughs. The number of new weekly unemployment claims, which before this year had never crossed 700,000, has been a million or more for 17 weeks straight. Everybody understands that the country is at the beginning of a once-in-a-century unemployment crisis.

But if not for the supercharged unemployment benefits—which I am going to mention were developed in the Finance Committee room—keeping families afloat, this country would also be in the middle of its second Great Depression. Those benefits, however, are going to expire in a matter of days.

They are going to lapse if Senate Republicans refuse to act by July 25th. That, in my view, will be a moral and economic disaster that is just going to hit the country like a wrecking ball. Folks are not going to have the money they need to make rent and buy groceries. We ought to make sure everybody understands those supercharged benefits did so much to keep our economy afloat over the last months.

Now, the Trump administration does not have a plan for any of this. The administration now is hiding COVID data from the pub-

lic, going by media reports. The big idea is to cut jobless workers' lifeline to pay for tax handouts to corporations and Wall Street.

So I am just going to close with a little bit of history so everybody understands what we are dealing with over the next few weeks.

In the Finance Committee room, Finance Committee leadership developed the original unemployment package. As Secretary Scalia said, you could not do the first choice, which was basic wage replacement, so we had to go with an averaging technique, which was \$600 per week each week. And that has allowed millions—even with all the hassles at the State level in trying to get the IT systems up and running—it has allowed millions to pay rent and to buy groceries, and to be able to survive as we deal with this pandemic.

And this was put together by Finance leadership and signed off on by Secretary Mnuchin in the Finance Committee room. So now, renewing those supercharged unemployment benefits at a time when the unemployment rate is so high cannot wait any longer.

The Senate should have done that weeks and weeks ago, instead of leaving town for a recess. Now the Democratic leader, Senator Schumer, and I have a proposal called the American Workforce Rescue Act that in effect would tie future unemployment benefits to economic conditions on the ground.

I have heard Republican Senators say, for example, they understand the need for a benefit when unemployment is high and folks cannot pay rent and buy groceries, but the benefit really should taper off when the unemployment rate goes down. That is exactly what Senator Schumer and I have talked about, and members of the Republican leadership have in effect said virtually what I just described.

By delaying unemployment benefits, in my view, the Republican leader is exploiting for political leverage all those Americans who are walking on an economic tightrope. It is wrong. It ought to end this week. And I hope people are following the Senate this week, because we are going to do everything we can to make it possible to get supercharged benefits renewed this week. Because, come July 25th, millions of Americans are going to see their lifeline—what they need to make rent, buy groceries—they are going to see that lifeline cut massively. And it is being cut over the opposition of Senate Democrats.

So today's hearing is going to examine important nominations. Mr. Chairman, I am going to close by saying I appreciate you calling the hearing. I look forward to the questions and answers. And in the days ahead, I hope this committee turns again to address the income cliff and the pandemic that has killed 140,000 Americans and threatens to do extraordinary, long-lasting damage to our economy.

These are challenges that the Senate Finance Committee can address, and it ought to be done this week. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Wyden.

[The prepared statement of Senator Wyden appears in the appendix.]



The CHAIRMAN. I will introduce the three nominees, and then we will hear from the three nominees. And then we will have questions for the nominees first by me, then by Senator Wyden, and then any other members who want to participate.

So I will start out with Mr. Nemelka. He currently is working as a special advisor to Ambassador Lighthizer. He has had an opportunity to become directly familiar with the U.S. Trade Representative's work and office, the trade priorities of this administration, and what we in the Congress think about various trade issues. Accordingly, he is in a position to hit the ground running once he is confirmed.

Before joining USTR, Mr. Nemelka was a partner at Kellogg, Hansen, Todd, Figel, and Frederick, where his practice focused on complex commercial litigation. Kellogg Hansen is a highly regarded law firm whose alumni include Justice Neil Gorsuch of the Supreme Court and two Circuit Court judges, and hopefully they can claim this new Ambassador as well after he is confirmed.

The nominee holds a B.A. in history from Brigham Young University and a juris doctorate from the University of Virginia School of Law, where he was on the managing board of the *Virginia Law Review*. Following law school, the nominee clerked for Judge Paul Niemeyer of the Fourth Circuit.

And now I am going to go to Christian Weiler, who has been nominated to be a judge of the Tax Court. And I am going to turn to Senator Cassidy, if he is available virtually, to speak about this nominee.

**OPENING STATEMENT OF HON. BILL CASSIDY,  
A U.S. SENATOR FROM LOUISIANA**

Senator CASSIDY. Thank you, Mr. Chairman. I assume you can hear me.

The CHAIRMAN. Yes, I can.

Senator CASSIDY. It is my pleasure to voice strong support for Christian Weiler to be a judge in the United States Tax Court. Mr. Weiler is very qualified and prepared for the position. And we are honored that he is able to join us remotely.

Now, he would not be here, as is so true for many of us, without the love and support of his spouse. Leslie is a CPA. He also has four children: Amelia, 13; Jack, 12; Michael, 8; and their youngest is 3. Amelia plays volleyball; Jack and Michael, soccer and football. Nathan is still a little young, but I am told he has his fourth birthday Sunday, so happy birthday, Nathan.

And I have it on good authority they are in the next room. And so again, you spoke of how we do things differently. It is so great to have family in the room with us—well, they are now in the room with us virtually. Not quite the same, but it is still great that they are here. And I am sure that they are incredibly proud.

Thank you all for the sacrifice you will make as a family.

Mr. Weiler has been a board-certified tax specialist since 2012, certified by the Louisiana State Board of Legal Specialization. He was born and raised in New Orleans and went to LSU for undergrad, where he earned his degree in accounting. He earned his juris doctorate from Loyola University Law School in New Orleans and his L.L.M. in Taxation from SMU's Dedman School of Law.

He has been admitted to practice in all Louisiana State courts, the Federal District Courts for the Eastern and Middle Districts of Louisiana and the Eastern District of Texas, United States Tax Court, United States Court of Federal Claims, and the United States Fifth Circuit Court of Appeals.

He has been recognized as a top-rated tax attorney in New Orleans by *Super Lawyers*, as well as by *New Orleans Magazine*. Besides being an outstanding attorney, he gives back to our community in a remarkable fashion. He is a volunteer with the Southeast Louisiana Legal Services Pro Bono Tax Clinic. He was a recipient of their 2015 Outstanding Pro Bono Service Award, in recognition of his dedication to low-income tax clients in Louisiana. He was the recipient of the 2016 Pro Bono Public Award from the Louisiana State Bar Association, again for outstanding pro bono service to Louisiana's indigent.

Beyond leveraging his legal expertise, Mr. Weiler also volunteers with Boys Hope Girls Hope of New Orleans. He is a board member. He serves on the Children's Neuromuscular Foundation of Louisiana, and the Louise T. Fine Memorial Foundation.

He and his family attend St. Pius X Catholic Church, where he actively serves. He has worked at the New Orleans law firm Weiler and Reeves since 2006 alongside his father John, making partner in 2012. I read that, and I thought, man, your dad must be pretty tough. Took him 6 years to make you a partner in a firm that he heads. Anyway, his firm primarily handles small business clients and individual tax-related matters.

As you can see, Mr. Weiler is an exceptional tax attorney and an exceptional person. He is very qualified to serve the Tax Court. I look forward to his confirmation hearing and the eventual vote in the full Senate.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you for that very thorough introduction, Senator Cassidy.

So I will introduce our last nominee, Alina Marshall. She is very familiar with the Tax Court. She has worked as counsel to the Chief Judge since 2013. Also, she has been adjunct professor of law at Georgetown University Law Center. And she has experience in private practice.

Ms. Marshall has a bachelor's degree from Yale University and completed her juris doctorate at the University of Pennsylvania Law School. Also, she served as a law clerk at the Tax Court. So she is very closely connected to the Tax Court through her entire legal career.

So I thank you all for participating in today's hearing, and we will start with Mr. Nemelka.

**STATEMENT OF MICHAEL N. NEMELKA, NOMINATED TO BE DEPUTY UNITED STATES TRADE REPRESENTATIVE FOR INVESTMENT SERVICES, LABOR, ENVIRONMENT, AFRICA, CHINA, AND THE WESTERN HEMISPHERE, WITH THE RANK OF AMBASSADOR, EXECUTIVE OFFICE OF THE PRESIDENT, WASHINGTON, DC**

Mr. NEMELKA. Chairman Grassley, Ranking Member Wyden, and members of the committee, let me start by thanking you for hold-

ing this hearing today. I would also like to thank your staffs for their professionalism, expertise, and courtesy throughout this nomination process.

Thank you, Chairman Grassley, for that introduction and for your support. It is a special honor to appear before you today. As you mentioned, I clerked for Judge Niemeyer on the Fourth Circuit, and he gave each of his young law clerks a word of advice at the start of our clerkship. He said, "I want you to treat taxpayer dollars as if you had to show every receipt to Senator Grassley."

I have always remembered that, and I never imagined I would have the privilege of testifying before you some day. But you should know that your spirit of responsibility has filtered down into the Federal judiciary, and I know I will certainly continue to follow that advice if I have the honor of being confirmed.

I would like to recognize the members of my family who are here with me today, and those who are watching from home. I am grateful to my wife Melanie for supporting my desire to serve in government, and for her love and friendship. We have been blessed with four wonderful children: two daughters, Emma and Ava, who are behind me; and two teenaged sons, Benjamin and William, who are either sleeping or watching from home.

I have also been blessed with the best of parents, siblings, and in-laws, and would like to thank them for their love and support. And I would be remiss if I did not mention my gratitude for my second family at Kellogg Hansen, a firm that epitomizes excellence and integrity.

I am deeply honored to have been recommended by Ambassador Lighthizer and nominated by President Trump to serve as the Deputy United States Trade Representative for Africa, China, and the Western Hemisphere, and for Investment Services, Textiles, Labor, and Environment.

I have had the privilege of serving at USTR for the past 5 months as an advisor and counselor to Ambassador Lighthizer. Based on my experience, I know firsthand how tirelessly he works day in and day out advocating for the interests of the United States. The dignity of the American worker is at the forefront of everything he does. We are all very fortunate to have him as our United States Trade Representative.

As I have seen, one of the main reasons Ambassador Lighthizer has had so much success is because of his close partnership with you. One of my primary goals, if I am confirmed, will be to ensure that I contribute to that constructive relationship with this committee and others in Congress.

If confirmed, I would have the opportunity to help build on the successes that USTR has already achieved. In the Western Hemisphere, we have the new United States-Mexico-Canada Agreement that just entered into force on July 1st. As Ambassador Lighthizer has said, that landmark agreement is the gold standard against which all other trade agreements will be judged.

It earned 89 votes in the Senate, a remarkable feat, and was supported by labor unions, businesses, farmers, and ranchers alike. The job now is to enforce it, including through the Brown-Wyden rapid response mechanism, the groundbreaking enforcement tool for resolving certain labor violations. You have my commitment, if

I am confirmed, to ensure that we receive every benefit of the bargain through smart and effective enforcement.

For China, we have the Phase One agreement, which also just entered into force a few months ago. In that remarkable agreement, USTR achieved many long-held goals, including a commitment from China to fully respect intellectual property rights, end forced technology transfer, and increase purchases of U.S. goods and farm products, among many other things.

We must ensure that China lives up to its commitment, and we have an agreement that is in writing and is fully enforceable to make sure they do.

In Africa, USTR just launched negotiations on a free trade agreement with Kenya, which would be the first such agreement between the United States and a Sub-Saharan African country. As Ambassador Lighthizer has said, the goal is to conclude an agreement that is comprehensive and high standard, while also being one that works for Kenya and can serve as a model for additional agreements across Africa.

I also look forward to seizing the opportunities we have in investment, services, and textiles, and building on the USMCA's model labor and environment chapters. In short, it is a very exciting time to be at USTR, and I would be very grateful for the opportunity to serve my country in this position, should I be confirmed.

Members of the committee, I thank you again for this opportunity, and I look forward to your questions.

[The prepared statement of Mr. Nemelka appears in the appendix.]

The CHAIRMAN. Thank you. We will now go to Mr. Weiler, remotely.

**STATEMENT OF CHRISTIAN N. WEILER, NOMINATED TO BE A JUDGE OF THE UNITED STATES TAX COURT, WASHINGTON, DC**

Mr. WEILER. Good morning, Chairman Grassley, Ranking Member Wyden, and the other members of the Finance Committee. Thank you for scheduling my confirmation hearing this morning.

I would also like to specifically thank Senator Cassidy for his kind introduction, and for his support throughout my nomination process.

I am honored to be nominated to serve as a judge on the United States Tax Court. I would also like to acknowledge this morning my beautiful wife Leslie and my four children who are here with me this morning: Amelia, Jack, Michael, and Nathan. And I want to thank them for all of their love and encouragement throughout my nomination process. I know that I would not be appearing before this committee today without the support of my family.

Senators, the Tax Court provides a critical independent forum for the resolution of civil tax disputes with IRS. If confirmed, I pledge to decide all matters in an impartial manner by applying the facts before me to the relevant provisions of the tax code as written, and by also looking to controlling precedent.

In my home town of New Orleans, I have had the pleasure of working for my father and my law partner, John Weiler, for nearly 15 years. In working with my father, I have not only had the privilege of being mentored by a truly outstanding tax attorney with un-

paralleled knowledge and skill, I have also had the privilege of learning from a great human being. Through my father's example, he has shown me how to treat others with respect and kindness in all matters. Formed by my strong Christian faith, I believe we are all children of God, and therefore not only do I pledge to serve as an impartial judge, I also pledge to treat all parties who may appear before me with respect and kindness.

I am also proud of my volunteer work with Southeast Louisiana Legal Services Pro Bono Tax Clinic. I believe my volunteer experience with the Tax Clinic will serve me well as a judge.

Finally, if confirmed, I look forward to serving my country.

Senators, thank you for your time and consideration this morning, and I look forward to answering any questions that you might have. Thank you.

[The prepared statement of Mr. Weiler appears in the appendix.]

The CHAIRMAN. Thank you, Mr. Weiler. Now we go to Ms. Marshall.

**STATEMENT OF ALINA I. MARSHALL, NOMINATED TO BE A JUDGE OF THE UNITED STATES TAX COURT, WASHINGTON DC**

Ms. MARSHALL. Chairman Grassley, Ranking Member Wyden, and members of the Finance Committee, thank you for holding this hearing to consider my nomination to serve as a judge on the United States Tax Court. I am grateful to you and your staffs for the opportunity to be here today.

My husband Sean, my daughter Elizabeth, and my son Luke are here with me this morning. Stand up, guys. Their love and support brighten my days and renew my enthusiasm. My parents, Jackie and Florin Ionescu, my in-laws Michele and George Hall and Barbara and David Marshall, are all supporting me remotely, and I remain thankful for their patience and encouragement.

I am grateful to Chief Judge Foley, the judges of the Tax Court, and the Tax Court family who have allowed me to work with them on so many challenging and exciting opinions and projects.

I also want to thank my generous and supportive friends, especially the Walshes. I am thankful to President Trump for nominating me to serve on the Court. This chance to chase my dream is truly humbling and a reminder of the opportunities that are uniquely available in the United States. I remain amazed that an immigrant who learned to speak English in the public school system and from "Sesame Street" would have the chance to meet with you today and, if confirmed, serve as a judge.

My family's journey of coming from Romania and building a new life is a tale of the American Dream, and the chances and resources given to us inspire me to give back, promote opportunity, and serve others.

For much of the last decade, I have had the privilege of serving at the Tax Court. I have been a member of the Tax Court family since 2010 and have served as counsel to the Chief Judge since 2013. I have the honor of advising the Chief Judge in the exercise of his statutory duties to review opinions before release.

I also have the privilege of helping with, and advising on, administrative and policy matters, including as the Court has continued to serve its mission during this pandemic. The Court quickly

changed its ways of conducting business, and it has been exhilarating to participate in the Court's adoption of new opinion review, case management, and trial procedures.

Given my time at the Tax Court and my experience at both large and small law firms, I believe I would be well-equipped to try cases and dispose of pending motions carefully, accurately, and efficiently, if I am confirmed.

The Tax Court is a special place, both because of its feeling of family and because of everyone's commitment to the Court's mission: the crucial role in supporting the United States' system of voluntary self-assessment.

Everyone works hard to meet the Court's mission of being a national forum for the expeditious resolution of disputes between taxpayers and the Internal Revenue Service, the careful consideration of the merits of each case, and a uniform interpretation of the Internal Revenue Code.

I already seek to serve the Court's mission by reviewing opinions and advising the Chief Judge, and I believe I could further support the Court's mission by carefully hearing cases and fairly applying the law to the facts of each case.

Thank you again for your consideration. I look forward to the committee's questions.

[The prepared statement of Ms. Marshall appears in the appendix.]

The CHAIRMAN. Okay. Before I go to my questions and Senator Wyden's questions, there are four questions that we always ask every nominee who comes before the committee. And generally there is a one-word answer.

First, is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated? I will start with Mr. Nemelka.

Mr. NEMELKA. No.

The CHAIRMAN. I will go to Mr. Weiler.

Mr. WEILER. No, Mr. Chairman.

The CHAIRMAN. And now to Ms. Marshall.

Ms. MARSHALL. No, Mr. Chairman.

The CHAIRMAN. Did you say "no," Ms. Marshall?

Ms. MARSHALL. I said "no," Mr. Chairman. Sorry.

The CHAIRMAN. Okay; thank you.

Now the next question is, do you know of any reason, personal or otherwise, that would in any way prevent you from fully or honorably discharging the responsibilities of the office to which you have been nominated? Mr. Nemelka?

Mr. NEMELKA. No.

The CHAIRMAN. Okay. And then, Mr. Weiler?

Mr. WEILER. No, Mr. Chairman.

The CHAIRMAN. And now, Ms. Marshall.

Ms. MARSHALL. No, Mr. Chairman.

The CHAIRMAN. Thank you.

The next question: do you agree, without reservation, to respond to any reasonable summons to appear and testify before any duly constituted committee of Congress if you are confirmed? Now let me ask my staff, is that question for all three, or just for the nominee to the USTR?

Okay, we have always asked that even of judges. So, if you haven't forgotten what I asked, would you answer that question, Mr. Nemelka?

Mr. NEMELKA. Yes, Mr. Chairman.

The CHAIRMAN. Mr. Weiler?

Mr. WEILER. Yes, Mr. Chairman.

The CHAIRMAN. Okay. And Ms. Marshall?

Ms. MARSHALL. Yes, Mr. Chairman.

The CHAIRMAN. Okay. The last question: do you commit to provide a prompt response in writing to any questions addressed to you by any Senator of this committee? Mr. Nemelka?

Mr. NEMELKA. Yes, Mr. Chairman.

Mr. WEILER. Yes, Mr. Chairman, I do.

The CHAIRMAN. And, Ms. Marshall?

Ms. MARSHALL. Yes, Mr. Chairman.

The CHAIRMAN. Okay. Now we will go to the questions that I will ask, and then we will go to Senator Wyden, and then we have a long list of people who might ask questions.

And let me say, there are going to be a lot of them. Only two of them, I think, intend to be here in person, so for those who are remote, if there is anyone who has said they are coming to the committee meeting and will not in the end do that, I would like to have you tell me so I know how much time to devote to questioning.

Mr. Nemelka, I have been traveling through Iowa the last couple of weeks because the Senate has been in recess. I hold Q&As with my constituents. My fellow farmers have repeatedly raised the importance of the China Phase One deal. They have faced a lot of hardships because of trade negotiations and trade disputes we have had, so I feel that we are trying to do right with them. But there are still questions out there.

As we enter the fall, it will be critical to ensure that China follows through on purchase commitments. If confirmed, you will be the Deputy USTR with responsibility for China. Tell me what you will do to ensure that China follows through on the obligation. That is my first question.

Mr. NEMELKA. Thank you for that question, Mr. Chairman. I know that, at USTR, we work every day to ensure that China lives up to its commitments under the China Phase One deal. And if I have the honor of being confirmed, I will put all of my energies behind that as well.

Specifically on the agricultural purchases, we have our ambassador, Greg Doud, who is on the phone almost every day with the Chinese ensuring that they fulfill their commitments. And in the fall, in particular with the seasonal products, and soybeans in particular that are currently in the ground, we expect to see those purchases rapidly increase.

The CHAIRMAN. Now my next question deals with Brazil and ethanol. The administration is trying to improve our trade relations with Brazil. Brazil is one of the top markets for American ethanol. In 2017 however, Brazil imposed a restrictive trade rate quota on ethanol that has limited our trade.

I would like to have you discuss with me—or if you can make a commitment to make ethanol market access a top priority as part of any effort to improve trade relations with Brazil.

Mr. NEMELKA. Thank you for that question. And yes, you do have my commitment. And I know we are currently discussing, or those at the office are currently discussing ethanol, in particular with Brazil. As you mentioned, they have imposed a TRQ. Brazil should either raise that TRQ or they should lower their tariff. They have a higher tariff on ethanol than we have, which shows an imbalance where they have tilted the table in a way for their products and adversely against ours. And so we should work closely with them to either raise the TRQ or reduce their tariffs.

The CHAIRMAN. If confirmed, you will be overseeing our negotiations with Kenya. With respect to the USMCA, we have had folks express concern that the approach to protecting American investment is insufficient. In particular, they are worried that Mexico may be moving in the wrong direction in giving a fair shake to Americans, since the investor-state dispute settlement has been scaled back.

This effects more than just investments that could have been done in America or any other country. It involves issues like licensing intellectual property or investments in geologic resources.

We want Americans to be able to safely make those types of investments overseas, because they benefit us here at home. If confirmed, will you commit that, for Kenya you will seek comprehensive protections for American investors that are more robust than the approach taken in the USMCA?

Mr. NEMELKA. The investment chapter with Kenya—I agree, it is going to be a very important chapter for that agreement. And we have a goal of making it a high-standard, a comprehensive chapter with respect to ISDS. I know that that is still under consideration, and you have my commitment to work with Ambassador Lighthizer to carefully consider that issue and consult with you on it.

The CHAIRMAN. Okay. I have kind of a softball question for our tax nominees that I would like to have you respond to. As a Tax Court judge, you will preside over many cases that involve unsophisticated taxpayers with few resources to deploy while making their case.

What lessons do you take from your prior professional experience to ensure that you will treat these taxpayers with respect and an understanding, while stopping short of awarding them an advantage? And I know that you each took care to make sure that you were going to be very equitable in this area, but I would still like to have you express it more fully. Or as short as you can, for whatever answer you want to give me in regard to that. Mr. Weiler?

Mr. WEILER. Yes, Mr. Chairman. Thank you.

I believe my background and experience will serve me well to handle such matters. I am in a small firm presently, and as Senator Cassidy mentioned, principally my practice is small business owners and individuals.

Also, I have volunteered for some 10 years at Southeast Louisiana Tax Clinic and handled pro bono matters that are often before the court, including collection matters, innocent spouse relief, Earned Income Tax Credit matters. In fact, some 70 percent of the Tax Court docket is small claims and pro se matters. So I think that experience will serve me well.



I have also volunteered as an attorney at the calendar call here in New Orleans for the Tax Court. And as a judge, although my role would be different, obviously, and I would be an impartial arbitrator, I think there are opportunities as a judge to make these taxpayers aware of the pro se—actually, the pro bono outreach activities, including the calendar call volunteer attorneys.

So I would commit to making taxpayers aware of this service. And finally, I would also pledge to keep an open mind and of course to apply the law as written by Congress.

Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Marshall?

Ms. MARSHALL. Before coming back to the Court as counsel to the Chief Judge, I had the privilege of working at a smaller firm where I worked with human being clients who were sometimes less knowledgeable about the tax laws but very passionate about their jobs and their families.

In my work at the Court, I have seen a lot of trial testimony and briefs. I have seen the challenges that taxpayers face in trying to make complex arguments in an unfamiliar forum.

Also, as an immigrant, I understand how language barriers can hinder communication and how sometimes a little bit of time and patience can resolve these challenges. Because of my background, I am familiar with the Tax Court's resources to help smaller taxpayers. I am familiar with the small tax case designation, with the LITCs, the Low-Income Tax Clinics, the pro bono programs, and with the Court's website that has a lot of resources that can be helpful to taxpayers.

The CHAIRMAN. I thank you very much.

Now we will go to Senator Wyden.

Senator WYDEN. Thank you very much, Mr. Chairman. I was glad, Mr. Chairman, you asked that question of the Tax Court nominees as your wrap-up question, because that really is the litmus test: can they relate to people who are not up on the ins and outs of tax law? So I appreciate you asking it.

Let me go to the trade issue, Mr. Nemelka. One out of four jobs in my State revolves around international trade. The trade jobs often pay better than do the non-trade jobs. And the ball game with respect to—

The CHAIRMAN. [Inaudible.]

Senator WYDEN. Mr. Chairman, may I continue?

The CHAIRMAN. I was rude. I was talking to a colleague, and my microphone was on, so I am sorry, Senator Wyden. Proceed.

Senator WYDEN. Not to worry. In the sweep of western civilization, not a problem. [Laughter.]

Now, Mr. Nemelka, with respect to trade, the ball game is really enforcement. And that is what Senator Brown and I sought to do with colleagues, on the Democratic side in particular, to make sure that trade efforts going forward actually were supported with laws that had teeth in them. And because you have worked in these trade areas for some time, you understand what the issues are. There are questions of Mexico's commitment to labor obligations, dairy markets—that access—Customs, food safety.

And so I think the first question I would like to ask you is, if confirmed, can you give us some kind of target date when we could

expect to start seeing enforcement actions brought by the Trump administration, by the U.S. Trade Representative? Can you give us a target date when we could begin to see those kind of enforcement actions?

We all understand first impressions are key, and I think knowing that there are going to be enforcement actions coming up is an extraordinarily important message to send right now.

Mr. NEMELKA. Thank you, Senator Wyden, for that question. And I agree completely that enforcement is key. And you have my commitment, if I am confirmed, to make that a priority.

Your question with respect to a target date—I know that, in my job as an advisor there currently, we have hit the ground running. All the committees are stood up. We have the panelists appointed. For the labor issues, we have the hotline set up. We have a petition process established. And we are working with stakeholders and others to identify the best cases, because I think your point is a very important one, which is the first impression—not only to do it quickly, but also to pick the right cases and work and consult with you and this committee to identify the best cases. And to win them. That is what I would bring from my background: to ensure that we have smart and effective enforcement and actually win the cases we bring.

In terms of a target date, I know that Ambassador Lighthizer has said that we have this month to review the process and then consult with you, and quickly thereafter bring the best cases.

Of course before we bring a case, we need to consult with Canada and Mexico and try to resolve the case before actually litigating. But if those consultations fail, I agree with you we need to be fully prepared to use the tools that you have given us, including the Brown-Wyden rapid response mechanism.

Senator WYDEN. But you could see, for example, an enforcement action in the next several months?

Mr. NEMELKA. If the consultation processes fail, I could see sometime this fall. There are time periods where we need to consult with Canada and Mexico, so we are limited by that time period we need to consult. But if those consultations fail, I could see, if I am confirmed, actually doing something this fall.

Senator WYDEN. Okay. Second question: the UK has adopted a unilateral digital services tax that unfairly targets American technology companies and is certainly a burden on digital trade.

Will you commit to ensuring that repealing this discriminatory tax is a top priority in the negotiations between the U.S. and the UK?

Mr. NEMELKA. I do agree with that, Senator Wyden.

Senator WYDEN. I appreciate that, because the stakes there are enormous. And I am glad you have made it clear, because I know those negotiations between the United States and the UK are going to be the place where we are going to be watching, and to know that that is a top priority is very important to me.

The last trade question I want to talk about is China's unfair trade practices. They range from IP theft to censorship. They are obviously a special priority for the Finance Committee, and China is in your portfolio and that of the Ambassador.

Now, how are you going to spearhead the China portfolio, and particularly prosecuting the cause of going after China's unfair trade practices? With Mr. Gerrish's departure, we want to see progress on Phase Two. We want to see the issues addressed in the Trade Rep's report in 301. How are you going to use the China portfolio to go after China's trade practices that rip off our jobs and our workers and companies?

Mr. NEMELKA. Thank you for that question, Senator Wyden. I think the primary way we will do that is that the China Phase One deal has an enforcement mechanism that actually sets out a process to do just that. And it is a process that escalates as we do not get the response that we expect, or that China has committed to. And so I think we use the enforcement mechanism that we have in writing in the China Phase One deal.

And with respect to the other abuses that you have alluded to, I think that is something that we always need to be mindful of and continue to work with China on to see what we can do in a Phase Two deal.

The CHAIRMAN. Senator Enzi?

Senator ENZI. Thank you, Mr. Chairman. And I want to thank the nominees for their willingness to serve. We need competent people in all of these important positions, and as an accountant, I particularly appreciate the nominees for the Tax Court and know what kind of efforts and decisions that they will have to make.

I am going to aim my questions for Mr. Nemelka. My State of Wyoming is home to some of the highest-grade rare earth deposits in North America. Rare earth elements are an important part of many electronic products we use every day, like computers and cameras.

Right now the problem for the United States is that China has a stranglehold on the supply chain that makes it difficult to utilize the deposits we have here. I have made it my goal to see that the supply chain for rare earths, from the mining to the refining, is done right here in this country—and better yet, the State of Wyoming. And locating the supply chain closer to where the minerals are found is good for our national security, and it makes economic sense.

Do you share my concern over China's control over the rare earth elements? And do you think there is a way to reduce our dependence on China for rare earth elements? And are there ways to use trade to foster a domestic industry?

I have seen how they have traded a lot of countries out of their rare earths by building a soccer stadium or a new parliamentary building. And they are locking those up around the world, as we speak. What can we be doing?

Mr. NEMELKA. Thank you, Senator, for that question. I do share your concern with respect to rare earth minerals and having them primarily coming from overseas. And I am from Utah, which is next door to Wyoming, and I am aware of the rare earth deposits that are in Wyoming and other western States, and how important it is to develop those industries. And you do have my commitment to make that a priority.

And I think it is going to take a government-wide interagency effort on this, not just trade but across the government. And I know

that this administration has had some initiatives that it has announced on that front, and you have my commitment to contribute constructively to those.

Senator ENZI. Thank you. I want to ask an agricultural question too. I appreciated the chairman's questions and know that he will be involved in negotiations with China, and others of course.

Are there ways to ensure that the domestic agriculture is safeguarded and not used as a pawn during the negotiations? You have seen the times when it has been a pawn, and I want to make sure that that is not the fact.

Mr. NEMELKA. I think that is critical. One of the primary—you know, what America does best, as the chairman and others have said, is to grow food products and export them to the world.

You know we have a Chief Agricultural Negotiator whose sole job is to make sure that it does not become a pawn, and I have never seen any evidence that that would happen. And I certainly would not allow that to happen in any negotiation I am involved in.

Senator ENZI. Thank you. My final question on trade: American entrepreneurs depend on protection of their intellectual property in ongoing negotiations that you do with China. Do you commit to holding China accountable to their intellectual property practices, and ensuring that American intellectual property is protected?

Mr. NEMELKA. Yes, you do have my commitment. And that is one of the commitments that we have in writing in the China Phase One deal, that China will respect intellectual property rights. And my understanding is they have actually made a lot of progress on that, on their commitments that they have made in the China Phase One deal.

And if I am confirmed, I will certainly make that a priority to ensure that they continue to live up to those commitments.

Senator ENZI. Thank you for your answers, and your willingness to serve. I yield back.

The CHAIRMAN. Senator Cantwell?

Senator CANTWELL. Thank you, Mr. Chairman.

Mr. NEMELKA, congratulations on your nomination. Trade is a very important issue to the State of Washington, and so I have a lot of trade-related questions for you.

One, starting with wheat—and 90 percent of our wheat is exported—Kenya is a very specific market opportunity that has 10-percent tariffs. What are we doing currently to reduce those 10-percent tariffs in Kenya?

Mr. NEMELKA. Thank you, Senator Cantwell, and I am aware of your expertise on trade and how important it is to the State of Washington. That is going to be a priority in our negotiations with Kenya, if I am confirmed, and those negotiations just kicked off and—

Senator CANTWELL. You mean if you are not confirmed, it will not be a priority? [Laughter.]

Mr. NEMELKA. Well, if I am not confirmed, I will not be there. So, if I am there, and I am confirmed, then that will be a priority. And I know that reducing those tariffs will be a key part of our ask with Kenya.

Senator CANTWELL. Thank you. On what I call the twin side of the coin with the Mexico agreement, Senator Wyden talked about enforcement. I want to ask you specifically about capacity building.

We were able to get \$240 million in there for capacity building. What do you think the priorities are in capacity building in Mexico?

Mr. NEMELKA. Thank you for that question. You did provide those resources to the Department of Labor particularly for the capacity building, and some to USTR. I think that a priority is labor, to ensure that the workers in Mexico know their labor rights, know about the reforms, and to ensure that protectionist unions that are currently there, that there is a process to challenge those—and that the labor workers understand their rights. And so I think capacity building around labor is a priority in Mexico.

Senator CANTWELL. And so, does USTR undertake that? How do you make sure that happens?

Mr. NEMELKA. We work very closely with the Department of Labor. We actually have attachés. Labor has three attachés in Mexico. USTR is having a permanent person who will be placed in Mexico to help oversee those efforts. We have the Interagency Labor Committee, which we co-chair with the Department of Labor, which will help coordinate those efforts.

There is a structure—

Senator CANTWELL. And they have annual meetings and things? I mean, since the COVID problem is so pervasive there as well, I just wonder how this is going.

Mr. NEMELKA. They have many more than just annual meetings. They have already met. They are meeting again this week, I believe. They have regular meetings. It is an up and functioning committee that is—as you mentioned, they have to do it remotely, but it is ongoing.

Senator CANTWELL. Right. And can we get updates on that periodically?

Mr. NEMELKA. Absolutely.

Senator CANTWELL. Great. That would be so helpful.

Aluminum: what is USTR doing to stop the oversupply with China on aluminum?

Mr. NEMELKA. The oversupply issue on aluminum and other products, I know is a big issue, and I know it is something that Ambassador Lighthizer considers frequently. And I actually, in particular, do not know of any specific efforts. I have not been involved in those discussions, but I know that it is a priority. And it would be, if I were confirmed.

Senator CANTWELL. Well, I think overcapacity—and my colleague before me, Senator Enzi, was talking about rare earth minerals. I could say the same. A lot of our aluminum is going to building essential materials in the U.S., and I think that we need to understand where the United States needs to be as it relates to aluminum, and the criticality of that supply.

So I look forward to working with you on that issue. Thank you, Mr. Chairman.

Mr. NEMELKA. I do too. Thank you.

The CHAIRMAN. Is Senator Toomey available? You are next if you—

Senator TOOMEY. I am here. Can you hear me, Mr. Chairman?  
The CHAIRMAN. Yes. Please proceed.

Senator TOOMEY. Thank you very much, Mr. Chairman. My question is for Mr. Nemelka, and it is follow-up on a question Senator Cantwell raised. We keep hearing that the administration is considering reimposing section 232 tariffs, specifically upon Canadian aluminum, despite the fact that Canada is a country with whom we have a free trade agreement.

Now of course as you know, section 232 authorizes tariffs in response to the importation of a product or an article that impairs national security. In the United States, as I am sure you know, U.S. aluminum manufacturers are not seeking these tariffs. The U.S. aluminum manufacturers alone cannot meet domestic demand for aluminum, even at full capacity. I am told that U.S. primary aluminum smelters can only meet about one-third of demand for input aluminum if they are working all-out. And maybe more importantly than any of this, there are far more Pennsylvania and American jobs that come from aluminum users than aluminum producers.

About 97 percent of the U.S. aluminum jobs are not in the production of aluminum, they are in the use of that aluminum to make products. Those workers, that 97 percent of all workers in the aluminum space, their jobs are at risk if the input that they need becomes uncompetitive because we decide to arbitrarily put a tax on it when it comes from Canada.

So my question is, given this dynamic that we have, wouldn't raising tariffs on aluminum cost more jobs than it saves?

Mr. NEMELKA. Thank you for that question, Senator Toomey. I have read the press reports about the surges of aluminum imports from Canada and the concern that that raises. I am also aware of the August agreement between Mexico, Canada, and the United States with respect to certain 232 tariffs. And I know that—I know that the office is carefully considering those issues.

I have not been involved in those discussions, but I think that there is a framework in place, based on the August agreement between Mexico, Canada, and the United States, to address any aluminum surges.

Senator TOOMEY. But you did not answer the question. Does it not stand to reason that, with the vast majority of people in the aluminum space working for companies that use aluminum in order to make some other product, does it not stand to reason that if the cost of that input is uniquely higher for American manufacturers, they would be at a competitive disadvantage? Is not the risk that raising taxes on Canadian aluminum for American consumption—in other words, raising taxes on Americans—that it would diminish jobs and not create jobs?

Mr. NEMELKA. I am not—I am not sure about the analysis. I know that there was an issue that was addressed by Mexico, Canada, and the United States, and we were able to—the office was able to resolve that in August. And Canada and Mexico agreed to certain conditions—

Senator TOOMEY. I understand what they agreed to, and I understand the circumstances under which they agreed to it. I am asking a different question, which is, is it a good idea to put the jobs of

people who use aluminum to make products in jeopardy by raising the cost of their input? And I would certainly hope that you could commit to doing a thorough analysis of the negative impact on the people employed in aluminum-using industries before recommending that we make them less competitive by raising their costs.

Mr. NEMELKA. Senator Toomey, you do have my commitment, if I am confirmed, that any such action that I would actually work on would definitely include a full analysis of those types of considerations.

Senator TOOMEY. Thank you. One other question, also for Mr. Nemelka, and that is about the 301 tariffs on medical products. My understanding is that right now there are a number of goods that we use that we consider to be personal protective equipment—garments, diagnostic test instruments, hand sanitizers, and others—some of which are subject to tariffs now. And given the tremendous need for these products, and given that American manufacturers are, I am pretty sure, working all-out to provide all that they can, would it not be a good idea to consider immediately suspending the tariffs on all COVID-related protection products?

Mr. NEMELKA. Thank you for that question, Senator Toomey, and it is a critical issue at this time in the middle of the pandemic. I do know that there is a—you mentioned a 301 tariff. There is an exclusion process that has been put in place that is very thorough, and for a lot of the equipment you referred to, those exclusions have been granted.

In terms of, if your question goes to elimination of all the pre-existing tariffs, I think that Ambassador Lighthizer has said, and I agree, that we need to encourage domestic manufacturers for those, and that certainly plays into the considerations.

Senator TOOMEY. Yes; now that kind of effort to manage the economy and decide which things must be made in America and which ones are not, is very misguided in the first place, in my view. But it is only even conceivable in the very long term, right, because it takes awhile to invest in a manufacturing facility, to build a plant. And so the idea that now in the midst of a crisis we would knowingly impose this higher cost on Americans who are trying to protect themselves, with the idea that well, maybe sometime in years down the road we will increase domestic manufacturing, it just strikes me as profoundly misguided. I hope the U.S. Trade Rep will reconsider that.

The CHAIRMAN. Senator Carper? Senator Carper, if you are available.

Senator CARPER. Senator Carper is available. Can you hear me?

The CHAIRMAN. Yes; go ahead.

Senator CARPER. That is great. I just want to say to Mr. Weiler and Ms. Marshall, thank you for your willingness to serve in these positions.

Ms. Marshall, it looks like you have had some pretty good experience for the last 7 years as the counsel for the Chief Judge at the Tax Court? Is that right?

Ms. MARSHALL. Yes, Senator.

Senator CARPER. If Mr. Weiler needs some advice as the new kid on the block, would you be willing to give him some counsel and help him get ready for his new job, if he is confirmed?

Ms. MARSHALL. It would be an honor, sir.

Senator CARPER. And, Mr. Weiler, how would you feel about accepting that offer?

Mr. WEILER. Oh, I would very much welcome it, Senator. So thank you. Yes.

Senator CARPER. I think in every job I have ever held or been elected to, I have asked people who had served in the role before for their advice and counsel. As the Governor of Delaware, I used to, as they say, "Sit on the shoulders of those who came before me," people like Mike Castle and Pete du Pont and others. So I would urge you to do the same thing here.

Mr. NEMELKA, I have just a personal question, if I could. Have you had a chance to meet with most of the members of this committee prior to your confirmation hearing?

Mr. NEMELKA. I have had the opportunity to speak with many. I do not know if it is "most," but many I have, including you, and I very much enjoyed our conversation.

Senator CARPER. I was going to ask, which interview did you most enjoy?

Mr. NEMELKA. I would have to say yours. I think ours went on for close to an hour, and it was a very enjoyable conversation.

Senator CARPER. It is not supposed to be that much fun, and I have great expectations for your upcoming service as a key member of the Trade Rep's team.

I do have a serious question. I understand from our conversation a couple of weeks ago that the Trade Rep has set up something called the Interagency Environment Committee and has hired a number of new staff dedicated to USMCA environmental enforcement.

I was pleased to learn of this progress, and I commend you and your team for moving quickly on implementation in this area. As we discussed, I am particularly interested in making sure that the Trade Rep uses the new environmental monitoring and environmental mechanism that several of us pushed to include in USMCA.

This mechanism, as you may know, would require the Interagency Environment Committee to review all allegations of environmental violations that result in a factual record at the Commission for Environmental Cooperation.

You mentioned on a call that the U.S. Trade Rep and EPA now have an agreement that the Interagency Environment Committee will not only review cases that result in a factual record, but all submissions to the Commission for Environmental Cooperation, a move that I wholeheartedly applaud.

Here is my question: now that USMCA is officially in effect—and we are glad it is—does the Interagency Environment Committee have a process in place for reviewing submissions to the Commission for Environmental Cooperation? And has the new committee begun reviewing any submissions?

Mr. NEMELKA. Thank you for that question, and I appreciate your leadership on the environmental issues and the environmental chapter in USMCA. And the answer is, yes. The committee is up and running and does have a process for considering those—those petitions. And as you mentioned, we do have that agreement with the EPA that it is not just the petitions to the Commission



that result in a factual record, but any—any complaint that is submitted, or any other complaint outside of that process. Somebody can submit a complaint directly to the committee or otherwise.

Senator CARPER. Well, you may have just answered my next question, but I am going to ask it anyway. Would that committee be open to accepting direct submissions from the public for issues outside of the Customs verification agreement, rather than going through the Commission for Environmental Cooperation?

Mr. NEMELKA. The answer is, yes, Senator.

Senator CARPER. Thank you. One last question. How has the COVID-19 pandemic impacted the ability of the U.S. Trade Rep and the Interagency Environment Committee to conduct on-the-ground monitoring of Mexico's environmental obligations?

Mr. NEMELKA. It is a very good question. We have three attachés, environmental attachés, who have been assigned to USTR from NOAA, EPA, and Fish and Wildlife Service who will be based in Mexico City. And I would say that the primary—we have those attachés—the primary obstacle that COVID has given us is actually getting them established in Mexico. But otherwise, our environmental office is in constant contact with their Mexican and Canadian counterparts, and USMCA, the environmental chapter, is up and running.

But the primary obstacle with COVID has been getting those attachés and our permanent USTR person actually established in Mexico City.

Senator CARPER. Mr. Nemelka, thank you very much. My congratulations to each nominee. We look forward to voting and hopefully confirming you into your service.

Mr. Chairman, thank you.

The CHAIRMAN. Thank you. Senator Cassidy, remotely.

Senator CASSIDY. Yes. First, Mr. Weiler and Ms. Marshall—again thank you all, all three of you, for your willingness to do this.

You know, I have worked for 25 years as a physician in a public hospital for the uninsured. I am always struck that when you work with people closely, you actually have more of their perspective. And sometimes I hear folks say something about health care for those who are less well-off, and I am thinking that is not my patients. Those were not the folks I treated for 25 years.

You have both done this pro bono work for those who are less well-off when they come to the Tax Court. What is—very quickly, because I have questions for our other nominee—what is the one insight you have that you think is unique that folks might not understand for those who came to your pro bono tax courts?

Mr. Weiler, let us start with you.

Mr. WEILER. Thank you. Thank you, Senator Cassidy, for that question. I would say the one insight that I have gained is being able to listen first, being able to hear what the client's needs are, and being able to direct that to solving their issue and problem. And as a judge, I feel that I can do the same.

I am pledged to be fair, pledged to be impartial, but I think it is important to listen to the pro se taxpayer. They are not necessarily an attorney. They do not have the legal acumen maybe to express their position articulately. So I think, as a judge, that is

important, particularly for the Tax Court to listen to the taxpayer and to try to resolve the issue if at all possible.

Senator CASSIDY. And, Ms. Marshall, would you add to that, or do you have the same impression?

Ms. MARSHALL. I would agree with everything Mr. Weiler said, and I would echo and suggest that my insight would be how hard the Tax Court tries to get it right. The judges really work hard to hear the cases, to make sure every case is heard fairly and carefully, and that every person who comes to the Court, every individual, every corporation, the IRS, everyone has a moment to make their best case and to be heard.

Senator CASSIDY. Got you.

Listen, Mr. Nemelka, in our agreement with China—I believe I know the answer to this—are there any environmental protections? Or are there any worker rights protections in that agreement with China?

Mr. NEMELKA. Specifically directed to those two subjects, I cannot—I do not recall any.

Senator CASSIDY. So if we demand those of Mexico, of Central American countries, et cetera—which, by the way, I think we should—and China is willing to ignore them, using slave labor, allegedly, befouling the air with greenhouse gases which float over to Oregon, Washington State, and California, is that not effectively regulation imposed upon a country like Guatemala or Mexico, which by ignoring is effectively a subsidy to lowering the production costs in China?

Mr. NEMELKA. I agree with you, Senator Cassidy, that labor and environmental standards are incredibly important and are trade-related for the very reason that you say, and that we should have the minimum standard that all countries should abide by.

Senator CASSIDY. So we do not have them with China, and China just blatantly ignores them. And so I am concerned that we are effectively incentivizing companies to move production from a Central American country which needs that worker base to keep folks there, keep them prosperous, incenting them to move to China which does not have enforcement of those regulations. Again, any comment on that? Do you disagree that we might be incentivizing by these regulations?

Mr. NEMELKA. Thank you for that comment. I mean, I agree with the basic premise, which is, if countries do not abide by labor or environmental standards, that it then is a trade-distorting issue, because—

Senator CASSIDY. Now let me ask you something else. During the negotiations with Mexico on the USMCA, I was concerned about the actions of investor-state dispute settlements. And I understood kind of philosophically that for some it served as a subsidy. There was an uncertainty of doing business in Mexico. Why should we alleviate that uncertainty? I was upset because it was not for energy companies.

You are required to develop their energy resources in Mexico—they are in Mexico—but nonetheless if they nationalize it, you have no recourse. Cabotage laws make both building companies locate in Mexico—they have cabotage laws like we have cabotage laws—but otherwise there is no ISDS.

But I get that. Now let us flip over to intellectual property rights. By the same principle, why should we be protecting intellectual property rights? Should that not be the price of doing business, that somebody may steal your IP? Why do we defend intellectual property rights when we do not defend a boat company which has to build in Mexico because of cabotage laws?

Mr. NEMELKA. Thank you for that question, Senator Cassidy. I know that the ISDS issue was heavily negotiated with Mexico and Canada. In terms of the actual reasons why some are covered and some not, I actually do not know the archeology of that. But I am happy to work with you and discuss that with you.

The CHAIRMAN. Senator Cardin?

Senator CARDIN. Thank you, Mr. Chairman. And let me thank all of our nominees for their willingness to serve.

Mr. Nemelka, I want to ask you a couple questions. Our committee, the Congress, was very strong in the Trade Promotion Authority when we gave the executive power to negotiate. Some of our principle trade objectives are good governance, anti-corruption, and human rights.

In the USMCA agreement, that was carried out by a separate chapter on good governance. And my question really refers to—if we go forward with a free trade agreement with Kenya, this would be a real challenge on governance. Kenya has a reputation that is less than stellar on fighting corruption. They have significant human rights challenges in that country. It would be a country that would present challenges under any scenario on governance issues, but if it is our first free trade agreement with a challenged country, it is going to be looked upon as a model to move forward.

So what commitment can you give this committee, if we move forward with this agreement and submit one to Congress for approval, about how you would protect the trade objectives that Congress overwhelmingly supported on good governance in such a trade agreement?

Mr. NEMELKA. Thank you for that question, Senator. And I completely agree with you that those elements are important. They are in the Trade Promotion Authority that Congress has directed for USTR with respect to trade objectives. And as Ambassador Lightizer said, the intention is to negotiate a high-standard, comprehensive agreement with Kenya that can serve as a model. And I think you identify an important consideration there, that if we do not have strong good governance and anti-corruption provisions, it will not be as useful as a model.

And so you have my commitment to seek, if I am confirmed, an agreement with Kenya that would have those strong protections.

Senator CARDIN. Well, I have some concerns about proceeding with Kenya with a free trade agreement. But putting that aside for one moment, if that goes forward I would just ask your commitment to work with us from the beginning on this chapter dealing with good governance so that we have the input of those of us in Congress who have pushed very hard for this objective in trade to make sure that any agreement that is submitted to Congress contains adequate protections on good governance.

Do I have your assurance that you will work with us from the beginning on these issues?

Mr. NEMELKA. Senator Cardin, you do. And I welcome that.  
Senator CARDIN. Thank you.

The USMCA contains a provision in regard to small businesses. I am the ranking Democrat on the Small Business Committee. I had a chance to talk to Ambassador Lighthizer about these issues.

Can you just update us as to how the implementation of the small business provisions of the USMCA is moving forward, particularly knowing that COVID-19 has changed the time schedule on a lot of the implementations of the USMCA?

Mr. NEMELKA. Happy to. My understanding is that a lot of progress is being made on the small business provisions of USMCA, and that largely—you know the agreement is in force. I know that our office talks to Mexico almost every day on various USMCA provisions. And one of them, a very important one, is the small business chapter.

And my understanding is that that is largely stood up.

Senator CARDIN. Thank you. And to our two nominees in regards to the Tax Court, I just really want to underscore the point that was raised by other colleagues. The Court plays a critically important function, and not everyone who appears before it has the same degree of sophistication.

So I appreciate your response that you will be listening to the litigants, particularly those who are not represented by counsel, and understand it is a complex area for even those of us who have a knowledge of the field and have adequate representation. But for those who do not, it does require a sensitivity, and I just urge you to be an advocate for that type of sensitivity in the Court.

With that, Mr. Chairman, I would yield back my time.

The CHAIRMAN. Thank you, Senator Cardin. Now, Senator Lankford.

Senator LANKFORD. Mr. Chairman, thank you very much.

Mr. Nemelka, let me ask you several questions. Thanks to all of you, by the way, before I get started, for the work that you continue to do, and for stepping up to be able to take this responsibility. All have impressive backgrounds, so thanks for stepping into this kind of public service.

Mr. Nemelka, I want to be able to talk specifically with you. And you and I have talked before about rare earth minerals and our dependence in connection with China and rare earth minerals.

What is your philosophy at this point on how to be able to diversify our trade portfolio and our opportunities to be able to pursue rare earth minerals, in particular from locations other than China, and developing those?

Mr. NEMELKA. Thank you, Senator Lankford. And I did enjoy our conversation, and I appreciate that question. It is a similar concern that Senator Enzi expressed. And my philosophy is that it has got to be a priority; that it has got to be not just a trade issue, but an intergovernmental effort. We need to work across the board to not just diversify our supply of rare earth minerals, as you say from other countries, but also to develop our own supplies here domestically.

Senator LANKFORD. I would agree. So the Indo-Pacific—obviously there are other countries that have some of these same rare earth minerals. Are we targeting relationships with specific countries in

the Pacific Rim to develop some of those relationships in trade, as well as trying to get domestic manufacturing? Specifically, what would your responsibility be on the trade side? Any specific countries we are trying to target right now?

Mr. NEMELKA. Southeast Asia would not be in my portfolio, but we do have a specific office that is dedicated to such matters, and not just geographically, but also competitively. And I know that that is—you know, rare earth minerals, and sourcing, and diversifying where our companies get those materials, are a priority across the administration.

Senator LANKFORD. Okay. We will continue to talk about that. I know you have China in your portfolio. That is the reason I raised that for the whole region, and just the connections that we continue to have in our dependence there.

Let us talk a little bit about the Northern Triangle and the Western Hemisphere. The Northern Triangle has been a vital trade partner for us. It is also vital not only for trade and what is coming in, but also geopolitically, and creating a stable set of economies in the Northern Triangle is exceptionally important.

Do you have plans? Do you have key partners that are there? Do you have expansions? Do you have technical expertise that you are providing to Guatemala, El Salvador, and Honduras at this point, especially that you are trying to target for increased trade relationships and stability, or trade among each other in the ongoing trade agreements already there?

Mr. NEMELKA. Thank you for that question, and I agree with its importance. And I agree that those are critical trade relationships. And I do know that we are in frequent contact with those countries on trade-related matters, trying to not only increase trade and facilitate it, but address the irritants. And I am aware that the office has people directly—that their job is to work with those countries on those trade-related matters. And I look forward to working with you and others on it.

Senator LANKFORD. Yes; we cannot lean in enough there. Obviously those are all—all three of those countries are vital trade partners for us, and it is important that their economies continue to remain strong long-term as well, and continue to be able to grow.

Several of my Oklahoma companies have been very, very concerned about the 301 tariffs and the tariff lists and the exemptions. The exemption process has been arduous, to say the least, as they have gone through this the last couple of years. And there has been a great deal of instability to say whether they are going to be extended, not extended, what happens next with our 301 tariffs, where they do the design engineering in Oklahoma, and then they do manufacturing, let us say in China.

What is your plan on the exemption process? Are there any thoughts that you have on the 301 tariffs for the future?

Mr. NEMELKA. Thank you for that question. On the exemption process, I know that that is run by our Office of General Counsel and by professional staff. I know that they work tirelessly on that and take each request sincerely and work hard on that.

And so I am not particularly involved, in my current position, nor would I be if I am confirmed. But I do know that it is a process that the office handles with the utmost conscientiousness.

Senator LANKFORD. The challenge that I have is obviously the China connection that you have in your portfolio, that if those resources are produced there in China, this becomes a very, very difficult process to be able to get clarification on how long the exemption—when they will get information on the exemption, if it is going to expire at some point. Just providing as much clarity as we could possibly give in the days ahead will help our trade relationships.

And if the push is going to be that you just need to go somewhere else, people just need to know that and not be led along to think that there will be some exemption in the days ahead when there is not one coming.

So we just need to be able to make sure that we provide long-term clarity to companies.

Mr. Chairman, thank you. Thanks to all of the folks who are here testifying today.

The CHAIRMAN. Thank you, Senator Lankford. Now, is Senator Hassan available?

Senator HASSAN. I am, Mr. Chairman. Thank you.

The CHAIRMAN. You bet. Go ahead.

Senator HASSAN. Well, thank you, Chairman Grassley and Ranking Member Wyden, for holding this hearing. And to all three of our nominees today, thank you for your public service, and thank your families for supporting you in that service. Nobody does this by themselves, and we are very grateful for everything that you and your families are willing to do to serve.

Mr. Nemelka, I want to just touch on the same issue that Senator Lankford was just asking about, because companies all across New Hampshire are trying to weather this economic crisis, but are also having to pay substantial tariffs that the administration has imposed on imports from China. And since China is part of your portfolio, I hope that you will get as up to speed as possible on the exclusion issue. Because the tariffs were already a major burden prior to COVID-19, and I am really concerned that they continue to affect businesses, especially small businesses, during this crisis.

One example is a business in New Hampshire, Extreme Networks, which has 400 employees in Salem, NH. It was denied tariff exclusions and continues to pay tariffs on networking hardware.

So please get up to speed on this issue, and I hope that the office will revisit not only the way it is communicating to small businesses about these exclusions, but consider the impact that these exclusions are having during the economic crisis.

Can you commit to doing that?

Mr. NEMELKA. I can, Senator. I thank you for that guidance.

Senator HASSAN. I also wanted to follow up on a question that Senator Toomey asked. I want to drill down a little bit more on the issue of the supply of personal protective equipment.

It is not just a matter of public and individual health, but it is also obviously a matter of economic recovery for our country. Let me be clear about what is happening on the ground.

Medical facilities, nursing homes, schools, businesses, do not have enough personal protective equipment. And the administration does not have a plan to secure the supply of PPE needed for the long term. During Ambassador Lighthizer's June appearance

before this committee, I asked him if the administration would lower tariff barriers that reduce U.S. access to personal protective equipment and medical supplies.

And I take it from your answer now that you think USTR should address tariff barriers in order to strengthen international PPE supply chains. Is that correct?

Mr. NEMELKA. Could you repeat the question?

Senator HASSAN. Do you think USTR should address tariff barriers, specifically lower some of these tariffs, to strengthen our international personal protective equipment supply chain?

Mr. NEMELKA. I do not know if I said that. If I did, I misspoke. I think what I was saying is that during this pandemic, I think the office has granted the exclusions, the 301 exclusions, on those products. And with respect to the standard tariffs that apply in any event, not just the 301, I think what I said is, it is important to strike a balance, that we want to move supply chains here. It is important to have our own domestic supply.

But I agree with you. It is important to make sure that our front-line workers have enough—have that equipment at hand. And so it is a balance.

Senator HASSAN. It is a balance. It is also about predictability as we try to give people confidence that they will be able to go back to school and go back to work. We need to know how and where we are getting these supplies, and how to produce them at home as well.

Let me follow up a little bit more on this. In the same hearing with Ambassador Lighthizer, he told me that USTR and the FEMA-led PPE task force were not coordinating. I urged USTR to coordinate with FEMA to build out our domestic supply of PPE.

Mr. Nemelka, has USTR begun to coordinate with FEMA's PPE task force since Ambassador Lighthizer appeared here last month?

Mr. NEMELKA. Thank you for that question. I do not know the answer, but I will definitely find out and am happy to follow up with you.

Senator HASSAN. I would really appreciate it. This is absolutely critical for our capacity to protect health, but also our economic recovery. And I would really urge you and the entire task force team to work together and really develop a strategy that we have not yet seen from the administration.

Thank you, Mr. Chairman. I yield the rest of my time.

The CHAIRMAN. Thank you very much. And now we call on Senator Cortez Masto, and it looks like that Senator will be the last one unless somebody else lets me know that they have questions. Otherwise, I will adjourn, and we are getting close to the vote anyway. So I hope that this might be the last Senator to participate.

Senator from Nevada, go ahead.

Senator CORTEZ MASTO. Thank you, Mr. Chairman.

To the panelists, congratulations on your nominations. Welcome to your family members as well.

Let me start with the two potential tax judges. I know you have been sitting there and watching as your panelist, the Deputy USTR nominee, is getting a lot of questions. So let me talk to you a little bit about the Tax Court.

Both of you either have, as attorneys, been before the Tax Court, or want to be working there now. What are the technological challenges at the Tax Court right now? My understanding is that there are challenges in filing petitions online. There are challenges in accessing documents online as well. Is that true? And what would you do as Tax Court judges? Or what would you like to see change, if that is the case?

Let me start with Mr. Weiler, and then I will ask Ms. Marshall to go next.

Mr. WEILER. Thank you, Senator. Yes, the Tax Court is, as are most of the courts around the country, facing some unprecedented times. The Tax Court has been proactive. I have been—obviously I am not at the Court today, so I cannot get very specific—but my understanding in my discussions with Ms. Marshall, the other nominee, as well as with the Chief Judge, is that the Tax Court has implemented a Zoom or a virtual platform. And it is really to promote that the docket continues to move.

Petitions are being filed and now being accepted by the Court. So they are accepting mail. And there is an online platform for pro se taxpayers and practitioners alike to file. So from a high level, I can address and say the good news is that the Tax Court is moving forward with having virtual dockets, which I think most importantly will allow settlement, hopefully a resolution of the matters.

Most of the matters before the Tax Court ultimately are resolved. So I think this promotes discussion and dialogue between a taxpayer and IRS counsel. And if and when the need arises, then a hearing or a virtual trial can proceed.

Senator CORTEZ MASTO. Thank you. Ms. Marshall?

Ms. MARSHALL. Thank you for that question, Senator. This is a time of change at the Tax Court. It is a really exciting time to work there.

This past Friday the Court set up its new website. I think it is a little more taxpayer-friendly, a little easier to access from your smart device. The Court is working towards a new case management system. That is expected to come out before the end of 2020. The new case management system is also designed to be more user-friendly, more taxpayer-friendly. And unlike the current system, it will allow for petitions to be electronically filed with the Court.

The Court has set up a program with ZoomGov for hearings and trials, which will be conducted remotely for the next while. And the Court does currently allow a lot of access to documents. Right now, the public can access on the Tax Court website all Court opinions, all Court orders, Court decisions, and docket record sheets. In addition to that, taxpayers and practitioners can access their cases, any document in their cases. Taxpayers who would like further access to the Court can call in a request and, for a fee of, I believe it is 50 cents a page, \$3 maximum per document, they can get Court records that are not sealed emailed to them.

Senator CORTEZ MASTO. Okay; and so has COVID-19 added an additional burden on accessing this information because of the technological challenges? Or is that something the Court has worked through to address right now so that there are no backlogs?



Ms. MARSHALL. I do not believe the current system—I believe that the Court has done a good job of keeping up with changes in technology and trying to adapt to the pandemic. The Court did not receive mail for over 3 months, and currently petitions cannot be electronically filed. So there will be a backlog in the Court catching up on that.

Traditionally, documents could be accessed by the public at the Court for free, but the Court is not currently open for visitors. And traditionally the documents were mailed or picked up by courier, but now since the pandemic, the Court is allowing emailed documents.

Senator CORTEZ MASTO. Okay. Thank you very much. Congratulations, everyone. I notice my time is up. Thank you for your willingness to serve.

The CHAIRMAN. Okay, we are about done here. So I will finish by thanking all the Senators who participated, and particularly the nominees for answering their questions. Also, we wish—we congratulate you once again on your willingness to serve. And then for people who have asked questions, or people who were not asking any questions who want to submit questions for answers in writing, we would ask that that deadline be 5 o'clock this Friday, July 24th. And then in turn, I tell the nominees to answer the questions as quickly as they can in writing.

And so with that—

Mr. NEMELKA. Senator Grassley?

The CHAIRMAN. Yes?

Mr. NEMELKA. Do you mind if I quickly call my daughters? The other kids got on the screen, and I was not able to bring them on. I know I am going to hear about it if I do not.

The CHAIRMAN. Please do that.

Mr. NEMELKA. This is Emma, and Ava is right here.

The CHAIRMAN. Okay. You bet.

Mr. NEMELKA. Thank you.

The CHAIRMAN. Well, God bless them and thank you very much. Meeting adjourned.

[Whereupon, at 11:50 a.m., the hearing was concluded.]



## APPENDIX

### ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

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PREPARED STATEMENT OF HON. CHUCK GRASSLEY,  
A U.S. SENATOR FROM IOWA

Welcome, everyone, to today's hearing on pending nominations. Today, we will have an opportunity to hear testimony from the President's nominees for positions with the U.S. Trade Representative and the U.S. Tax Court.

We'll hear from Michael Nemelka, who has been nominated to serve as a Deputy U.S. Trade Representative.

We'll also hear from Christian Weiler and Alina Marshall, both of whom have been nominated to be judges of the U.S. Tax Court for 15-year terms.

I want to congratulate the nominees and say that I appreciate their willingness to serve their country. The background of each of these individuals is impressive. They are all very accomplished professionals. I applaud the President for providing us such well-qualified nominees.

I would also add there is a clear need to fill these positions quickly. The pandemic has taken a terrible economic toll on our citizens. Recovery requires an ambitious trade agenda to open markets and create new jobs for our citizens. The current USTR, Ambassador Lighthizer, is trying to do exactly that, including by negotiating a trade agreement with Kenya. Mr. Nemelka would assist him with this important goal. That's why we need to get him over to USTR to help Ambassador Lighthizer.

Today, we will also hear from two nominees to the U.S. Tax Court. The Tax Court is especially important in that it gives ordinary taxpayers a place to challenge the IRS before they need to pay the disputed liability. In a disagreement with the IRS, many people can feel like they have no way to voice a disagreement with such a large and powerful government agency. The Tax Court gives those taxpayers a place for their disputes with the IRS to be considered fairly. Like many other institutions, the Tax Court has been required to adapt to the COVID-19 situation and is conducting proceedings remotely. Even in this new environment, a delayed tax day finally came last week, and taxpayers will still need a forum for dispute resolution that is as operational as we can make it.

If the two nominees before us today are confirmed, 18 of 19 positions for judges at the Tax Court will be filled.

Thank you to everyone who is participating in today's hearing, whether in person or remotely. I hope we'll be able to take some steps toward economic recovery with the advancement of these nominees.

I look forward to hearing the nominees' statements and, hopefully, to working with them very soon.

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PREPARED STATEMENT OF ALINA I. MARSHALL, NOMINATED TO BE A  
JUDGE OF THE UNITED STATES TAX COURT

Chairman Grassley, Ranking Member Wyden, and members of the Finance Committee, thank you for holding this hearing to consider my nomination to serve as a judge on the United States Tax Court. I am grateful to you and your staff for the opportunity to be here today.

My husband Sean, my daughter Elizabeth, and my son Luke are here with me this morning. Their love and support brighten my days and renew my enthusiasm. My parents Jackie and Florin Ionescu, and my in-laws Michele and George Hall and Barbara and David Marshall, are all supporting me remotely, and I remain thankful for their patience and encouragement. I am grateful to Chief Judge Foley, the judges of the Tax Court and the Tax Court family, who have allowed me to work with them on so many challenging and exciting opinions and projects. I also want to thank my generous and supportive friends and neighbors, especially the Walshes.

I am thankful to President Trump for nominating me to serve on the Tax Court. This chance to chase my dream is truly humbling and a reminder of the opportunities that are uniquely available in the United States. I remain amazed that an immigrant who learned to speak English in the public school system and from “Sesame Street” would have the chance to meet with you today and, if confirmed, to serve as a judge. My family’s journey of coming from Romania and building a new life is a tale of the American dream, and the chances and resources given to us inspire me to give back, promote opportunity, and serve others. For much of the last decade, I have had the privilege of serving at the Tax Court.

I have been a member of the Tax Court family since 2010 and have served as counsel to the Chief Judge since 2013. I have the honor of advising the Chief Judge in the exercise of his statutory duty to review opinions before public release. I also have the privilege of helping with and advising on administrative and policy matters, including as the Court has continued to serve its mission during this pandemic. The Court quickly changed its ways of conducting business, and it has been exhilarating to participate the Court’s adoption of new opinion review, case management, and trial procedures. Given my time at the Tax Court and my experience at both large and small law firms, I believe I would be well-equipped to try cases and dispose of pending motions carefully, accurately, and efficiently if I am confirmed.

The Tax Court is a special place, both because of its feeling of family and because of everyone’s commitment to the Court’s crucial role in supporting the United States’ system of voluntary self-assessment. Everyone works hard to meet the Court’s mission of being “a national forum for the expeditious resolution of disputes between taxpayers and the Internal Revenue Service; for careful consideration of the merits of each case; and to ensure a uniform interpretation of the Internal Revenue Code.” I already seek to serve the Court’s mission by reviewing opinions and advising the Chief Judge, and I believe I could further support the Court’s goals by carefully hearing cases and fairly applying the law to the facts of each case.

Thank you again for your consideration. I look forward to answering the committee’s questions.

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## **SENATE FINANCE COMMITTEE**

### **STATEMENT OF INFORMATION REQUESTED OF NOMINEE**

#### **A. BIOGRAPHICAL INFORMATION**

1. Name (include any former names used): Alina Ionescu Marshall; former: Alina Ionescu.
2. Position to which nominated: Judge, United States Tax Court.
3. Date of nomination: November 19, 2019.
4. Address (list current residence, office, and mailing addresses):
5. Date and place of birth: October 1, 1977; Bucharest, Romania.
6. Marital status (include maiden name of wife or husband’s name):
7. Names and ages of children:
8. Education (list all secondary and higher education institutions, dates attended, degree received, and date degree granted):

Greenwich High School, Greenwich, CT; August 1991–June 1995, high school diploma; class salutatorian, June 1995.

Yale University; August 1995–May 1999, bachelor’s degree, ethics, politics, and economic and international studies, *cum laude*, May 1999.

University of Pennsylvania Law School; August 1999–May 2002, juris doctor, *cum laude*, May 2002.

9. Employment record (list all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment for each job):

June 2013–present: Counsel to the Chief Judge, United States Tax Court, Washington, DC. Provide substantive comments on draft opinions prepared by the judges; recommend to the Chief Judge whether draft opinions should be reviewed by the Court Conference, published as precedential opinions, or released as nonprecedential memorandum opinions; consult with the Chief Judge.

January 2011–December 2013: Adjunct professor of law, Georgetown University Law Center, Washington, DC. Taught “Tax Penalties and Tax Crimes” (later “Tax Penalties and Tax Opinions”).

April 2012–June 2013: Associate, West and Feinberg, P.C., Bethesda: MD. Advised closely held businesses on corporate and tax planning matters; researched Federal and State tax law; drafted documents including asset and stock purchase agreements, promissory notes, stock appreciation rights, and employment agreements.

July 2010–April 2012: Law clerk, United States Tax Court, Washington, DC. Drafted opinions on topics including economic substance, section 183 hobby losses, accounting method change, sale of mixed-use property, fraudulent failure to file a tax return, and awards of attorney’s fees. Drafted orders on motions.

August 2004–August 2009: Associate, Freshfields Bruckhaus Deringer US LLP, Washington, DC. Drafted and negotiated transaction documents, including for securitizations, debt offerings, derivatives, financings, and tax-advantaged structures. Drafted tax opinion letters.

September 2002–August 2004: Associate, Milbank, Tweed, Hadley, and McCloy, LLP (now Milbank LLP), Washington, DC. Drafted project finance transaction documents and performed due diligence.

January 2002–May 2002: Student telemarketer, University of Pennsylvania Law School Alumni Development Office, Philadelphia, PA. Solicited donations from alumni over the telephone.

August 2001–December 2001: Legal writing fellow, University of Pennsylvania Law School, Philadelphia, PA. Taught legal writing to LL.M. students.

May 2001–August 2001: Summer associate, Milbank, Tweed, Hadley, and McCloy, LLP (now Milbank LLP), New York, NY. Rotated through departments, including tax.

June 2000–December 2000: Insurance clerk, Stradley, Ronon, Stevens, and Young, LLP, Philadelphia, PA. Assisted attorneys in insurance defense litigation group.

December 1999–January 2000: Temporary assistant, Cliggott Publishing (via Judlind Temps), Darien, CT. Temporary office assistant.

October 1998–May 1999: Office assistant, Yale University, New Haven, CT. Office assistant to Professor Csaba Horvath, professor of chemical engineering.

June 1998–September 1998: Research analyst, International Marketing Strategies, Marine Money International, Stamford, CT. Drafted research summaries about shipping companies.

October 1997–May 1998: Dining hall student worker, Yale University, New Haven, CT. Assisted with preparing, serving, and cleaning after meals.

May 1997–August 1997: Office assistant, American Institute of Foreign Study, Au Pair Division, Stamford, CT. Worked as an office assistant.

June 1995–January 1997: Part-time recruiting assistant, Staffing Partners, Shelton, CT. Data entry and office assistance.

10. Government experience (list any current and former advisory) consultative, honorary, or other part-time service or positions with Federal, State, or local governments held since college, including dates, other than those listed above):

None.

11. Business relationships (list all current and former positions held as an officer, director, trustee, partner (*e.g.*, limited partner, non-voting, etc.), proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution):

In my law firm positions as an associate, I acted as an agent, representative, or consultant for the firms' clients. I have volunteered as an alumni interviewer for Yale University and the University of Pennsylvania.

12. Memberships (list all current and former memberships, as well as any current and former offices held in professional, fraternal, scholarly, civic, business, charitable, and other organizations dating back to college, including dates for these memberships and offices):

*Bar memberships:* New York State, 3rd Judicial Department, since January 2003; District of Columbia, since April 2004; Maryland State, since April 2012; and the U.S. Tax Court Bar, since July 2011.

*Professional organizations:* American Bar Association (and Tax Section), member since May 2003; New York State Bar Association, member from March 2004 (and Tax Section member from March 2005–December 2010; District of Columbia Bar tax community, member since June 2006; Maryland State Bar Association (and Tax Section), member from March 2012–February 2014; Federal Bar Association, member since September 2019; J. Edgar Murdock American Inn of Court, member since 2012; and International Fiscal Association, member from June 2006 to December 2009.

*Others:* St. Charles Catholic Church—parishioner since 2004; Columbus Club Pool—member since February 2017; Jhoon Rhee Tae Kwon Do, member since June 2016; Orangetheory Fitness, member since January 2019; Kennedy Center, associate level member February 2013–February 2014; Dean Clinton Society for consecutive donors to Penn Law, joined 2012; Penn Law Kilgore Society, joined 2013; University of Pennsylvania Law Review, editor 2000–2002; Penn Law student newspaper participant in 2001–2002; Yale University Women's Organization, member and/or volunteer for part of college; and Yale Alpine Ski Team, racer for part of college.

13. Political affiliations and activities:

- a. List all public offices for which you have been a candidate dating back to the age of 18.

None.

- b. List all memberships and offices held in and services rendered to all political parties or election committees, currently and during the last 10 years prior to the date of your nomination.

None.

- c. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years prior to the date of your nomination.

None.

I have worked for the Tax Court for many of the last 10 years and, as a Tax Court employee, I am obligated to follow the Code of Conduct for Judicial Employees. As such, I am not permitted to contribute to a candidate, political organization, or political event.

14. Honors and awards (list all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement received since the age of 18):

President's Education Awards Program Outstanding Academic Achievement award, 1995; graduated Yale University in 1999 *cum laude*; graduated University of Pennsylvania Law School in 2002 *cum laude*; *University of Pennsylvania Law Review*; University of Pennsylvania legal writing fellow; Order of the Coif;

U.S. Tax Court performance awards in 2015, 2016, 2018, and 2019; and U.S. Tax Court certificate of appreciation in 2017.

15. Published writings (list the titles, publishers, dates, and hyperlinks (as applicable) of all books, articles, reports, blog posts, or other published materials you have written):

- “Is the Limited Scope Marketed Opinion Preparing for a Comeback?”, *Tax Talk*, Fall 2012 at pg. 3, [https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member\\_Groups/Sections/Taxation/taxtalkfall12.pdf](https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Taxation/taxtalkfall12.pdf).
- “The Rescission Decision,” *Tax Talk*, Spring 2013 at pg. 3, 7, [https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member\\_Groups/Sections/Taxation/taxtalkspring13.pdf](https://cdn.laruta.io/app/uploads/sites/7/legacyFiles/uploadedFiles/MSBA/Member_Groups/Sections/Taxation/taxtalkspring13.pdf).

I worked on at least two client updates at Freshfields, Bruckhaus, Deringer but, after searching my files, I was unable to confirm whether any client updates went out with my name on them. I reached out to the firm, and they were unable to confirm as well.

In the summer of 1998, I drafted research summaries about shipping companies that were included in an annual review of shipping companies published by Marine Money International. It also seems likely that one of the summaries was expanded and published as an article called “Hyide Marine: At a Glance” in July 1998. I do not have a copy of this article. See <https://www.marinemoney.com/search/node?keys=alina%20ionescu>.

I have not written any articles while at the Tax Court because of limitations on employees and the nature of my current position.

16. Speeches (list all formal speeches and presentations (e.g., PowerPoint) you have delivered during the past 5 years which are on topics relevant to the position for which you have been nominated, including dates):

I have not given any formal speeches or presentations while at the Tax Court because of limitations on employees and the nature of my current position.

I have participated in group presentations for the J. Edgar Murdock American Inn of Court. Members are assigned to groups, and groups are assigned dates and topics for presentations. Our group presentations were not formal speeches and did not have PowerPoint presentations. The topics were: October 2014: Statute of limitations for assessments (IRC sec. 6501); November 2015: Preparing the lay witness for trial/knowing your witness has testified incorrectly (misinterpreting the question, facts, etc.) or falsely; November 2016: Protection of taxpayer information on electronic devices used by private sector and Government lawyers; November 2017: *Branerton v. Commissioner*—parties are expected to engage in an informal exchange of information before utilizing the Tax Court’s rules for formal discovery; and November 2018: Transferee liability, nominee liens, and alter ego.

The next group presentation will be in January 2020 on the topic of source and selection of criminal tax cases.

I have also participated in internal presentations for law clerks at the Tax Court. Every fall, the counsel to the Chief Judge gives a presentation at law clerk orientation to explain the reviewer function and offer suggestions for successful opinion writing. Also, near the end of 2017 and 2018, I participated in internal presentations about collection due process cases and procedures.

17. Qualifications (state what, in your opinion, qualifies you to serve in the position to which you have been nominated):

I am qualified to serve as a judge on the United States Tax Court because of my background in private practice, teaching experience, work at the Tax Court in various capacities, and commitment to the mission of the Tax Court.

My private practice experience offered exposure to a variety of clients, ranging from large multinationals to individuals. The years spent at large law firms afforded me the luxury of exhaustive research and experience preparing a work product suited to the needs of a sophisticated client. I learned about structuring transactions, tax efficiency, negotiation, and advocacy. My time at a small firm, on the other hand, allowed me to understand the needs of individuals, families, and small businesses. These clients needed timely and affordable answers that could be adapted to their changing circumstances. Because of my background

in private practice, I can see cases from different points of view and am prepared to hear and decide cases of a range of taxpayers, including individuals and multinational businesses. I understand that the Tax Court must serve both large taxpayers with sophisticated transactions and individual taxpayers with straightforward tax returns, and that it must do so in a timely, careful, and consistent manner.

At Georgetown University Law Center, I co-taught a class focused on tax penalties, tax opinion letters, and tax crimes. Because tax penalties are often at issue in Tax Court cases and because taxpayers often raise reliance on a professional as a penalty defense, my background in this area has proven and will continue to prove useful.

I currently serve as counsel to the Chief Judge of the Tax Court. Along with three colleagues, I advise the Chief Judge in the exercise of his statutory duty to review opinions before public release. I provide substantive comments on draft opinions prepared by the judges, focusing on accuracy, persuasiveness, thoroughness in considering relevant authorities, and consistency with the case law of the Tax Court and the relevant Court of Appeals. I recommend to the Chief Judge whether draft opinions should be reviewed by the Court Conference, published as precedential opinions, or released as nonprecedential memorandum opinions, and consult with him regarding substantive topics or particular draft opinions. Previously, as a law clerk at the Tax Court, I drafted opinions addressing a variety of fact-finding and legal issues and drafted orders on motions. I am familiar with the Tax Court's jurisprudence rules and internal procedures and would be well-equipped to try cases and dispose of pending motions immediately, should I be confirmed.

The Tax Court has described its mission as providing "a national forum for the expeditious resolution of disputes between taxpayers and the Internal Revenue Service that allows for careful consideration of the merits of each case and ensures a uniform interpretation the Internal Revenue Code." By offering taxpayers the opportunity to be heard timely by an impartial judge without having to pay the disputed liability first, I believe the Tax Court plays a crucial role in supporting the United States' system of voluntary self-assessment. I already seek to serve the Court's mission by reviewing opinions and advising the Chief Judge, and I believe I could further support the Court's goals by carefully hearing cases and fairly applying the law to the facts of each case.

#### **B. FUTURE EMPLOYMENT RELATIONSHIPS**

1. Will you sever all connections (including participation in future benefit arrangements) with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.

If confirmed by the Senate; I will continue to work at the Tax Court in my new capacity.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.

No.

3. Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.

No.

4. If you are confirmed by the Senate, do you expect to serve out your full term or until the next presidential election, whichever is applicable? If not, explain.

Yes.

#### **C. POTENTIAL CONFLICTS OF INTEREST**

1. Indicate any current and former investments, obligations, liabilities, or other personal relationships, including spousal or family employment, which could involve potential conflicts of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the Administrative Office of the U.S. Courts (AOUSC) to prepare and file a financial disclosure.



sure report. Because of my position at the Tax Court, I have been preparing and filing financial disclosure reports since 2013.

I am not aware of any potential conflicts of interest; however, I have worked on tax matters in private practice that could potentially be brought to the Tax Court. Should any matter arise that involves an actual or potential conflict of interest, I would take whatever steps were necessary and appropriate after carefully and diligently applying 28 U.S.C. section 455, Canon 3 of the Code of Conduct for United States Judges, and other relevant canons and provisions, including recusal.

2. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years (prior to the date of your nomination), whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

In connection with the nomination process, I have consulted with the AOUSC to prepare and file a financial disclosure report. Because of my position at the Tax Court, I have been preparing and filing financial disclosure reports since 2013.

I am not aware of any potential conflicts of interest; however, I have worked on tax matters in private practice that could potentially be brought to the Tax Court. Should any matter arise that involves an actual or potential conflict of interest, I would take whatever steps were necessary and appropriate after carefully and diligently applying 28 U.S.C. section 455, Canon 3 of the Code of Conduct for United States Judges, and other relevant canons and provisions, including recusal.

3. Describe any activity during the past 10 years (prior to the date of your nomination) in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal Government need not be listed.

None.

4. Explain how you will resolve any potential conflict of interest, including any that are disclosed by your responses to the above items.

If confirmed, I would take whatever steps were necessary and appropriate after carefully and diligently applying 28 U.S.C. section 455, Canon 3 of the Code of Conduct for United States Judges, and other relevant canons, provisions and guidance, including recusal.

5. Two copies of written opinions should be provided directly to the committee by the designated agency ethics officer of the agency to which you have been nominated and by the Office of Government Ethics concerning potential conflicts of interest any legal impediments to your serving in this position.
6. The following information is to be provided only by nominees to the positions of United States Trade Representative and Deputy United States Trade Representative: have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter at any time in any capacity? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time frame of the work (*e.g.*, March to December 1995), and the number of hours spent on the representation.

Not applicable.

#### **D. LEGAL AND OTHER MATTERS**

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency (*e.g.*, an Inspector General's office), professional association, disciplinary committee, or other ethics enforcement entity at any time? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details, regardless of the outcome.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for violation of any Federal, State, county, or municipal law, regulation, or ordinance, other than a minor traffic offense? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details.

No, with one exception: In July 2016, my husband and I received a violation notice from the Arlington County Department of Community Planning, Housing and Development (Department) for our residence. The notice identified a violation of Virginia Maintenance Code Section 304.2 described a “Chipped and peeling paint on the exterior of the attached side carport.” The correction action was described as follows: “Remove all deficient paint. Repaint all unprotected surfaces to protect from the elements and prevent deterioration and maintain in good condition.” We corrected the violation by the identified compliance date (August 11, 2016) and did not hear back from the Department.

3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.  
No.
4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.  
No.
5. Please advise the committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.  
None.

#### E. TESTIFYING BEFORE CONGRESS

1. If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?  
Yes.
2. If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?  
Yes.

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#### QUESTIONS SUBMITTED FOR THE RECORD TO ALINA I. MARSHALL

##### QUESTION SUBMITTED BY HON. CHUCK GRASSLEY

*Question.* Generally, a best practice in protecting and promoting healthy whistleblowing is to secure whistleblowers’ access to independent judicial reviews of their claims. This is no less true for those who blow the whistle on tax fraud to the Internal Revenue Service. In 2006, I authored an amendment that established a mandatory IRS whistleblower award program and transferred review of whistleblower cases away from the U.S. Court of Claims to the U.S. Tax Court. The Tax Court has, in the past, decided whistleblower cases using a *de novo* standard of review, but hadn’t made a decision on the standard of review for over 12 years. However, the Tax Court, in *Kasper v. Commissioner of Internal Revenue* (2018), applied an arbitrary and capricious standard of review. I am concerned that the *Kasper* case may negatively affect whistleblowers coming forward in the future, though I am pleased to know that the Tax Court has decided to revisit the standard of review for whistleblowers in Tax Court case 11099–13W. To that end, my question to you is this: will you commit to having an open mind when considering the appropriate standard of review for whistleblower cases—looking to the plain language of the statute and the meaning of the words when the statute was adopted in 2006?

*Answer.* Yes, if confirmed and if I were to consider a challenge to *Kasper*, either in a case before me or with respect to a case referred to the Court Conference, I would have an open mind in considering the appropriate standard of review for whistleblower cases. I would look to the plain language of the statute, the meaning of the words when the statute was adopted, and *stare decisis* considerations.

## QUESTIONS SUBMITTED BY HON. TODD YOUNG

*Question.* Transparency is a widely accepted judicial norm—increasing the accountability of courts and thereby increasing the confidence and trust from the general public. However, the limited access afforded to Tax Court documents has been a longstanding issue. Most of the documents are public, but never see the light of day due to the burdensome process for nonparties and those outside Washington, DC. The current Tax Court practice essentially limits on-demand e-access to documents to main parties, and those who have the resources to go to the Tax Court personally. While I'm sympathetic to the need for privacy for personal/confidential information, it is still important for the public to have access to the IRS's position and aids pro se litigants in preparing briefings based on prior petitioners with similar cases. Should the Tax Court be subject to the same systemic oversight and transparency that our system demands of Article III courts with respect to e-access to documents? If so, how do you plan on addressing the Court's electronic transparency?

*Answer.* Oversight and transparency are important to every court's accountability to the public, and therefore to the public's perception of justice. I agree that it is important for the public to have access to the IRS's positions and that pro se taxpayers benefit from accessing records of petitioners with similar cases. Because of the Tax Court's position as an Article I court that is not under the Administrative Office of the U.S. Courts, the Tax Court's policies and procedures do not always align with those of Article III courts.

The Court has recently changed the document retrieval policy for non-parties. To ensure public access during the pandemic, the Court now receives copy requests from non-parties by telephone and fulfills the requests electronically by email for a fee of \$0.50 per page, with a per-document cap of \$3.00. This is a move in the right direction. If I am confirmed, I would look for other ways to increase public access to Court documents while also protecting the sensitive taxpayer data.

*Question.* Amid the COVID-19 pandemic, the Tax Court faces a large mail backlog with a large percentage constituting unopened petitions (as these must be filed in paper form). There are reports that the Tax Court received 2½ truckloads of mail to be processed. Amidst the current backlog what is the court doing to ensure that these petitions are processed in an efficient manner? How do you plan to ensure petitioners receive a fair and timely trial?

What other challenges do you foresee the Tax Court encountering as a result of the coronavirus, and how do you plan to address these challenges to return to the pre-pandemic status quo?

*Answer.* The Court is working hard to address the current backlog of mail, with records and petitions clerks working staggered shifts to ensure compliance with social distancing and virus protection protocols.

If confirmed, I will immediately be available to take trial sessions and resolve cases. My Court experiences will assist me in handling my caseload in a manner that will ensure petitioners receive a fair and timely trial. For example, I plan to contact the parties early in the process to promote cooperation and will address motions and evidentiary issues promptly.

One significant challenge the Court faces is the implementation of remote trial proceedings. I fully anticipate that the Court's process will have to evolve and, if confirmed, I will help to make the necessary adjustments to ensure that taxpayers receive an opportunity to appear before the Court safely and with minimal inconvenience and expense.

As a result of the pandemic and related medical or personal challenges, the Court may be asked to address innumerable taxpayers who experience difficulty meeting petition and notice of appeal filing deadlines. The Tax Court will have to address such issues as they arise in each case.

The Tax Court has benefitted from new technology and adapted quickly to the challenges of the pandemic. By capitalizing on these opportunities, I believe that the Tax Court will be well-suited to address any post-pandemic challenges.

*Question.* The Tax Court's decision to conduct remote proceedings reflects the new "normal" that we are all experiencing during these unprecedented times. As a result, parties must take steps to ensure that they and their witnesses have adequate technology and Internet resources to participate in a remote proceeding. Today, the vast majority of Americans have, or can use, a telephone. But proceedings that re-

quire a personal computer with Internet service may not be accessible to many litigants. With that said, I have concerns with how remote proceedings will work for vulnerable, low-income taxpayers.

How do you plan to address the socioeconomic “digital divide” with respect to remote proceedings and ensure there’s an easily accessible platform so low-income taxpayers can fairly participate?

How do you anticipate the general use of remote proceedings will impact the current lengthy delay in issuing a judgment in the Tax Court, while still ensuring a just process?

Answer. Most Tax Court cases are resolved without trial and taxpayers may, over the telephone, participate in and resolve all pre-trial matters. In addition, the Court’s remote proceedings will be conducted via Zoomgov, a secure platform selected because it is user-friendly. While video features are accessible over computer, tablet, or smartphone, taxpayers can also dial in to Zoomgov by telephone.

The Court has a long history of encouraging and working with Low-Income Taxpayer Clinics (LITCs) and pro bono assistance programs, which will be available to help these taxpayers with Zoomgov and other technological concerns. LITCs and pro bono assistance programs participated in the development of the Court’s remote trial procedures.

Upon notification of their case being calendared, taxpayers are notified of the availability of the LITCs and programs. In addition, immediately after the case is calendared, the LITCs, pro bono assistance programs, and other attorneys will be able to assist parties by entering a limited entry of appearance. If confirmed, I will ensure that litigants are aware of these resources, treated with kindness, patience and respect, and not disadvantaged because of challenges in using technology.

I believe that the general use of remote proceedings could help the Tax Court to decide cases more quickly and efficiently. Tax Court judges using remote proceedings will save time traveling. It is also possible that the Court may receive fewer requests for a continuance, as taxpayers will not be required to travel to a city of trial and may be able to avoid taking time off work or finding childcare in order to attend a trial.

*Question.* Like any other court proceeding, there is a waiting period that may be required. There is no fixed time in which a judge must make a decision, but in most cases, it can be at least 6 months between when the petition is filed to when the case is called for trial, and then another 6 months or year before an opinion is issued—especially given the current backlog.

With the possibility of interest continuing to accrue on an individual’s unpaid tax balance throughout the course of the proceeding, do you plan to address the waiting period and the time it takes to render a decision? If so, what are your plans?

Will you commit to issuing opinions within a year of the trial date?

Answer. If confirmed, I would help the Tax Court to investigate and consider options to shorten the period of time between when a petition is filed and when an opinion is issued. For example, a taxpayer may wait longer for a trial if the taxpayer chooses a place of trial where the Court has fewer cases and therefore only holds one trial session per year. It may be possible to reduce this period of time for a taxpayer willing to have a remote trial.

I believe in the maxim that justice delayed is justice denied. I will aspire to issue opinions in the vast majority of cases within a year of the trial date. I cannot guarantee, however, that every opinion will be issued within a year because there are valid and necessary reasons that a case might require additional time. For example, issuance of a court opinion may be delayed if a taxpayer files a bankruptcy petition that temporarily bars continuation of a pending Tax Court case, a case is designated for review by the Court Conference, or the parties request a longer briefing schedule or extensions to filing deadlines after a complex trial.

*Question.* The Tax Court is responsible for overseeing a diverse array of tax-related legal challenges, and because of its power and responsibilities, it is vital that it continue to improve.

Based on your career, what proactive steps can Congress take to improve the experience of taxpayers?

In your knowledge, what current outstanding issues should this committee be aware of as it pertains to the interaction between taxpayers and the Tax Court?

Answer. I believe that Congress's best method for continuing to improve the experience of taxpayers is to continue providing clear statutes that can be readily interpreted by taxpayers, attorneys, the Internal Revenue Service, and the courts.

In addition, I believe that taxpayers would be well-served if Congress were to accept the Tax Court's proposal regarding subpoenas. The Court has sought to modernize its subpoena authority, including by removing the requirement that the production of documents or other evidence be at a "designated place of hearing" (26 U.S.C. sec. 7456(a)(1)). This change would allow for the production of documents and other evidence before a hearing date and at a place other than the place of the trial or hearing. By allowing the parties earlier access to documents and other evidence, the parties may be able to settle issues more quickly or narrow issues before trial.

As it pertains to the interaction between taxpayers and the Tax Court, the committee should be aware that the Court is capitalizing on new technology to increase communications with and access by taxpayers. The Court has updated its website, offering a more user-friendly, mobile-friendly Internet resource. The Court has implemented remote trial procedures using Zoomgov so that it can keep cases moving during this pandemic, when travel is difficult and large gatherings in courtrooms are unadvisable. By year-end, the Court will complete and switch to its new case management system. The new case management system will be mobile-friendly and permit taxpayers to file petitions electronically. To ensure excellent communication and clarity, the Court has done usability testing with stakeholders, including low income taxpayer clinics and the general public, to ensure that the new case management system is user-friendly.

*Question.* How will you seek to ensure the access of clinics to the Tax Court to ensure proper representation of all taxpayers, regardless of their financial situations?

Answer. While the Tax Court cannot endorse or recommend any particular low-income taxpayer clinic or pro bono assistance program, the Court mails information about these resources to pro se taxpayers. To facilitate taxpayer access to representation, the Court allows limited entries of appearance to be entered as soon as a case is calendared.

If I am confirmed, I would, on conference calls and at calendar call, remind taxpayers of these resources. I would also direct taxpayers to the Court's website, which includes an example of a remote trial proceeding (*i.e.*, pre-calendar call, the process of clinics arranging assistance for a self-represented taxpayer, calendar call, and trial).

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PREPARED STATEMENT OF MICHAEL N. NEMELKA, NOMINATED TO BE DEPUTY UNITED STATES TRADE REPRESENTATIVE FOR INVESTMENT SERVICES, LABOR, ENVIRONMENT, AFRICA, CHINA, AND THE WESTERN HEMISPHERE, WITH THE RANK OF AMBASSADOR, EXECUTIVE OFFICE OF THE PRESIDENT

Chairman Grassley, Ranking Member Wyden, and members of the committee, let me start by thanking you for holding this hearing today. I'd also like to thank your staff for their professionalism, expertise, and courtesy throughout this nomination process.

Thank you, Chairman Grassley, for that introduction and for your support. It is an especial honor to appear before you today. I clerked for Judge Paul V. Niemeyer on the United States Court of Appeals for the Fourth Circuit in 2006, which is when you were chairman of this committee the first time around. Judge Niemeyer gave each of his young law clerks a word of advice at the start of our clerkship. He said, "I want you to treat taxpayer dollars as if you had to show every receipt to Senator Grassley." I've always remembered that, and I never imagined I would have the privilege of testifying before you some day—although, if you ask, I don't have those receipts anymore from all those years ago. But you should know that your spirit of responsibility has filtered down into the Federal judiciary, and I think Judge Niemeyer still gives that same advice today. I know I will certainly continue to follow it, if I have the honor of being confirmed to this position.

I would like to recognize the members of my family who are here with me today, and those who are watching from home. I'm grateful to my wife Melanie for supporting my desire to serve in government, and for her love and friendship. We've been blessed with four wonderful children—two daughters, Emma and Ava, who are

with us today; and two teenaged sons, Benjamin and William, who are either sleeping or watching from home. I've also been blessed with the best of parents, siblings, and in-laws, and I would like to thank them for their love and support.

I am deeply honored to have been recommended by Ambassador Lighthizer and nominated by President Trump to serve as the Deputy United States Trade Representative for Africa, China, and the Western Hemisphere, and for Investment, Services, Textiles, Labor, and Environment. I have had the privilege of serving at USTR for the past 5 months as an advisor and counselor to Ambassador Lighthizer. Based on my experience, I know firsthand how tirelessly he works day in and day out advocating for the interests of the United States. The dignity of the American worker is at the forefront of everything he does. We are all very fortunate to have him as our United States Trade Representative.

As I've seen, one of the main reasons Ambassador Lighthizer has had so much success is because of his close partnership with you. One of my primary goals, if I am confirmed, is to ensure that I contribute to that constructive relationship with this committee and others in Congress.

If confirmed, I would have the opportunity to help build on the successes that USTR has already achieved. In the Western Hemisphere, we have the new United States-Mexico-Canada Agreement that just entered into force on July 1st. As Ambassador Lighthizer has said, that landmark agreement is the gold standard against which all other trade agreements will be judged. It earned 89 votes in the Senate, a remarkable feat, and was supported by labor unions, businesses, farmers, and ranchers alike. The job now is to enforce it, including through the Brown-Wyden rapid response mechanism, the groundbreaking enforcement tool for resolving certain labor violations. You have my commitment, if I am confirmed, to ensure that we receive every benefit of the bargain through smart and effective enforcement.

For China, we have the Phase One agreement, which also just entered into force a few months ago. In that remarkable agreement, USTR achieved many long-held goals, including a commitment from China to fully respect intellectual property rights, end forced technology transfer, and increase purchases of US goods and products, among many other things. We must ensure that China lives up to its commitments. And we have an agreement that is in writing, and is fully enforceable, to make sure they do.

In Africa, USTR just launched negotiations on a free trade agreement with Kenya, which would be the first such agreement between the United States and a Sub-Saharan African country. As Ambassador Lighthizer has said, the goal is to conclude an agreement that is comprehensive and high-standard, while also being one that works for Kenya and can serve as a model for additional agreements across Africa.

If confirmed, I also look forward to seizing the opportunities we have on investment, services, and textiles, and building on the USMCA's model labor and environmental chapters.

In short, it is a very exciting time to be at USTR, and I would be very grateful for the opportunity to serve my country in this position should I be confirmed.

Members of the committee, I thank you again for this opportunity, and I look forward to your questions.

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## **SENATE FINANCE COMMITTEE**

### **STATEMENT OF INFORMATION REQUESTED OF NOMINEE**

#### **A. BIOGRAPHICAL INFORMATION**

1. Name (include any former names used): Michael Nephi Nemelka.
2. Position to which nominated: Deputy United States Trade Representative.
3. Date of nomination: March 20, 2020—White House announcement of intent to nominate; May 4, 2020 (expected)—Nomination delivered to the Senate.
4. Address (list current residence, office, and mailing addresses):

5. Date and place of birth: August 6, 1978; Salt Lake City, UT.
6. Marital status (include maiden name of wife or husband's name):
7. Names and ages of children:
8. Education (list all secondary and higher education institutions, dates attended, degree received and date degree granted):
 

Brigham Young University, B.A. in history teaching.  
 Dates attended: June–December 1997 and then 2000–2003 (from January 1998 to February 2000 I lived in the Czech Republic as a representative for my church, hence the gap in dates attended); date degree granted: May 2003.

University of Virginia School of Law, J.D.  
 Dates attended: 2003–2006; date degree granted: May 2006.
9. Employment record (list all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment for each job):
 

Wilmer Hale LLP, summer associate, worked on various legal research issues, Washington, DC office, summer 2005.

Covington and Burling LLP, summer associate, worked on various legal research issues, Washington, DC office, summer 2006.

The Honorable Judge Paul V. Niemeyer, law clerk to judge on U.S. Court of Appeals for the Fourth Circuit, drafted case memos, judicial opinions, and helped judge prepare for oral argument, August 2006–August 2007.

Kellogg, Hansen, Todd, Figel, and Frederick, P.L.L.C., associate (2007–2014) and then partner (2015–2020), areas of focus included antitrust, intellectual property, contractual disputes, and appellate litigation. Tried numerous cases to verdict, including in both Federal and State courts, as well as in arbitration.

The Office of the United States Trade Representative, special advisor to Ambassador Lighthizer, work on assigned projects, January 23, 2020 to the present.
10. Government experience (list any current and former advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments held since college, including dates, other than those listed above):
 

None other than those listed above.
11. Business relationships (list all current and former positions held as an officer, director, trustee, partner (*e.g.*, limited partner, non-voting, etc.), proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution):
 

Partner at Kellogg, Hansen, Todd, Figel, and Frederick, P.L.L.C.
12. Memberships (list all current and former memberships, as well as any current and former offices held in professional, fraternal, scholarly, civic, business, charitable, and other organizations dating back to college, including dates for these memberships and offices):
 

Virginia State Bar, member June 8, 2007 to the present; District of Columbia Bar, member October 6, 2008 to the present; Federalist Society, member 2003 to the present; *Virginia Law Review*, managing board (2005–2006), editor (2004–2005); Rex E. Lee Law Society, member 2003–2006; the Church of Jesus Christ of Latter-day Saints, lifelong member.
13. Political affiliations and activities:
  - a. List all public offices for which you have been a candidate dating back to the age of 18.
 

None.
  - b. List all memberships and offices held in and services rendered to all political parties or election committees, currently and during the last 10 years prior to the date of your nomination.
 

None.

- c. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years prior to the date of your nomination.

None.

14. Honors and awards (list all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement received since the age of 18):

Heritage Scholarship (full-tuition 4-year scholarship) at B.Y.U.; Raven Society Award at University of Virginia; Phi Kappa Phi; and Phi Alpha Theta.

15. Published writings (list the titles, publishers, dates, and hyperlinks (as applicable) of all books, articles, reports, blog posts, or other published materials you have written):

None.

16. Speeches (list all formal speeches and presentations (*e.g.*, PowerPoint) you have delivered during the past 5 years which are on topics relevant to the position for which you have been nominated, including dates):

None.

17. Qualifications (state what, in your opinion, qualifies you to serve in the position to which you have been nominated):

The position of Deputy United States Trade Representative requires skills on dispute resolution, negotiation, and leading teams toward a common goal. My experience as a commercial litigation partner at Kellogg Hansen has prepared me to perform these aspects of the position. Thinking tactically, advocating a position, developing relationships with counterparts, leading large teams, and putting the interests of my clients first have formed the basis for my practice in dispute resolution and settlement of large, complex cases. As Deputy USTR, my job will be to apply those same skills in representing the interests of the United States as an effective advocate. I also understand that in order to achieve the best results and respect Congress's Article I power over trade, it is essential to work closely with members of Congress and their staffs in that effort.

## B. FUTURE EMPLOYMENT RELATIONSHIPS

1. Will you sever all connections (including participation in future benefit arrangements) with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.

Pursuant to the policy of Kellogg Hansen, I will receive the remainder of my share of 2019 profits after my departure from the firm.

- *Amount:* \$2,815,482.
- *Dates of Payment:* The remaining share of 2019 firm profits will be paid in 10 units in 2020 at intervals yet to be determined.
- *Source:* Share of firm profits for work performed January 1, 2019–December 31, 2019.

Pursuant to the policy of Kellogg Hansen, I retain an interest in any recovery obtained in a contingency fee case for which I was the originating partner. The only case to which this pertains is a domestic antitrust case against CDK Global, LLC ("CPK") and The Reynolds and Reynolds Company ("Reynolds"), two enterprise software providers. The firm represents other software vendors that need to access data on the databases within the enterprise software systems controlled by CDK and Reynolds. The plaintiffs represented by the firm are: (1) Motor Vehicle Software Corporation; (2) Cox Automotive; (3) AutoLoop LLC; and (4) Authenticom, Inc. The terms of my remaining interest are limited to my actual time investment and originating interest to the cases while employed at the firm, plus a partial share of any amount in excess of the firm's investment at the time of any future recovery.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.

No.



3. Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.  
No.
4. If you are confirmed by the Senate, do you expect to serve out your full term or until the next presidential election, whichever is applicable? If not, explain.  
Yes.

### **C. POTENTIAL CONFLICTS OF INTEREST**

1. Indicate any current and former investments, obligations, liabilities, or other personal relationships, including spousal or family employment, which could involve potential conflicts of interest in the position to which you have been nominated.  
None.
2. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years (prior to the date of your nomination), whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.  
None.
3. Describe any activity during the past 10 years (prior to the date of your nomination) in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of my legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal Government need not be listed.  
None.
4. Explain how you will resolve any potential conflict of interest, including any that are disclosed by your responses to the above items.  
I am entering into an ethics agreement with USTR, which will be forthcoming after the nomination is officially sent to the Senate on May 4, 2020.
5. Two copies of written opinions should be provided directly to the committee by the designated agency ethics officer of the agency to which you have been nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position.  
These will be forthcoming from the relevant officials.
6. The following information is to be provided only by nominees to the position of United States Trade Representative and Deputy United States Trade Representative: have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter at any time in any capacity? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time frame of the work (*e.g.*, March to December 1995), and the number of hours spent on the representation.  
No.

### **D. LEGAL AND OTHER MATTERS**

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency (*e.g.*, an Inspector General's office), professional association, disciplinary committee, or other ethics enforcement entity at any time? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details, regardless of the outcome.  
No.
2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for a violation of any Federal, State, county, or municipal law, regulation, or ordinance, other than a minor traffic

offense? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details.

No.

3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provided details.

No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.

No.

5. Please advise the committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None.

#### E. TESTIFYING BEFORE CONGRESS

1. If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

Yes.

2. If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?

Yes.

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#### QUESTIONS SUBMITTED FOR THE RECORD TO MICHAEL N. NEMELKA

##### QUESTIONS SUBMITTED BY HON. CHUCK GRASSLEY

*Question.* I've been traveling through Iowa the last couple of weeks. My fellow farmers have repeatedly raised the importance of the China Phase One deal. They've faced a lot of hardship under the trade war, and we need to do right by them. As we enter the fall, it will be critical to ensure that China follows through on its purchase commitments. If confirmed, you will be the Deputy USTR with responsibility for the China portfolio. Tell me what you will do to ensure that China follows through on its obligations.

*Answer.* USTR has been following China's progress in purchasing U.S. food and agricultural products very closely. If confirmed, I will be prepared to handle whatever China issues Ambassador Lighthizer asks me to take on, including holding China to its commitments to purchase U.S. food and agricultural products.

*Question.* The administration is trying to improve our trade relations with Brazil. Brazil is one of the top markets for American ethanol. In 2017 though, Brazil imposed a restrictive tariff rate quota (TRQ) scheme on ethanol that has limited our trade.

Will you commit to making ethanol market access a top priority as part of any efforts to improve trade relations with Brazil?

*Answer.* Yes. Presidents Trump and Bolsonaro have repeatedly called for closer trade and economic ties between the United States and Brazil. If confirmed, I will continue efforts to support this charge, including by working with U.S. Chief Agricultural Negotiator Gregg Doud to advocate at every opportunity for fair trade in ethanol.

*Question.* If confirmed, you will be overseeing both the negotiations for a free trade agreement with Kenya and our trade policy concerning investment. With respect to USMCA, we've had folks express concern that the approach to protecting American investment is insufficient. In particular, they're worried that Mexico may be moving in the wrong direction in giving a fair shake to Americans since the investor-state dispute settlement (ISDS) has been scaled back. This affects more than just investment that could have been done in America or another country. It involves issues like licensing of intellectual property or investments in geologic resources. We want Americans to be able safely make those type of investments overseas because they benefit us here at home.

If confirmed, will you commit that for the Kenya negotiations that you will seek comprehensive protections for American investors that are more robust than the approach taken with USMCA?

Answer. If confirmed, I will push for a high-standard and comprehensive U.S.-Kenya FTA, including a high-standard investment chapter. To this end, the administration will seek to secure for U.S. investors in Kenya important rights consistent with U.S. legal principles and practice and the highest international standards, as well as seeking to reduce or eliminate investment barriers in Kenya, such as equity caps, land ownership limitations, and local content requirements. The administration will also seek mechanisms to ensure that Kenya lives up to its commitments; the administration is still considering the appropriateness of investor-state dispute settlement, however.

*Question.* Eliminating foreign barriers to trade in services could, by some estimates, increase U.S. services exports by as much as \$1.4 trillion, creating millions of new American jobs. How do you plan to use your position to continue to break barriers and expand markets for U.S. services providers?

Answer. Services is a key element of this position's portfolio, and if confirmed, I will work to ensure that the United States remains the global leader in services trade. The United States is the world's largest services trading country, accounting for 15 percent of global exports. In 2019, U.S. services exports were \$845 billion, one-third of all U.S. exports, and exceeding services imports by \$250 billion. Growth in U.S. services sectors powers growth across the whole economy. I will therefore look forward to pursuing high standard services and digital trade commitments in U.S. FTA negotiations with the United Kingdom and Kenya and continuing to advocate high standard services and digital trade rules in the WTO and other forums. I will also continue to advocate for U.S. interests and consider the range of trade tools available whenever a trading partner seeks to introduce new barriers, such as digital tax regimes that target world-class U.S. service suppliers.

#### QUESTIONS SUBMITTED BY HON. BEN SASSE

*Question.* Given the extensive conversations we are having with our allies and partners about the national security concerns surrounding Chinese inputs into the supply chains of telecommunications and general technological goods, these will continue to be areas negotiated and discussed in phase deals like with Japan and full TPA negotiated trade agreements with the U.K. and Kenya.

You are currently working at USTR as a special advisor to Ambassador Lighthizer; what experience have you had in representing the interest of the United States in national security concerns?

Answer. In my role as advisor and counselor to Ambassador Lighthizer, I see firsthand how important national security concerns can be in the context of trade. I will not have the necessary security clearance until after confirmation to work on all issues in this area, but if I'm confirmed, one area in particular that will be important will be the CFIUS review process. I also understand that USTR coordinates closely with inter-government agencies—including national security agencies—in clearing chapter texts for specific trade agreements. USTR also negotiates for national security exemptions, as necessary, from specific trade agreements so that the U.S. government has the necessary flexibility on national security issues that come up in the context of trade.

*Question.* What has been your coordination with the intelligence community and other national security agencies when negotiating trade agreements?

Answer. I have not personally coordinated with the intelligence community and other national security agencies given that I will only have the necessary security clearance if I am confirmed. But I know that USTR, in clearing chapter texts as part of negotiations of free trade agreements, generally coordinates with national security agencies as part of that process. I also understand that USTR regularly coordinates with the National Security Agency on various aspects of our trading relationships.

*Question.* China seems to have unfettered access to our markets, while they impose restrictions on American companies to relinquish sensitive technology to gain access to their market. I understand USTR has been working on these matters, including the 2018 report on the investigation into China's actions under section 301. When confirmed, to what extent will you continue to apply pressure to China on these forced technology transfers and what would be the ideal outcome of a Phase

Two agreement with China? How is USTR evaluating the risks to U.S. national security that could come through increased economic transactions?

Answer. Following the administration's imposition of substantial additional tariffs on Chinese goods pursuant to section 301, China entered into negotiations with the United States, which resulted in a historic Phase One economic and trade agreement, signed in January 15, 2020. In this agreement, the administration was able to address a wide range of unfair trade practices, including in the area of technology transfer, where China committed not to force or pressure U.S. companies to transfer technology to Chinese companies, among other things. USTR is closely monitoring China's implementation of its Phase One commitments. In Phase Two, we remain fully committed to addressing additional unfair trade practices, including further disciplines in the area of technology transfer and new disciplines in critical areas such as state-sponsored cyber-theft for commercial gain as well as excess capacity, subsidies, and state-owned enterprises, among others.

The administration utilizes a range of tools to address the national security risks that may arise from economic transactions involving forced technology transfer. For example, the Foreign Investment Risk Review Modernization Act (FIRRMA), signed into law in August 2018, provides significantly expanded jurisdiction for the United States to review and, if needed, to mitigate or to prohibit controlling and non-controlling foreign investments in the area of critical technologies.

*Question.* When the entire U.S. Government (State, Commerce, intelligence community, Treasury) is laser-focused on encouraging our allies and partners to reduce their reliance on Huawei technology because of the security implications, how does USTR take those larger foreign policy efforts into account when negotiating specific trade agreements with allies and partners?

Answer. I understand that USTR coordinates closely with inter-government agencies—including national security agencies—in clearing chapter texts for specific trade agreements. USTR also negotiates for national security exemptions, as necessary, from specific trade agreements. It is important that the U.S. Government has the necessary flexibility on national security issues that come up in the context of trade. Coordinating with the relevant national security agencies—and relying on the experience and expertise of the professionals at USTR—is critical to the process.

*Question.* Will you share USTR's strategy and commitment to developing a plan for strengthening ties to Southeast Asia, including expanding market access and eliminating non-tariff barriers, so that Nebraska agriculture and U.S. businesses are not at a disadvantage for access to trade in these markets?

Answer. Under the Trump administration's Indo-Pacific Strategy, the United States works with countries across Southeast Asia and the Pacific to strengthen regional trade and security. USTR's activities in the region are focused on expanding market access and eliminating non-tariff barriers, including by confronting structural barriers, expanding market access for U.S. farmers and exporters, and targeting unfair trade practices that underpin trade deficits. In support of these objectives, the United States regularly engages Southeast Asia and Pacific countries both in our Trade and Investment Framework Agreements (with Brunei, Burma, Cambodia, Indonesia, Laos, Malaysia, New Zealand, the Philippines, Thailand, Vietnam, and the ten ASEAN countries collectively) and under our two FTAs (with Australia and Singapore). Throughout the Trump administration, we have made and will continue to make the expansion of U.S. agricultural exports and the elimination of agricultural trade barriers including non-tariff barriers high priorities in these engagements.

*Question.* Can you comment on timing for a Phase Two agreement with Japan?

Answer. I understand that negotiations with Japan have been delayed due to the coronavirus pandemic and that Ambassador Lighthizer expects Phase Two negotiations to begin within the next few months. If confirmed, I will support the administration's plan to negotiate a comprehensive trade agreement, as outlined in the U.S.-Japan Trade Agreement Negotiation Objectives published in December 2018.

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QUESTIONS SUBMITTED BY HON. RON WYDEN

*Question.* Both USMCA and labor are in your portfolio. I have real concerns that the already monumental task of spurring real labor reform in Mexico has been made even more difficult under the COVID-19 pandemic. In the USMCA Implementation Act, Congress provided significant funds to, among other things, enable grants to

support worker-focused capacity building efforts in Mexico. As co-chair of the Interagency Labor Committee, USTR has a lead role in distributing the funds made available by the Act.

Do you pledge to ensure adequate funding of programs *on a timely basis* to maximize the ability of workers in Mexico to benefit from the obligations around collective bargaining and freedom of association and other critical labor issues addressed in the agreement?

What else besides funding is needed to ensure Mexican workers' rights are enforced?

Answer. I am committed to ensuring USCMA capacity-building funds are allocated as soon practicable, in order to support the implementation of USMCA labor obligations and Mexico's landmark reform process. USTR is working closely with the Department of Labor and the Interagency Labor Committee to make this happen. To date, the Department of Labor has awarded \$32 million in technical assistance funding to assist Mexico in complying with the labor commitments in the USMCA, improve working conditions, and strengthen the rule of law. An additional project will build worker capacity in Mexico to identify violations of labor law and also will provide legal support and improve advocacy and administrative functions. The Interagency Labor Committee also is working to monitor Mexico's implementation of USMCA's labor obligations. USTR and the Department of Labor have ongoing consultations with Mexico and labor stakeholders to identify challenges and address concerns, particularly those related to Mexico's implementation of the labor reform process. I look forward to working with you on this critical issue.

*Question.* Stakeholders have already raised a number of concerns about the implementation of the USMCA by Mexico. Among these are changes to Mexico's new General Rules of Foreign Trade (GRFT) which raises the "Tasa Global" charged on all shipments in the simplified clearance mode, including those from the United States. This and other aspects of the GRFT make it more expensive and more burdensome for certain U.S. shipments to enter Mexico than before the agreement was signed and came into force.

In your view, are Mexico's actions consistent with the agreement?

If so, how can it be that we negotiated an agreement that makes it harder for U.S. exports to get into Mexico? If not, how do you plan to remedy this issue?

Answer. Mexico's regulations to implement certain elements of the USMCA certainly raise questions which USTR will continue to address with our Mexican counterparts. On the "Tasa Global" increase, which was made with almost no notice or opportunity to comment, we have lodged questions formally with Mexico's Enquiry Point, requesting a delay and an opportunity to comment. In addition, we continue to engage the government of Mexico using an all-of-government approach.

*Question.* In June, Canada issued regulations implementing the USCMA tariff rate quota provisions for dairy products. These regulations, which allocate import licenses to Canadian producers of competing products, raise serious concerns regarding whether Canada will provide the market access for U.S. dairy products promised in the USCMA.

In your view, are Canada's TRQ regulations consistent with the agreement?

If not, what action will USTR take to ensure that the dairy market provisions are implemented as drafted?

Answer. A critical component of the market access the United States secured in the USMCA is the ability to export U.S. products duty-free, under tariff-rate quotas (TRQs) directly to retailers and distributors. Such exports maximize profit for U.S. producers and build consumer demand for U.S. products in Canada. I am committed to ensuring that Canada does not undermine the value of the market access for the United States under the USMCA.

USTR will be closely monitoring Canada's implementation of all its dairy commitments, including its administration of dairy TRQs, and will be ready to take enforcement action under the agreement, including through its dispute settlement mechanism, if necessary.

*Question.* As you are no doubt aware, China and China's unfair trade practices—ranging from IP theft to censorship—are a significant issue for this committee. China appears in both your portfolio and that of Ambassador Gerrish.

Can you explain what issues you will spearhead now and after Mr. Gerrish's departure?

Can you indicate when we will see significant progress on a Phase Two agreement addressing the structural reform identified by USTR's section 301 report?

Answer. Ambassador Gerrish has been handling the China portfolio since his confirmation in March 2018. Once he leaves USTR at the end of July 2020, Ambassador Lighthizer will reassign his portfolio, including with regard to China. I will be prepared to handle whatever China issues Ambassador Lighthizer asks me to handle. I can assure you that Ambassador Lighthizer places the highest priority on ensuring that China fully implements its commitments under the Phase One agreement. As I am called upon to help with that effort, I will do everything within my power to help ensure that China fully implements its Phase One agreement commitments.

USTR is fully committed to moving ahead with Phase Two negotiations as soon as we can. But both the United States and China have made clear that we first need to focus on making sure that the Phase One agreement is being properly implemented. Proper implementation of the Phase One agreement will be essential to establish the groundwork for tackling the other important issues that remain outstanding in Phase Two.

*Question.* What metrics do you think are relevant to judging the success of U.S. trade policy?

Are we to solely look to trade deficits and agriculture purchases?

What other criteria do you think should be considered when evaluating the success of trade policy?

Answer. There are many metrics that are relevant to judging the success of U.S. trade policy. Trade has a significant impact on employment, and the types of jobs that our economy supports, and so one of the most important metrics is the number of jobs—and *the quality of jobs*—that our trading relationships support. That includes jobs in manufacturing, services, technology, farming, ranching, and so forth. A primary purpose of trade policy, in my view, should be to create and support as many high-paying middle-class jobs as possible. Other relevant metrics include increasing exports, encouraging domestic manufacturing, particularly in critical supply chains, and supporting our farmers and ranchers. Another important indicator of success is having labor and environmental standards in our trading relationships that are consistent with those outlined in TPA. I also believe a successful trading policy requires strong and effective enforcement, and a close partnership with Congress. Thus, as is clear, I don't think we should look *solely* at trade deficits and agricultural purchases for judging the success of U.S. trade policy.

*Question.* Digital trade will be a critical part of your portfolio as the digital economy has a large and increasing impact on all sectors of the United States. Examples ranging from the deployment of precision agriculture technology to the incorporation of smart components in manufactured goods demonstrate how integrated digital trade has become in every facet of our economy.

Do you agree with me that every facet of our trade policy should be deployed to address barriers to digital trade, which is an area where the United States has a comparative advantage and which supports other exporting sectors?

What initiatives will you pursue for a digital trade agenda?

Answer. I recognize the importance of the digital economy to American jobs, prosperity, and security, and U.S. companies' unique competitive advantages in this area. If confirmed, I look forward to maximizing U.S. engagements and advancing U.S. goals in this area in all relevant multilateral, plurilateral, and bilateral venues, as well as, as necessary, using enforcement actions and other trade tools.

*Question.* Your portfolio includes Africa, and you will be leading the ongoing negotiations with Kenya. This is the first bilateral trade deal being negotiated with a Sub-Saharan African country, so it is important that any agreement we reach be ambitious and enforceable, with high standards on issues like the environment, labor, and digital trade.

First, on the environment: how will you seek to address illegal trafficking of wildlife, which can have ties to money laundering and terrorist financing?

Answer. The USMCA Environment Chapter will serve as the model for the Kenya environment negotiations. The USMCA contains the highest standard commitments to combat wildlife trafficking of any free trade agreement, including to treat inten-

tional transnational trafficking of wildlife as a serious crime, as defined in the United Nations Convention on Transnational Organized Crime. We will continue to pursue strong, robust, and enforceable provisions regarding illegally traded wildlife in the U.S.-Kenya Environment Chapter. If confirmed, as the negotiations proceed, I look forward to discussions with Congress and other stakeholders on how to most effectively address this critical issue with Kenya and with other countries on the continent.

*Question.* Second, given Kenya's sizable informal labor market, how will you ensure that we can achieve high-standard and *enforceable* labor obligations?

*Answer.* On labor, I agree that Kenya's informal labor market presents certain challenges. The negotiating objectives Congress set out in TPA emphasize the importance of addressing labor rights issues regardless of economic sector. I am committed to ensuring that Kenya, like other FTA partners, adopts and maintains laws for the effective protection of labor rights and has the means to enforce those laws. I will work with you and other members of Congress on ways to address this challenge during the negotiations.

*Question.* Finally, like several other nations, Kenya has proposed a unilateral digital services tax (DST) that unfairly targets American tech companies and acts as a burden on digital trade. Will you commit to ensuring that Kenya abandons its unilateral DST as part of these negotiations?

*Answer.* We are pursuing high-standard services and digital trade commitments in our FTA negotiations with Kenya, and by necessity, that will include negotiations with Kenya to abandon its unilateral DST. I commit to continue to advocate for U.S. interests and consider the range of trade tools available whenever a trading partner seeks to introduce new barriers, such as digital tax regimes that target world-class U.S. service suppliers.

*Question.* The environmental obligations in our trade agreements help to ensure that our agreements do not encourage the flight of capital to locations with lower-standard environmental protections; that our trading partners effectively manage scarce resources, such as fisheries and timber; and that we incentivize good stewardship of the environment across those partners.

Do you commit to making high-standard commitments on fisheries subsidies in the UK, Kenya, and WTO negotiations a high priority?

*Answer.* Yes. The USMCA contains high standard commitments on fisheries subsidies and will serve as the model for the Kenya and UK environment negotiations. If confirmed, I will also consider additional proposals, including by the other trading partners, consistent with the negotiating objectives set out in TPA. In the WTO negotiations, the United States has played a very active role in seeking a meaningful outcome and real constraints on the world's largest subsidizers such as China, building on the kinds of prohibitions negotiated in the USMCA. If confirmed, I will continue to press for strong, clear prohibitions on subsidies for illegal fishing, overfished stocks, and fishing in areas beyond a country's own national jurisdiction and control, as well as real constraints on the world's largest subsidizers.

*Question.* What are your priorities in the implementation of USMCA with respect to the environment and what specific initiatives would you pursue with respect to the USMCA environmental issues?

*Answer.* The USMCA advances environmental protection with new and enforceable tools to protect and conserve ecologically and economically significant terrestrial and marine environments in North America and beyond. The administration has achieved timely implementation of USMCA environment obligations, consistent with the July 1, 2020 entry into force timeline. If confirmed, I will continue to advance implementation (and enforcement) of all aspects of the environment chapter. I will work closely with the members of the Interagency Environment Committee on Monitoring and Enforcement (IECME). I will use the IECME's assessment report, as well as input from other stakeholders, to develop priorities for our efforts. I will ensure the most effective and efficient use of the tools and resources made available to us through the USMCA and our relevant domestic statutes, including to identify priorities and specific initiatives for USMCA environment implementation.

## QUESTIONS SUBMITTED BY HON. MARK R. WARNER

*Question.* The U.S. has entered into preliminary negotiations with the Republic of Kenya to establish a comprehensive free trade agreement. While I am optimistic regarding the possibility of an agreement and a strengthened relationship with our Kenyan allies, I am concerned that USTR may use these negotiations as an opportunity to again export policy similar to the “safe harbor” provisions found in section 230 of the Communications Decency Act. As you know, there are multiple bipartisan efforts in Congress aimed at reforming the underlying statute on which the safe harbor provision is based. By including these provisions in trade agreements, as was done in the USMCA, USTR limits Congresses ability to legislate.

Further, in many countries (including Kenya) with recent histories of violence against ethnic and religious minorities, the use of social media platforms to incite and amplify calls to violence have been a major problem. In Myanmar, for instance, UN investigators concluded that Facebook was a “determining cause” of the genocide against the Rohingya. Countries across the world are exploring legal regimes to address the ways in which social media platforms can directly contribute to such harmful activity, including by holding platforms legally responsible. Yet as drafted, the platform safe harbor that USTR has pushed would prevent trading partners from maintaining civil or common law rules that hold platforms liable in instances in which they knowingly or recklessly leave up, or amplify, harmful content.

Given our understanding regarding the role of social media platforms in contributing, and in some cases catalyzing, ethnic cleansing campaigns, is this an appropriate provision to force on trading partners—particularly those, like Kenya, with fraught histories of religious and ethnic violence?

*Answer.* I believe that a provision addressing the non-IP civil liability of interactive computer service suppliers can play an important role as one element of a broader set of comprehensive, high standard digital trade rules to facilitate the continued growth of the U.S. economy and to support innovative Internet-based business models. At the same time, I recognize that any such provision in a trade agreement must provide flexibility for the Congress, the administration, and our negotiating partners to evolve policy and law in response to new challenges, including addressing the types of harms you identified.

*Question.* Like others, I am concerned about the inclusion of food and beverage-related products on lists of targeted products related to USTR’s Airbus actions. They have an outsized impact on consumers and small and medium-sized businesses. The presence of candy and chocolate products is especially concerning considering that the U.S. domestic industry their trade association have argued against the tariffs and feel they could lead to EU retaliation against them. How does USTR weigh comments arguing against tariffs on imported products from the U.S. domestic industry?

*Answer.* The European Union as a whole, and France, Germany, Spain, and the United Kingdom, are each party to the underlying dispute and are collectively responsible for the unfair subsidization of Airbus. Because of this, USTR’s action in October 2019, and the action taken in February 2020, focused on the EU member states that subsidize Airbus and also covered products of other EU member states. USTR established a process for interested persons to submit comments on the updated action through July 26th. Among other matters, USTR specifically invited comments regarding potential disproportionate economic harm to U.S. interests, including small or medium size businesses and consumers. USTR will continue to consider public comments concerning potential effects on the U.S. economy, and any other comments, when considering any possible further modifications to this trade action.

*Question.* The candy and confection industry is disproportionately targeted by this tariff list, with almost a third of the import value from tariffs that were newly added to this list. Why is such a small industry bearing the brunt of these tariffs?

*Answer.* Determining an appropriate action under section 301 involves a balance between the most effective action to obtain the elimination of the unfair act, policy, or practice, and minimizing any adverse effects on the U.S. economy. To assist in achieving the appropriate balance, USTR conducts a notice and comment process on possible trade actions and carefully considers all public input.



## QUESTIONS SUBMITTED BY HON. ROBERT MENENDEZ

*Question.* When this committee was debating Trade Promotion Authority, it passed my amendment that barred “fast track” procedures for any trade agreement with a country on Tier 3 of the State Department’s Trafficking in Persons (TIP) Report—a group of countries whose governments fail to combat human trafficking. Following that amendment, we saw unprecedented politicization of the TIP Report where countries were upgraded based on unrelated factors, one of those being trade. If confirmed, you will oversee our trading relationships with several countries that have poor records on combatting human trafficking.

Will you commit that, if confirmed, you will not take any action to attempt to influence the TIP Report?

*Answer.* Yes. I agree that it is of critical importance to take action to combat human trafficking. I would welcome the State Department’s report on this issue and would not in any way attempt to influence the conclusions that the State Department includes in its report based on their independent analysis and assessment.

*Question.* If confirmed, you will oversee our trade relationships with the entire hemisphere. And given the administration’s focus on trade deficits, it surprises me that the Western Hemisphere hasn’t gotten more attention, given the fact that we have trade surpluses with several of our trading partners in the region.

If confirmed, what will be your priorities for expanding our trade relationships with the other countries in the region? Will your primary focus be to explore new agreements or renegotiate the ones we already have?

*Answer.* Free, fair, and reciprocal trade with the countries of the Western Hemisphere will be one of my priorities, if I am confirmed. In the near term, our focus in the Western Hemisphere will be on deepening our trade relations with countries that share our trade priorities and are willing to meet high standards. We are already working with Brazil on regulatory and other issues under our Agreement on Trade and Economic Cooperation and with Ecuador on a range of issues, including import licensing reform, under our bilateral Trade and Investment Council. Any decisions on future FTA negotiations will be made in consultation with the Congress.

*Question.* Shortly after Congress approved USMCA, Mexico’s television regulator issued a new regulatory interpretation that severely limits the amount of advertising U.S. media firms can show on their paid TV channels in the country. U.S. industry argues that this action discriminates against U.S. TV providers in violation of USMCA and will undercut U.S. jobs that support their programming in Mexico. In last month’s hearing on the President’s 2020 trade policy agenda, Ambassador Lighthizer suggested that this action is indeed a likely violation of Mexico’s obligations under USMCA. Additionally, it is my understanding is that USTR viewed a similar move 6 years ago to be a violation of NAFTA and successfully resolved it until this latest change.

Do you believe this action by Mexico’s television regulator is a violation of USMCA? Now that USMCA has entered into force, if confirmed, what will you do to ensure Mexico lives up to its commitment not to discriminate against U.S. companies?

*Answer.* I agree that the regulatory interpretation issued in February by Mexico’s television regulator, made without prior notice or public consultation, is troubling and challenges longstanding industry practices that U.S. channels have used to make investment decisions. The administration has raised this issue with the Mexican government and will continue to fight for fair treatment for U.S. TV providers, including by bringing enforcement actions under the USMCA, as necessary.

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 QUESTIONS SUBMITTED BY HON. SHERROD BROWN

*Question.* This administration, including USTR Lighthizer, has said that USMCA should be a model for all future trade agreements. One of the key provisions in USMCA that allowed the agreement to garner broad, bipartisan support, is the Brown-Wyden rapid response mechanism that creates an entirely new, worker-driven enforcement process for key labor obligations.

Do you believe the Brown-Wyden rapid response mechanism should be included in a trade agreement reached with the UK? Do you believe it should be included in a trade agreement reached with Kenya?

*Answer.* USTR is currently developing draft text for the labor chapters of the UK and Kenya negotiations, in preparation for interagency discussions as well as consultations with the Congress and stakeholders. I look forward to working with you and other interested members of Congress on all of the labor aspects of these negotiations, including the appropriateness of the inclusion of a rapid response labor mechanism.

*Question.* In your opinion, how successful do you believe U.S. trade agreements have been in combating forced labor in our trading partners and in U.S.-based companies' global supply chains? Do you believe there are improvements that should be made to U.S. trade agreements with respect to forced labor? If so, please detail those improvements.

*Answer.* I am strongly committed to addressing forced labor under U.S. trade agreements and related U.S. laws. USTR officials engage with trade partner countries and U.S. businesses regarding forced labor around the world, including discussions on global supply chains. USTR also participates in a number of intra-governmental initiatives that work to address forced labor and is part of the U.S. government's whole-of-government enforcement work in this area. USTR is a member of both the Forced Labor Enforcement Task Force and the DHS Forced Labor Interagency Working Group, and collaborates with Customs and Border Protection (CBP) on its enforcement of the forced labor import prohibition in section 307 of the Tariff Act of 1930. Since passage of the Trade Facilitation and Trade Enforcement Act of 2015, CBP has issued seventeen Withhold Release Orders to detain at the U.S. border shipments that they reasonably believe have been produced by forced labor. If confirmed, I look forward to working with you on this important issue.

*Question.* In your opinion, how important are unions to equitable growth in the U.S.? Do you believe expanding the presence of independent unions in our trading partners should be a primary objective in U.S. trade policy? Please explain.

*Answer.* The rights of workers to form and join unions of their choice and to bargain collectively are fundamental aspects of ensuring that the benefits of trade and economic growth are shared broadly. I believe this is true for all economies around the world, including those of our trading partners and that of the United States. I strongly support the inclusion of labor rights provisions in Trade Promotion Authority and in our trade agreements, and I admire and respect your leadership on this critical issue.

*Question.* In your opinion, should government purchases of U.S. agricultural goods be a primary negotiating objective of U.S. trade negotiations? Please explain.

*Answer.* USTR's ambitious trade agenda promotes fair, balanced trade to grow the U.S. economy and support high-paying American jobs. This agenda includes the negotiation of comprehensive trade agreements that address a broad range of important agricultural equities. This includes lowering of other countries' tariff and non-tariff barriers to achieve fairer, more balanced trade to benefit U.S. agriculture. Under some circumstances, I believe that the inclusion of agriculture purchase commitments may complement these efforts by offering immediate tangible benefits to U.S. agricultural producers.

*Question.* In your opinion, what improvements have been made in addressing global steel overcapacity in the last 2 years? Are you aware of any examples of overcapacity perpetrators reducing net steel production capacity in the last 2 years?

*Answer.* The problem of massive and persistent overcapacity in the global steel sector will only be addressed when countries that created the problem take meaningful steps to remove the distortive policies and practices that impede functioning markets and cause severe global imbalances. China is the prime offender in this regard. Capacity developments in China's steel sector are notoriously opaque, but information that is available suggests that net steel production capacity in China began to increase again in 2019, after modest reductions in the 2016–2018 period. At the same time, China has been actively pushing its steelmakers to build new capacity in overseas markets, particularly in Southeast Asia. The administration is working with like-minded partners in the OECD and G20 to bring greater international attention to these developments.

*Question.* USTR's published negotiating objectives for the Kenya FTA do not include sustainable or equitable economic development in Kenya as a stated objective of the negotiations.

In your opinion, do you believe sustainable, equitable economic development in Kenya should be a USTR objective for the talks? If so, what U.S. FTA, in your view,

has best achieved equitable growth in a developing country? On what metrics is that assessment based? Will that FTA serve as model for the Kenya FTA negotiations?

*Answer.* In pursuing an FTA with Kenya, I would seek an outcome that makes workers, farmers, and business people in both the United States and Kenya more prosperous. In that context, our vision is to conclude an agreement with Kenya that can serve as a model for additional agreements in Africa that will serve as an enduring foundation to expand U.S.-Africa trade and investment across the continent.

*Question.* In your opinion, what provisions of AGOA should be included in a Kenya FTA? Are there any AGOA provisions that should not be included in a bilateral FTA with Kenya?

*Answer.* Given that AGOA is set to expire in 2025, we are preparing for a future that reflects the economic and commercial opportunities our modern comprehensive trade agreements can help support—opportunities that unilateral trade preferences like AGOA simply cannot. Our negotiating objectives for the agreement are consistent with those Congress outlined in Trade Promotion Authority.

*Question.* In your opinion, should addressing the market-distorting impacts of state-owned enterprises be a priority of USTR in any Phase Two negotiations with China?

*Answer.* Yes. There are many critical issues that need to be addressed in the Phase Two negotiations, and addressing China's problematic state-owned enterprises will certainly be a priority. Under China's non-market economic system, state-owned enterprises receive substantial preferences not available to other competitors, especially foreign competitors, and as a result the playing field is by no means level.

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PREPARED STATEMENT OF CHRISTIAN N. WEILER,  
NOMINATED TO BE A JUDGE OF THE UNITED STATES TAX COURT

Chairman Grassley, Ranking Member Wyden, and other Senators on the Finance Committee, thank you for holding this hearing.

I am honored to be nominated to serve as a judge of the United States Tax Court. I would like to also thank my beautiful wife and four children for their love and encouragement throughout my nomination process. I know that I would not be appearing before you without their support.

The role of the Tax Court, albeit limited in scope, is very important. The Tax Court provides a critical independent forum for the resolution of civil tax disputes with the IRS. The Court hears all types of tax cases, which can vary substantially in size and complexity depending on the taxpayer. If confirmed, I pledge to decide all matters in an impartial manner, by applying the facts before me to the relevant provisions of the tax code and by also looking to controlling precedent. I genuinely believe the Tax Court serves an important function in safeguarding the fairness of our Nation's tax system.

In my hometown of New Orleans, LA, I have had the pleasure of working with my father and law partner, John Weiler, for some 15 years at the law firm of Weiler and Rees. In working with my father, I have not only had the privilege of being mentored by a truly outstanding tax attorney with unparalleled knowledge and skills, I have also had the privilege of learning from a great human being. By my father's example, he has shown me how to treat others with respect and kindness in all matters. My father has also shown me the importance of listening to my clients' problems and how to work alongside them to help guide them to a resolution of their legal issue. In short, I believe the advocacy and personal skills I have acquired while working with my father will serve me well as a judge.

Formed by my strong Christian faith, I believe we are all children of God, and therefore not only do I pledge to serve as an impartial judge, I also pledge to treat all parties and attorneys who may appear before me with respect and kindness.

Also, while the Tax Court hears large and complex tax issues, it most often hears small tax matters filed by self-represented litigants. I am proud of my volunteer work as an attorney with the Southeast Louisiana Legal Services Pro Bono Tax Clinic, where I have gained valuable experience in matters commonly before the Tax Court, such as audits of the Earned Income Tax Credit, innocent spouse claims for relief, and collection due process appeals. I believe my experience with these specific tax matters will serve me well as a judge.

Finally, if confirmed, I look forward to serving my country.

Thank you for your time and consideration, and I look forward to answering any questions that the committee might have.

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## SENATE FINANCE COMMITTEE

### STATEMENT OF INFORMATION REQUESTED OF NOMINEE

#### A. BIOGRAPHICAL INFORMATION

1. Name (include any former names used): Christian Neumann Weiler.
2. Position to which nominated: Judge, United States Tax Court.
3. Date of nomination: November 19, 2019.
4. Address (list current residence, office, and mailing addresses):
5. Date and place of birth: May 1, 1979; New Orleans, LA.
6. Marital status (include maiden name of wife or husband's name):
7. Names and ages of children:
8. Education (list all secondary and higher education institutions, dates attended, degree received, and date degree granted):
 

Masters of law (LL.M.) in taxation, Southern Methodist University Dedman School of Law, Dallas, TX, May 2006.

Juris Doctor (J.D.), Loyola University School of Law, New Orleans, LA, May 2005.

Bachelor of science (accounting), Louisiana State University, Baton Rouge, LA, December 2001.
9. Employment record (list all jobs held since college, including the title or description of job, name of employer, location of work, and dates of employment for each job):
 

Weiler and Rees, LLC, law firm, New Orleans and Covington, LA, partner, January 2012 to present; associate attorney, June 2000 to December 2011.

Winn, Beaudry, and Winn, LLP, 1601 Elm Street, #4200, Dallas, TX 75201, part-time law clerk while attending SMU Law School, September 2005 to May 2006 (estimate).

Courtenay, Hunter, and Fontana, 400 Poydras Street, New Orleans, LA, part-time law clerk while attending Loyola Law School, January 2004 to May 2005 (estimate).

KPMG, LLP, 909 Poydras Street, Suite 2900, New Orleans, LA 70112, staff accountant, January 2002 to May 2002.
10. Government experience (list any current and former advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments held since college, including dates, other than those listed above):
 

None.
11. Business relationships (list all current and former positions held as an officer, director, trustee, partner (*e.g.*, limited partner, non-voting, etc.), proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, other business enterprise, or educational or other institution):
 

Weiler and Rees, LLC, law firm, New Orleans and Covington, LA, member, January 2012 to present.
12. Memberships (list all current and former memberships, as well as any current and former offices held in professional, fraternal, scholarly, civic, business, char-

itable, and other organizations dating back to college, including dates for these memberships and offices):

Member of the Louisiana Bar Association, 2005 to present.

Board-certified tax law specialist, Louisiana State Board of Legal Specialization, January 2012 to present.

Member and officer for the Louisiana State Bar Tax Section; member from 2006 to present, officer from 2018 to present.

Active member of the American Bar Association Tax Section, 2005 to present.

Former officer and member of the National Association of Planned Givers, Greater New Orleans Chapter, 2007 to 2018 (approximate).

Former volunteer board member of Boys Hope Girls Hope of Greater New Orleans, 2008 to 2010 (estimate).

Volunteer board member of Children's Neuromuscular Foundation of Louisiana, June 2008 to present.

Volunteer board member of Louise T. Fein Memorial Foundation, April 2010 to present.

Former member of Krewe of Thoth, a New Orleans Mardi Gras club, 2013 until 2017 (estimate).

13. Political affiliations and activities:

a. List all public offices for which you have been a candidate dating back to the age of 18.

None.

b. List all memberships and offices held in and services rendered to all political parties or election committees, currently and during the last 10 years prior to the date of your nomination.

None.

c. Itemize all memberships and contributions to any individual, campaign organization, political party, political action committee, or similar entity of \$50 or more for the past 10 years prior to the date of your nomination.

I have not made any personal political contributions that I can recall. My law firm, Weiler and Rees, LLC has made prior political contributions to local candidates running for public office. Attached as Exhibit A is a detailed listing of all prior contributions made by my law firm from the Louisiana Ethics Administration Program.

14. Honors and awards (list all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognitions for outstanding service or achievement received since the age of 18):

Recognized as a top-rated tax attorney in New Orleans by *Super Lawyers* and *New Orleans Magazine*.

Officer for the Louisiana State Bar Tax Section and active member of the American Bar Association Tax Section.

Recipient of the 2016 *Pro Bono Publico Award* from the Louisiana State Bar Association for "Outstanding Pro Bono Service to Louisiana's indigent."

Recipient of the southeast Louisiana Legal Services *Outstanding Pro Bono Service Award*, in "Recognition of his extraordinary pro bono services, and dedication to our low-income tax clients of Louisiana," November 2016.

15. Published writings (list the titles, publishers, dates, and hyperlinks (as applicable) of all books, articles, reports, blog posts, or other published materials you have written):

"Overview: How the Tax Cuts and Jobs Act Affects You and Your Law Practice"; *Louisiana Bar Journal*, April–May 2019, 66 La. B.J. 336 (a copy of this article is attached as Exhibit B-1), <http://files.lsba.org/documents/publications/BarJournal/Feature2-Weiler-Journal-Feb-March-2019.pdf>.

"Louisiana Pet Trusts and How to Avoid Some Hairy Situations"; *Louisiana Bar Journal*, February–March 2017, 64 La. B.J. 344 (a copy of this article is at-

tached as Exhibit B-2), <https://www.lsba.org/documents/publications/BarJournal/Journal-Feature1-Feb-Mar-2017.pdf>.

“IRS Makes Important Changes to Offshore Voluntary Disclosure Program”; *Louisiana Bar Journal*, April–May 2014, 62 La. B.J. 228 (a copy of this article is attached as Exhibit B-3).

“The Low-Profit Limited Liability Company Has Arrived in Louisiana”; *Louisiana Bar Journal*, April–May 2011, 59 La. B.J. 98 (a copy of this article is attached as Exhibit B-4), <https://www.lsba.org/documents/publications/BarJournal/Journal-Feature2-August2011.pdf>.

“Compliance With the Patient Protection and Affordable Care Act,” November 12, 2012, Weiler and Rees, News and Highlight (a copy of this article is attached as Exhibit B-5), <http://www.wrtaxlaw.com/compliance-with-the-patient-protection-and-affordable-care-act-ppaca/>.

“The Angel Investor Tax Credit, A Unique Way to Invest Capital in a Louisiana Business,” April 10, 2013, Weiler and Rees, News and Highlight (a copy of this article is attached as Exhibit B-6), <http://wrtaxlaw.com/the-angel-investor-tax-credit/>.

“Current Federal Taxation Update 2017,” March 24, 2018, Weiler and Rees, News and Highlight (a copy of this article is attached as Exhibit B-7), <http://wrtaxlaw.com/current-federal-taxation-update-2017/>.

“Understanding U.S. Taxation of Virtual or Crypto-Currency Transactions,” August 22, 2018, Weiler and Rees, News and Highlight (a copy of this article is attached as Exhibit B-8), <https://wrtaxlaw.com/understanding-u-s-taxation-of-virtual-or-crypto-currency-transactions/>.

Co-author of the *Louisiana LLC Forms and Practice Manual, 3rd Edition*, Data Trace Publishing Company; provided annual updates for the manual in years 2011, 2012, 2013, 2014 and 2015, <https://www.datatrace.com/louisiana-limited-liability.html>.

16. Speeches (list all formal speeches and presentations (e.g., PowerPoint) you have delivered during the past 5 years which are on topics relevant to the position for which you have been nominated, including dates):

“Rent-to-Own Personal Property, Is it Taxable or Exempt?”, 2019 IAAO Conference on September 9, 2019. Attached as Exhibit C.

“Valuation problems and complexity in valuing and assessing Low-Income Housing Tax Credit Developments, including Scattered-Site Developments in Louisiana,” 2018 IAAO Legal Conference in December 2018. Attached as Exhibit C.

“Overview of the 2017 Federal Tax Cuts and Jobs Act,” three presentations for customers of Gulf Coast Bank and Trust, made in March and April 2018. Attached as Exhibit C.

17. Qualifications (state what, in your opinion, qualifies you to serve in the position to which you have been nominated):

I believe I am a strong candidate for the position of Tax Court judge based on my experience and personal commitment to service. I believe the role of the Tax Court is vital to ensure taxpayers of the United States have an opportunity to be heard separate and apart from IRS.

I am an experienced tax attorney, a board-certified tax law specialist, and I hold an LL.M. in taxation from SMU Dedman School of Law. I am also an active member of the ABA Tax Section and Louisiana State Bar Association Tax Section.

Over my approximately 14 years of experience as an attorney, I have gained valuable trial and litigation experience before the United States Tax Court, Federal District Courts, and Louisiana State Courts. This litigation experience would serve me well as a judge for the United States Tax Court.

I have also volunteered for some 10 years with Southeast Louisiana Legal Services—a pro bono tax clinic in south Louisiana. Through my volunteering, I have handled many issues often faced by Tax Court judges, including “S” cases (“small claims”), collection due process appeals, Earned Income Tax Credit (“EITC”) eligibility issues, and dependency claims. My experience as a volunteer attorney with the tax clinic, working with pro se litigations, would serve me

well since a large majority of Tax Court cases are brought by pro se taxpayers/litigants.

Finally, I believe I have the personal aptitude sought in a judge. In other words, in my practice I routinely listen to the concerns of my clients, who are individuals and small business owners, and seek a reasonable resolution for them.

#### **B. FUTURE EMPLOYMENT RELATIONSHIPS**

1. Will you sever all connections (including participation in future benefit arrangements) with your present employers, business firms, associations, or organizations if you are confirmed by the Senate? If not, provide details.

Yes, I plan to sever all connections with my present law firm.

2. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the government? If so, provide details.

No, I do not have any plans or agreements to pursue outside employment.

3. Has any person or entity made a commitment or agreement to employ your services in any capacity after you leave government service? If so, provide details.

No.

4. If you are confirmed by the Senate, do you expect to serve out your full term or until the next presidential election, whichever is applicable? If not, explain.

Yes.

#### **C. POTENTIAL CONFLICTS OF INTEREST**

1. Indicate any current and former investments, obligations, liabilities, or other personal relationships, including spousal or family employment, which could involve potential conflicts of interest in the position to which you have been nominated.

None.

2. Describe any business relationship, dealing, or financial transaction which you have had during the last 10 years (prior to the date of your nomination), whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

None; should any former client appear before me as a judge of the U.S. Tax Court, I would recuse myself from handling the case.

3. Describe any activity during the past 10 years (prior to the date of your nomination) in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy. Activities performed as an employee of the Federal Government need not be listed.

None.

4. Explain how you will resolve any potential conflict of interest, including any that are disclosed by your responses to the above items.

N/A.

5. Two copies of written opinions should be provided directly to the committee by the designated agency ethics officer of the agency to which you have been nominated and by the Office of Government Ethics concerning potential conflicts of interest or any legal impediments to your serving in this position.

N/A.

6. The following information is to be provided only by nominees to the positions of United States Trade Representative and Deputy United States Trade Representative:

Have you ever represented, advised, or otherwise aided a foreign government or a foreign political organization with respect to any international trade matter at any time in any capacity? If so, provide the name of the foreign entity, a description of the work performed (including any work you supervised), the time

frame of the work (e.g., March to December 1995), and the number of hours spent on the representation.

N/A.

#### D. LEGAL AND OTHER MATTERS

1. Have you ever been the subject of a complaint or been investigated, disciplined, or otherwise cited for a breach of ethics for unprofessional conduct before any court, administrative agency (e.g., an Inspector General's office), professional association, disciplinary committee, or other ethics enforcement entity at any time? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details, regardless of the outcome.

No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority for a violation of any Federal, State, county, or municipal law, regulation, or ordinance, other than a minor traffic offense? Have you ever been interviewed regarding your own conduct as part of any such inquiry or investigation? If so, provide details.

No.

3. Have you ever been involved as a party in interest in any administrative agency proceeding or civil litigation? If so, provide details.

No.

4. Have you ever been convicted (including plea of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, provide details.

No.

5. Please advise the committee of any additional information, favorable or unfavorable, which you feel should be considered in connection with your nomination.

None.

#### E. TESTIFYING BEFORE CONGRESS

1. If you are confirmed by the Senate, are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

Yes.

2. If you are confirmed by the Senate, are you willing to provide such information as is requested by such committees?

Yes.

### Exhibit A

#### Campaign Finance Contributions

Filer Name	Report	Type	Source	Description	Date	Amount
Core, Patricia .....	F102: ANN— LA-28858	Contribution	Weiler and Rees LLC 650 Poydras St., New Orleans, LA 70130	Golf Tournament	10/8/2007	\$600.00
Fitzmorris, Louis ...	F102: ANN— LA-63054	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		5/5/2016	\$500.00



## Campaign Finance Contributions—Continued

Filer Name	Report	Type	Source	Description	Date	Amount
Fitzmorris, Louis ....	F102: ANN— LA-63054	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		11/15/2016	\$500.00
Fitzmorris, Louis ....	F102: ANN— LA-69221	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		11/22/2017	\$500.00
Fitzmorris, Louis ....	F102: 30P— LA-78855	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		2/20/2019	\$500.00
Fitzmorris, Louis ....	F102: 30P— LA-50455	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		4/16/2015	\$300.00
Fitzmorris, Louis ....	F102: ANN— LA-69221	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		3/17/2017	\$250.00
Fitzmorris, Louis ....	F102: ANN— LA-75676	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		3/19/2018	\$125.00
Fitzmorris, Louis ....	F102: 30P— LA-78855	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		8/13/2019	\$125.00
Henry, Charles A. ..	F102: 30P— LA-78608	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd., Ste A, Covington, LA 70433		8/27/2019	\$500.00
Lopinto, Joseph P., III.	F102: 90P— LA-68724	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		10/19/2017	\$500.00
Lopinto, Joseph P., III.	F102: 10G— LA-70374	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		3/9/2018	\$250.00

**Campaign Finance Contributions—Continued**

Filer Name	Report	Type	Source	Description	Date	Amount
Lopinto, Joseph P., III.	F102: 30P— LA-69515	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		1/29/2018	\$200.00
Williams, Erroll G.	F102: ANN— LA-58186	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		7/2/2015	\$500.00
Williams, Erroll G.	F102: ANN— LA-58186	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		6/30/2015	\$500.00
Williams, Erroll G.	F102: 180P— LA-65622	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		2/23/2017	\$500.00
Williams, Erroll G.	F102: ANN— LA-76340	Contribution	Weiler and Rees, LLC 7039 Hwy 190 East Service Rd. Ste A, Covington, LA 70433		10/17/2018	\$500.00

**Exhibit B-1**

From *Louisiana Bar Journal*, Vol. 66, No. 5, February/March 2019

**OVERVIEW: HOW THE TAX CUTS AND JOBS ACT AFFECTS  
YOU AND YOUR LAW PRACTICE**

By Christian N. Weiler

The Tax Cuts and Jobs Act (TCJA or Tax Act) is a sweeping tax package that certainly impacts your federal personal income tax obligation beginning in 2018. Here is a look at some of the more important elements of the new law that will have an impact on you as an individual and as a Louisiana attorney.<sup>1</sup>

**Important Changes to Your Individual Federal Income Tax Return**

Beginning after December 31, 2017, seven tax rates now apply for individuals—10 percent, 12 percent, 22 percent, 24 percent, 32 percent, 35 percent and 37 percent. The standard deduction is also increased to \$24,000 for married individuals filing a joint return, \$18,000 for head-of-household filers, and \$12,000 for all other taxpayers, adjusted for inflation in tax years beginning after 2018. No changes are made to the additional standard deductions for the elderly and blind. The deduction for personal exemptions is effectively suspended by reducing the exemption amount to zero.

Here are some highlights to relevant changes which will impact your personal income tax return.

**Casualty Losses**

The new Tax Act suspends the personal casualty and theft loss deduction, except for personal casualty losses incurred in federally declared disaster areas.

<sup>1</sup>Unless otherwise noted, the changes are effective for tax years beginning in 2018 through 2025.

**Gambling Activities**

Under the new Tax Act, the limitation of wagering losses is modified to provide that all deductions for expenses incurred in carrying out wagering transactions, and not just gambling losses, are limited to the extent of gambling winnings.

**Child and Family Tax Credit**

The child tax credit is increased to \$2,000, and the phaseout limits are increased to \$400,000 for married taxpayers filing jointly and \$200,000 for all other taxpayers. The amount of the tax credit that is refundable is increased to \$1,400 per qualifying child, and this amount is indexed for inflation.

**State and Local Taxes**

Under the new Tax Act, a taxpayer may claim an itemized deduction up to \$10,000, \$5,000 for married taxpayers filing separately, for the aggregate of (i) state and local property taxes not paid or accrued in carrying a trade or business or an activity undertaken for profit, and (ii) state and local income taxes, or sales taxes in lieu of income, paid or accrued in the year. Foreign real property taxes may not be deducted.

**Mortgage Interest**

The deduction for interest on home equity indebtedness is suspended, and the deduction for mortgage interest is limited to underlying indebtedness of up to \$750,000 (\$375,000 for married taxpayers filing separately). After December 31, 2025, the former rules are reinstated.

**Medical Expenses**

For taxable years beginning after December 31, 2016, and before January 1, 2019, the threshold on personal medical expense deduction is reduced to 7.5 percent.

**College Sporting Event Tickets**

Under prior law, special rules applied to certain payments to institutions of higher education, in exchange for which the payor received the right to purchase tickets or seating at an athletic event. For contributions made in tax years beginning after December 31, 2017, no charitable deduction is allowed for these types of payments.

**Alimony**

Per any divorce or separation agreement executed after December 31, 2018, or executed before that date, but modified after, alimony and separate maintenance payments are not deductible by the payor spouse and are not included in the income of the payee spouse. Note: This provision is effective after December 31, 2018, and not December 31, 2017.

**Overall Limitation on Itemized Deductions**

The deduction for miscellaneous itemized deductions that are subject to the 2 percent floor is suspended, meaning the deduction may no longer be claimed. This includes deductions for tax preparation and out-of-pocket employee expenses.

**Moving Expenses**

The deduction for moving expenses is suspended. There is an exception for members of the armed forces.

**Health Care “Individual Mandate”**

The new Tax Act repeals the individual mandates of Obamacare by reducing the amount of the individual shared responsibility (penalty) to zero. The new Tax Act leaves intact the 3.8 percent Net Investment Income Tax, and the 0.9 percent additional Medicare Tax, both enacted by Obamacare.

**ABLE Accounts**

Under the new Tax Act, changes have been made to Internal Revenue Code Section 529A, which provides for “ABLE Accounts.” This is a provision that allows individuals with disabilities, and their families, to fund a tax-preferred savings account to pay for “qualified” disability-related expenses. Under prior law, annual limitation on contributions is the amount of the annual gift tax exemption (\$15,000 for 2018). Effective for tax years after the enactment date, and before January 1, 2026, the contribution amount is increased, the lesser of (i) the federal poverty line for a one-person household or (ii) the individual’s compensation for the year.

**College Savings Plans**

Under prior law, funds in a Code Section 529 College Savings Account could only be used for qualified higher education expenses. For distributions after December

31, 2017, “qualified higher education expenses” include tuition at an elementary or secondary public, private or religious school, up to a \$10,000 limit per tax year.

#### **Estate and Gift Tax Exemption**

Effective for testamentary and *inter vivos* gifts in 2018, the estate and gift tax exemption has been increased to roughly \$11.2 million (\$22.4 million for married couples).

#### **Alternative Minimum Tax (AMT) Exemption**

The AMT has been retained for individuals by the new law but the exemption has been increased to \$109,400 for joint filers (\$54,700 for married taxpayers filing separately) and \$70,300 for unmarried taxpayers. The exemption is phased out for taxpayers with alternative minimum taxable income over \$1 million for joint filers and over \$500,000 for all others.

#### **Bottom Line**

While these changes will lower rates at many income levels, determining the overall impact on any particular individual or family will depend on a variety of other changes made by the Tax Cuts and Jobs Act, including increases in the standard deduction, loss of personal and dependency exemptions, a dollar limit on itemized deductions for state and local taxes, and changes to the child tax credit.

### **Important Changes to Your Law Practice**

#### **New Corporate Income Tax Rate**

C corporations were historically subject to graduated tax rates of 15 percent for taxable income up to \$50,000, 25 percent (over \$50,000 to \$75,000), 34 percent (over \$75,000 to \$10,000,000), and 35 percent (over \$10,000,000). Personal service corporations pay tax on their entire taxable income at the rate of 35 percent. Beginning with the 2018 tax year, the new Tax Act makes the corporate tax rate a flat 21 percent, and it also eliminates the corporate alternative minimum tax.

#### **Meal, Entertainment and Fringe Benefit Changes**

There are changes to note in this area, all effective for amounts incurred or paid after December 31, 2017:

- ▶ Deductions for business-related entertainment expenses are disallowed.
- ▶ The 50 percent limit on the deductibility of business meals is retained and expanded to meals provided through an in-house cafeteria or otherwise on the premises of the employer.
- ▶ Deductions for employee transportation fringe benefits (*e.g.*, parking and mass transit) are denied, but the exclusion from income for such benefits received by an employee is retained (except in the case of qualified bicycle commuting reimbursements).
- ▶ No deduction is allowed for transportation expenses that are the equivalent of commuting for employees (*e.g.*, between the employee’s home and the workplace), except as provided for the safety of the employee. However, this bar on deducting transportation expenses does not apply to any qualified bicycle commuting reimbursement, for amounts paid or incurred after December 31, 2017, and before January 1, 2026.

#### **Expensing Rules Liberalized**

For property placed in service in tax years beginning after December 31, 2017, the maximum amount a taxpayer may expense is increased to \$1 million, and the phaseout threshold amount is increased to \$2.5 million.

#### **Net Operating Losses (NOLs)**

Under pre-TCJA rules, a net operating loss (NOL) for any tax year was generally carried back 2 years, and then carried forward 20 years. The new Tax Act repeals the general 2-year NOL carryback and also provides that NOLs may be carried forward indefinitely.

#### **New Business Income Deduction**

Under the new Tax Act, a new 20 percent income tax deduction for so-called “passthrough business income” is afforded. With the corporate tax rate being reduced under the new tax law to a flat 21 percent, a deduction for “pass through” forms of business was designed by Congress to give a reduction to those businesses approximating the lower corporate tax rate. If applicable, the 20 percent deduction can be claimed by the owners of S corporations, partnerships, sole proprietorships,

and even beneficiaries of trusts. These are generally referred to as “pass-through tax entities” that pay no income tax at the entity level. This business income is “passed through” to the owners (or trust beneficiaries) who must report the income on his or her individual income tax return.

It is an understatement to say this 20 percent deduction found in new IRC § 199A is saddled with exclusions, phase-outs, technical issues and uncertainties. Commentators are still attempting to analyze and figure out how this new deduction actually works.

For most pass-through business owners, the deduction is the lesser of (i) the “combined qualified business income” of the taxpayer, or (ii) 20 percent of the excess of taxable income over the sum of any net capital gain. The term “combined qualified business income” is then defined as the lesser of (i) 20 percent of the business owner’s qualified business income, called QBI or (ii) the greater of (a) 50 percent of the W-2 wages of business allocable to the owner; or (b) 25 percent of the W-2 wages of the business plus 2.5 percent of the unadjusted tax basis in property of the business allocable to the business owner.<sup>2</sup> Qualified business income is generally profit from the active income and expenses from the operation of the pass-through business and does not include passive income, such as interest, dividends or even capital gains.

The starting point for determining “QBI” is difficult, since the starting point is “profit of the business,” which is not really defined under the Internal Revenue Code. Profit might be defined as gross revenue less expenses. The 20 percent deduction of this profit amount, subject to a number of limitations, passes through to the owner as a deduction, which can be claimed on his or her individual income tax return to offset other taxable income, such as wages, dividends, interest and other forms of income.

The deduction is 20 percent of your “qualified business income” (QBI) from a partnership, S corporation or sole proprietorship, defined as the net amount of items of income, gain, deduction and loss with respect to your trade or business. The business must be conducted within the United States to qualify, and specified investment-related items are not included, *e.g.*, capital gains or losses, dividends and interest income (unless the interest is properly allocable to the business). The trade or business of being an employee does not qualify. Also, QBI does not include reasonable compensation received from an S corporation or a guaranteed payment received from a partnership for services provided to a partnership’s business.

The deduction is taken “below the line,” *i.e.*, it reduces your taxable income but not your adjusted gross income, but is available regardless of whether you itemize deductions or take the standard deduction. In general, the deduction cannot exceed 20 percent of the excess of your taxable income over net capital gain. If QBI is less than zero, it is treated as a loss from qualified business income the following year.

There is also a different phase-out for service businesses, which is applicable to those trades or businesses involving the performance of services in the fields of health, law, consulting, athletics, financial or brokerage services, or where the principal asset is the reputation or skill of one or more employees or owners. The exemption amounts and phase-in amounts are different. It is interesting to note that certain personal service providers have been excluded from the personal service rules.

### Conclusion

This article only briefly covers some of the most significant changes to you and your law practice. There are additional rules and limitations which may apply and, as with any piece of large legislation, there will be many lingering questions regarding implementation. Should you have any questions regarding the Tax Act, it is recommended that you consult your paid tax professional, particularly since the new Tax Act could result in material changes to your law practice.

<sup>2</sup>Exemptions exist for meeting the requirements of the wage limitation, where taxable income for a single filer is \$157,500 or less; or for married filing jointly, \$315,000 of income or less. Then there is a phase-out amount, and then the wage test becomes applicable.

**Exhibit B-2**

From *Louisiana Bar Journal*, Vol. 64, No. 5, February/March 2017

## LOUISIANA PET TRUSTS AND HOW TO AVOID SOME HAIRY SITUATIONS

By Christian N. Weiler

Many people consider their pets as more than companion animals. Many consider their pets as family members. In August 2015, the Louisiana Legislature enacted La. R.S. 9:2263 titled "Trust for the Care of an Animal" or, more commonly referred to as, a "Pet Trust." Louisiana was one of the last remaining states to enact a Pet Trust law (currently 49 states plus the District of Columbia have enacted Pet Trust laws).

According to the American Pet Products Association (APPA), it is estimated that this year the pet industry will reach \$62 billion in the United States. Also according to the APPA, 65 percent of U.S. households own at least one pet.

This author has had personal experience with several estate-planning clients who were concerned about the well-being and care of their pets upon death. Now, the Louisiana Legislature has offered a solution. While some may think considering a pet in estate planning unnecessary, for some clients, a legal estate planning document ensuring care for their pet after death provides peace of mind and a defined mandate for future caregivers.

**Background: Louisiana Pet Trust**

The controlling provisions of a Pet Trust are found in La. R.S. 9:2263. A Louisiana inter vivos or testamentary trust may be created to provide for the care of one or more animals in existence on the date of the creation of the trust. The trust instrument should designate a caregiver for each animal. An animal's caregiver will have physical custody of the animal after the death of the owner(s) and will bear responsibility for the animal's care. If a caregiver is not designated or if the designated or appointed caregiver is unable or unwilling to serve, the trustee is free to appoint a caregiver or he/she may act as the caregiver. The trust instrument also may designate a person to enforce the provisions of the trust. If a person is not designated to enforce the provisions of the trust or if the designated person is unable or unwilling to do so, the caregiver, the trust settlor or any of the settlor's successors may enforce the trust terms.

Under the Pet Trust provisions, trust assets may be used only for the care of each animal and for compensation and expenses of the trustee and the caregiver. Louisiana law indicates "reasonable compensation" may be afforded to the trustee and the caregiver. A Louisiana court may determine that the value of the trust "substantially exceeds the amount required to care for each animal and for reasonable compensation and expenses of the trustee and the caregiver." Upon such a determination, the court may partially terminate the trust, but only as to the excess assets held in trust.

A Pet Trust terminates upon the death of the last surviving animal provided for in the trust. The trust instrument may designate a person to receive the trust's principal upon a partial or complete termination. In the absence of a designation, the trust assets are distributed to the settlor, if living, or to the settlor's successors upon termination.

Unless otherwise provided for, a Pet Trust shall be governed by the provisions of the Louisiana Trust Code. Consequently, a trustee's fiduciary duty and obligation to render an accounting remains.

According to the Comments found in La. R.S. 9:2263, the Pet Trust provisions are modeled after similar provisions in the Uniform Trust Code, the Uniform Probate Code and laws from a variety of other states.<sup>1</sup> The Comments also state that a Pet Trust "creates a unique exception to a foundational principle of Louisiana law and allows an animal to serve as the beneficiary of a trust, through a mechanism sometimes referred to as a 'statutory pet trust.'" The Comments to the Pet Trust provision also state: "This Section contemplates the existence of a *tetra partite*, rather

<sup>1</sup>See, Comment (a) citing to: Unif. Trust Code § 408; Unif. Prob. Code § 2-907; 12 Del. C. § 3555; Cal. Prob. Code § 15212; N.C. Stat. § 36C-4-408; Tex. Prop. Code Ann. § 112.037; Fla. Stat. Ann. § 736.0408.

than tripartite relationship, under which there exists a settlor, trustee, caregiver, and beneficiary.”

However, this author questions some of these Comments and found material differences between the various state laws. In some states, there is no mention of a caregiver in the applicable law and it is permissible for the trustee to retain one or more persons to assist with animal care and well-being. If a Pet Trust names a caregiver, is that caregiver not also a beneficiary of the Pet Trust since he/she receives funding needed for the day-to-day maintenance and care of the pet? The pet is presumed to be a beneficiary under the Comments; however, this animal has no other rights under Louisiana law. Additionally, this provision now found in the Trust Code seems to conflict with the law of persons.<sup>2</sup> Furthermore, as discussed below, while the Louisiana Trust Code now provides for an animal to be a beneficiary, there is no federal law to the equivalent, resulting in some uncertain tax consequences.

A Pet Trust can be funded with anything from cash and investment assets, to retirement benefits and life insurance. The only limitation on funding a Pet Trust is that an excessive amount of funds may be prohibited from being transferred to the Pet Trust. As stated above, if a court finds that the value of the trust “substantially exceeds” the amount required to care for each pet and for realistic compensation and expenses of the trustee and caregiver, the court may terminate the trust as to the excess portion. However, what exactly is meant by “substantially exceeds”? Guidance for developing an answer to excessive funding would likely require knowledge on the life expectancy of the pet and the average cost of maintenance for that type of animal. Furthermore, drafting a Pet Trust with an explanation of the settlor’s maintenance and care desires, including a description of the pet’s current lifestyle, will presumably help to establish the amount of appropriate funding of the Pet Trust. How a trust is to work for distribution purposes is as varied as the funding mechanism. A Pet Trust is really only limited by a client’s imagination or the attorney’s creativity.

#### **What Are the Tax Implications of a Pet Trust?**

Pet Trusts are funded with assets transferred into the trust to provide for the care and well-being of the animal. While this transfer or funding does not trigger income tax, the earnings of this trust are taxable. If the trust is a revocable inter vivos trust, it would be considered a grantor trust for federal income tax purposes, resulting in taxation to the trust’s settlor. If the trust is irrevocable, the trust would be considered a “complex trust” under federal income tax laws and distributions from the trust would be taxable, presumably to the named caregiver. Consequently, a Pet Trust could result in unintended consequences to the pet’s caregiver.

Alternatively, if the animal is deemed as the trust beneficiary, all trust income, whether distributed or not, is taxed to the trust itself; however, trusts usually pay income taxes at a higher rate of tax. This approach was recognized by the IRS in Revenue Ruling 76-486.<sup>3</sup> The future income tax obligations of the trust or caretaker should be taken into consideration when establishing and funding the trust.

Based on the Internal Revenue Code, the IRS ruled in Revenue Ruling 78-105<sup>4</sup> that charitable remainder trusts which name animals as income beneficiaries or pay income for the benefit of animals will not qualify for a charitable federal estate tax deduction. The IRS ruled on several scenarios, with the primary thrust limiting a trust beneficiary as a “person” which includes an individual, trust or other company and excludes animals.

#### **Conclusion**

The overall goal of this revision to the Louisiana Trust Code by the Legislature is intended to honor the legality of a settlor’s bequest at his/her death, or in life. Louisiana-domiciled clients concerned about the well-being of their pets after their deaths can now consider a Pet Trust in their estate plans. The Pet Trust provision provides for personalization or customization and merely acts as a basic framework for the attorney drafting such a trust, whether it is an inter vivos or a testamentary trust. When advising clients, however, attorneys should make them aware of the po-

<sup>2</sup>La. Civ.C. art. 24 *et seq.*; see Comment (b).

<sup>3</sup>Rev. Rul. 76-486, 1976-2 CB 192.

<sup>4</sup>Rev. Rul. 78-105, 1978-1CB 295.

tential ramifications of such a trust, particularly the unique and complex federal tax implications.

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### Exhibit B-3

From *Louisiana Bar Journal*, Vol. 62, No. 3, October/November 2014

#### IRS MAKES IMPORTANT CHANGES TO OFFSHORE VOLUNTARY DISCLOSURE PROGRAM

By Christian N. Weiler

On June 18th, the Internal Revenue Service announced major changes to its offshore voluntary compliance programs, providing new options to taxpayers living overseas and taxpayers residing in the United States. The changes include an expansion of the streamlined filing-compliance procedures and modifications to the offshore-voluntary-disclosure program, often referred to as the "OVDP." The expanded program is intended to help those U.S. taxpayers whose failure to disclose their offshore assets was non-willful.

The changes to the streamlined filing-compliance procedures are now available to certain U.S. taxpayers residing in the United States. The changes eliminate both the requirement that the tax liability be \$1,500 or less and the requirement of a risk questionnaire from the taxpayer. The changes now require the taxpayer to certify that his or her previous failures to comply with the law were non-willful.

When a taxpayer intends to take advantage of the new streamlined disclosure, he must amend the most recent 3 years of personal income tax returns, complete a certification form and submit full payment of the tax liability, including interest and the miscellaneous offshore penalty. This miscellaneous offshore penalty is now equal to 5 percent of the highest aggregate balance/value of the taxpayer's total foreign financial assets. The taxpayer is also required to electronically file the most recent 6 years of overdue FBAR reports.

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### Exhibit B-4

From *Louisiana Bar Journal*, Vol. 59, No. 2, August/September 2011

#### THE LOW-PROFIT LIMITED LIABILITY COMPANY HAS ARRIVED IN LOUISIANA

By Christian N. Weiler

During the 2010 general session, the Louisiana Legislature enacted legislation to allow the creation of a new type of limited liability company called the "Low-Profit Limited Liability Company" or "L3C."<sup>1</sup> An L3C is a new form or "subset" of a limited liability company and is intended to be a mixture of for-profit and tax-exempt investors. The L3C is being touted as a wonderful new opportunity for private foundations to expand investment in program-related investments.

L3C legislation was first enacted in Vermont in April 2008. In 2009, L3C legislation was enacted in Michigan, Wyoming, Utah and Illinois. As of now, L3C legislation has been adopted in approximately nine states.

The L3C concept differs from a traditional LLC in that the primary or significant purpose of the L3C cannot be to make a profit, but rather to achieve a social benefit, with profit as a secondary or ancillary purpose. The name itself, Low-Profit Limited Liability Company, is a bit of a misnomer since the business is not restricted in how much profit it can make.

#### Requirements of an L3C

Under Louisiana law, an L3C is required to set forth in its articles of organization, and at all times satisfy a business purpose in conformity with, each of the following requirements:

(a) The entity significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal

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<sup>1</sup>2010 La. Acts, No. 417, amending Revised Statutes Title 12, Chapter 22, Parts I and II.



Revenue Code (IRC) and would not have been formed but for the entity's relationship to the accomplishment of charitable or educational purposes.

(b) No significant purpose of the entity is the production of income or the appreciation of property provided; however, the fact that an entity produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property.

(c) No purpose of the entity is to accomplish one or more political or legislative purposes within the meaning of IRC § 170(c)(2)(D).<sup>2</sup>

Within the articles of organization, an L3C must indicate whether the company is a low-profit limited liability company and is required to use the words "low-profit limited liability company" or the abbreviations "L3C" or "l3c."<sup>3</sup>

If a company organized to meet the requirements of an L3C at its formation or at any time ceases to satisfy any one of the foregoing requirements, it shall immediately cease to be a Low-Profit Limited Liability Company, but by continuing to meet all the other requirements of Louisiana law, it shall continue to exist as a limited liability company. In such event, the articles of organization shall be amended and the name of the company shall be changed to be in conformance with La. R.S. 12:1306, which requires the use of the words "limited liability company" or the abbreviations LLC or LC.<sup>4</sup>

### Potential Purposes of an L3C

According to the IRS, an L3C is not a nonprofit organization and it does not qualify as a tax-exempt organization unless all its members (*i.e.*, investors) are tax-exempt entities.<sup>5</sup>

In theory, the L3C bridges a gap between for-profit entities and certain nonprofit entities, namely entities categorized by federal law as private foundations. Under the Internal Revenue Code, a private foundation is any domestic or foreign religious, scientific or charitable organization described in IRC § 501(c)(3), other than organizations that meet one of the four requirements found in IRC § 509(a). In other words, a private foundation includes most 501(c)(3) charities, other than "public charities" and other specifically excluded charities, within the meaning of the Internal Revenue Code.

Due to the self-imposed restrictions on an L3C created by the Louisiana Legislature, a validly formed and operating L3C likely complies with the stringent requirements of IRC § 4944(c), which are otherwise known as "program-related investments" or "PRIs" and are imposed on L3Cs.

PRIs are investments made by private foundations in a for-profit venture that are in furtherance of the foundations' charitable, educational or religious activity. Historically, private foundations have carefully analyzed and limited such funding because these types of investments could jeopardize the foundation's exempt purpose, which in turn could jeopardize its qualified status with the Internal Revenue Service. A private foundation and its managers could have taxes imposed upon them for making investments in violation of IRC § 4944. The designation as an L3C is intended to eliminate this risk by labeling these types of companies as presumptively pre-qualified to receive funding from a private foundation. L3Cs provide a new opportunity for a private foundation to utilize its resources and assist in addressing social issues that ordinarily would be limited to organizations that are qualified as nonprofit entities.

Compliance with IRC § 4944(c) by an L3C opens up a new avenue of financing for those companies that focus on achieving one or more social benefits. An L3C is able to leverage a private foundation's status and access capital for its ventures, while offering in return the prospect of a positive social impact and reasonable assurance of its compliance with IRC § 4944.

### Pros and Cons of an L3C

The L3C structure limits its purpose. While it is apparent that an L3C is a "subset" of an LLC (as it is contained within the relevant portions of Chapter 22, Title

<sup>2</sup>La. R.S. 12:1302 C(1).

<sup>3</sup>La. R.S. 12:1306 A(1)(b).

<sup>4</sup>La. R.S. 12:1302 C(2).

<sup>5</sup>See Instructions for IRS Form 1023, Part II.

12 of the Louisiana Revised Statutes), there is no history for this entity in Louisiana, and likewise there is little, if any, legal precedent on this entity in the United States.

As of now, L3C legislation is available in a handful of states, including Louisiana. While the Internal Revenue Service has issued a few nonbinding opinion letters, nothing definitive has been said concerning whether a private foundation's investment in a L3C will qualify as a PRI.

Louisiana law provides that the L3C status is revoked and converted to an LLC if the entity does not comply with the primary purpose requirements found in La. R.S. 12:1302. On a practical level, how is failure determined or invoked, and by whom? Similarly, what are the tax implications to the private foundation's investment upon such conversion from an L3C to an LLC?

L3Cs offer a competitive edge to those businesses established in Louisiana whose primary goal is to achieve one or more charitable or educational purposes. Only time will tell whether L3Cs can reach their full potential and serve as a conduit for investments in Louisiana through private foundations. Certainly clarity from the IRS will go a long way in helping L3Cs reach this goal.<sup>6</sup>

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### Exhibit B-5

#### COMPLIANCE WITH THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA)

November 12, 2012

By Christian N. Weiler

In the wake of the U.S. Supreme Court ruling upholding the Patient Protection and Affordable Care Act (the "Affordable Care Act")—employers and individual taxpayers alike must now face the reality of compliance with this new legislation. In particular, business clients must soon determine which employees will be covered under the Affordable Care Act or face penalties by the IRS.

The tax attorneys at Weiler and Rees hold the knowledge and expertise to accurately advise clients on the tax and business ramifications of this legislation. The firm stands ready to advise employers, both large and small, on the legal requirements to provide affordable health insurance, penalties for failing to comply, eligibility for tax credits, and additional informational reporting requirements to the IRS.

Weiler and Rees is also prepared to advise individual clients on the penalty for failing to satisfy the individual mandate requirement, the additional FICA, Medicare and other taxes provided for in the Affordable Care Act and other relevant tax related provisions found in the Affordable Care Act.

For more information about this topic, please contact Christian N. Weiler.

This information is provided by Weiler and Rees for educational and informational purposes only and is not intended, nor should it be construed, as legal advice.

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<sup>6</sup>For more information on L3Cs, check out Americans for Community Development at <https://americansforcommunitydevelopment.org/>.

**Exhibit B-6**THE ANGEL INVESTOR TAX CREDIT—A UNIQUE WAY  
TO INVEST CAPITAL IN A LOUISIANA BUSINESS

April 10, 2013

By Christian N. Weiler

Among other Louisiana state tax credits—such as the Louisiana film and entertainment tax credit—the Louisiana angel investor tax credit offers a unique opportunity for investors to make investments in certain Louisiana start-up businesses. The program provides a 35% tax credit on investments made by an accredited investor who makes an investment in a business certified by Louisiana Economic Development (“LED”), a state agency. These businesses must be certified as Louisiana entrepreneurial businesses by LED. It is important to note that the total annual tax credits allotted by the State are capped at \$5,000,000.00 and the accredited investor may only invest up to \$1,000,000.00 per year and \$2,000,000.00 in total in a qualified business. Under the current law, the program is set to expire in June of 2015.

The angel investor tax credits are not available for all investments in Louisiana businesses. In general, the credits are not available for businesses involved in retail sales, real estate, professional services, gaming, natural gas exploration and other financial services. Furthermore, only certain uses of the funds invested qualify for credits, namely; capital improvements, research and development, and general working capital. Investments may not be used to pay dividends and/or repay shareholder loans and debt.

It is important to note that an accredited investor is generally defined as any natural person who has a net worth of over \$1,000,000.00 and an individual income of \$200,000.00 or joint income of \$300,000.00, if married. A pool of Angel Investors, all of whom are accredited—may also be eligible to make an investment.

An application to LED should be submitted through its website and include proof of investment. In exchange, LED will issue a tax certification letter stating that the investment qualifies for tax credits and the years of eligibility for which the credits may be applied against Louisiana income and corporate franchise tax liabilities of the investor. The tax credits may also be sold to a third party. Applications are received on a first-come, first-served basis, and the tax credits are issued in the order in which they are received until the annual allotment has been exhausted.

If you or a client has an interest in learning more about the Angel Investment Tax Credit Program, please contact Christian Weiler at [cweiler@wrtaxlaw.com](mailto:cweiler@wrtaxlaw.com) or (504) 524-2944.

This information is provided by Weiler and Rees, LLC for educational and informational purposes only and is not intended, nor should it be construed as legal advice.

**Exhibit B-7**

## CURRENT FEDERAL TAXATION UPDATE 2017

March 25, 2018

By Christian N. Weiler

**Congress Has Authorized the Denial or Revocation of U.S. Passports for Serious Delinquent Tax Accounts.**

In December 2015, Congress enacted § 7345 of the Internal Revenue Code (26 U.S.C. 7345) which requires the IRS to notify the U.S. State Department of those taxpayers certified as owing a serious delinquent tax debt to the United States. Within the Fixing Americas Surface Transportation Act of 2015, the State Department is generally prohibited from issuing or renewing a passport to a taxpayer with a serious tax debt. A “serious tax debt” is any balance over \$50,000, and in which a federal tax lien has been filed and all administrative remedies per IRC § 6320 (collection due process appeal rights) have passed.

Failure of a taxpayer to make arrangements with the IRS to repay the delinquent taxes, will allow IRS to notify the State Department that the taxpayer has a serious

delinquent tax debt. Even if you hold a valid passport, the State Department can revoke the passport upon notification by IRS.

A previously certified debt is no longer seriously delinquent when:

- You and the IRS enter into an installment agreement allowing you to pay the debt over time.
- The IRS accepts an offer in compromise to satisfy the debt.
- The Justice Department enters into a settlement agreement to satisfy the debt.
- Collection is suspended because you request innocent spouse relief under IRC § 6015.
- You make a timely request for a collection due process hearing in connection with a levy to collect the debt.

The IRS is required to notify you in writing at the time the IRS certifies your account as a serious delinquent tax debt to the State Department. The IRS is also required to notify you in writing at the time it reverses certification. IRS will notify the State Department of the reversal of your certification within 30 days your tax debt is resolved. If your U.S. passport application is delisted or your U.S. passport is revoked, the State Department will notify you in writing.

On January 1, 2018 IRS started certifying serious tax debts to the State Department.

For more information about this topic, please contact Christian N. Weiler.

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### Exhibit B-8

#### UNDERSTANDING U.S. TAXATION OF VIRTUAL OR “CRYPTO-CURRENCY” TRANSACTIONS

August 22, 2018

By Christian N. Weiler

It wasn't very long ago that few people had heard of the term “Crypto-currency.” While today the word is a well known term; however understanding the tax implications of crypto-currency is often a mystery.

“Crypto-currency” or virtual currency may be used to pay for goods or services, or held for investment. Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value. It can also operate like “real” currency—*i.e.*, the coin and paper money of the United States, or of any other country, that is designated as legal tender, circulates, and is customarily used and accepted as a medium of exchange in the country of issuance—but it does not have legal tender status in any jurisdiction.

There are a variety of different participants in virtual currency: (i) miners who cause the currency to go into circulation by “mining” them, using specialized computer hardware and software to solve complex algorithms; (ii) consumers who have obtained virtual currency either through mining or purchase, and who use virtual currency to purchase goods and services; (iii) dealers in virtual currency who buy and sell and/or operate specialized exchanges; (iv) traders who speculate on short-term price movements of virtual currency by purchasing and selling virtual currency on exchanges or privately; and (v) investors who obtain and hold virtual currency with the hopes of longer-term price appreciation, like any other investment asset.

In general, the sale or exchange of convertible virtual currency, or the use of convertible virtual currency to pay for goods or services in a real-world economy transaction, has tax consequences that may result in a tax liability.

For U.S. income tax purposes, virtual currency is treated as property. A taxpayer who receives virtual currency as payment for goods or services must, in computing gross income, include the fair market value of the virtual currency, measured in U.S. dollars, as of the date that the virtual currency was received. The basis of virtual currency that a taxpayer receives as payment for goods or services is the fair market value of the virtual currency in U.S. dollars as of the date of receipt.

For U.S. tax purposes, transactions using virtual currency must be reported in U.S. dollars. Therefore, taxpayers will be required to determine the fair market value of virtual currency in U.S. dollars as of the date of payment or receipt. If a virtual

currency is listed on an exchange, and the exchange rate is established by market supply and demand, the fair market value of the virtual currency is determined by converting the virtual currency into U.S. dollars (or into another real currency which, in turn, can be converted into U.S. dollars) at the exchange rate, in a reasonable manner that is consistently applied.

If the fair market value of property received in exchange for virtual currency exceeds the taxpayer's adjusted basis of the virtual currency, the taxpayer has taxable gain. The taxpayer has a loss if the fair market value of the property received is less than the adjusted basis of the virtual currency. The character of the gain or loss generally depends on whether the virtual currency is a capital asset in the hands of the taxpayer.

#### **“Mining” Virtual Currencies**

When a taxpayer successfully “mines” virtual currency, the fair market value of the virtual currency, as of the date of receipt, is includible in gross income of the taxpayer. If a taxpayer’s “mining” of virtual currency constitutes a trade or business, and the “mining” activity is not undertaken by the taxpayer as an employee, the net earnings from self-employment (generally, gross income derived from carrying on a trade or business less allowable deductions) resulting from those activities constitute self-employment income and are subject to the self-employment tax.

#### **Is a Payment Made Using Virtual Currency Subject to Information Reporting to IRS?**

Yes, a person who in the course of a trade or business makes a payment of fixed and determinable income using virtual currency with a value of \$600 or more in a year is required to report the payment to the IRS and to the payee. Examples of payments of fixed and determinable income include rent, salaries, wages, premiums, annuities, and compensation.

For more information about this topic, please contact Christian Weiler at [cweiler@wrtaxlaw.com](mailto:cweiler@wrtaxlaw.com) or (504) 524-2944.

This information is provided by Weiler and Rees for educational and informational purposes only and is not intended, nor should it be construed, as legal advice.

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### **Exhibit C**

## **2019 IAAO Conference**

### **Title: Rent-to-Own Personal Property, Is it Taxable or Exempt?**

**By: Assessor Erroll G. Williams and the Orleans Parish Assessor’s Office**

#### **Presenters:**

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#### **Summary of Topic:**

Historically rent-to-own business property has been reported as personal property, and subject to ad valorem taxation in the State of Louisiana. However, rent-to-own businesses in Louisiana and other States have now challenged the status quo, and claim their business property is exempt from taxation. This panel will discuss the arguments being raised by rent-to-own businesses in Louisiana, and other States,

and the challenges currently facing tax assessors in the assessment of rent-to-own personal property.

**Detailed Topic:**

“Rent-to-own” is a transaction under which tangible personal property, such as furniture, electronics and appliances, is leased and the customer acquires ownership of merchandise at the end of a fixed lease term, usually 12 to 24 months, by making all weekly, semi-monthly, or monthly lease payments. Customers have the option to return the merchandise or purchase it for a specified price. Rent-to-own businesses exist throughout the United States and serve approximately 3.8 million customers at any given time in the year.

In Louisiana, rent-to-own businesses annually report to the various local tax assessors business personal property, including office equipment and furniture, inventory and property “out on lease” to its customers. This business personal property reported to assessors is then depreciated and assessed local ad valorem taxes. However, rent-to-own businesses in Louisiana have now challenged the inclusion of its “out on lease” property, claiming this personal property is exempt from ad valorem taxes.

Like other States, the Louisiana State Constitution provides a tax exemption for personal property “used in the home.” Rent-to-own businesses have challenged the assessment made against “out on lease” properties, claiming this property is tax exempt, since its customers use the property in their homes. In the alternative, rent-to-own businesses have also argued, pursuant to the Louisiana Rental Purchase Agreement Act, the rent-to-own transaction is deemed to be a completed sale, and therefore no ad valorem tax is due by rent-to-own businesses, since they no longer own the personal property.

While in the State of North Carolina, rent-to-own businesses have made arguments contrary to the arguments being made in Louisiana. In North Carolina, rent-to-own businesses have argued its “out on lease” property remains “inventory” of the business, and therefore exempt from ad valorem taxes. North Carolina, like many States, exempts business “inventory” from ad valorem taxes.

This panel will make a detailed presentation on challenges facing tax assessors when assessing rent-to-own personal property in Louisiana and other States. This panel will also make a detailed presentation on arguments being made by rent-to-own businesses, and their challenges to personal property ad valorem tax assessments in Louisiana and other States.

**Summary of Facts Governing Rent-to-Own Transactions:**

- A Rent-to-Own Lease Purchase Agreement is entered into between the business and its customers.
- An example Lease Purchase Agreement for a 4.5 washer king sized aqua jet provided as follows:
  - The purchase price, called the “cash price,” which can be exercised by the customer within the first 120 days of the Rent-to-Own Agreement: \$683.19.
  - The number of total lease payments to be made in order to own the Tangible Property: 24 monthly payments or 48 semi-monthly payments.
  - Total cost to own, meaning total amount paid by the customer in order to obtain title and ownership to the leased property: 4.5 washer king sized aqua jet—(i) \$1,309.44 paid over 24 months, or (ii) \$1,596.96 paid in 48 semi-monthly payments;
  - The initial lease term: one month;
  - The initial monthly payment: \$54.56 (broken down and set forth as (i) lease payment of \$45.50 a month, (ii) service fee of \$4.55 per month, and (iii) taxes of \$4.51 a month);
  - The monthly renewal payment: \$54.56 (broken down and set forth as (i) lease payment of \$45.50 a month, (ii) service fee of \$4.55 per month, and (iii) taxes of \$4.51 a month);
  - The semi-monthly renewal payment (paid twice a month): \$33.27 (broken down and set forth as (i) lease payment of \$27.75 a month, (ii) service fee of \$2.77 per month, and (iii) taxes of \$2.75 a month);
  - The monthly renewal payment option is \$54.56 per month, while the semi-monthly renewal payment option is \$66.54 per month;

- The Lease Purchase Agreement provides: “*Ownership*. I will not own nor obtain any equity interest in the Leased Property until I have either made the Total Number of Payments to Own, and paid the Total Cost to Own, or exercised my early purchase option.”
- Under the terms of the “early purchase option,” the customer can purchase the Tangible Property, after 120 days, “at any time by paying an amount equal to the Total Cash Price [specified in the Lease Purchase Agreement] less 50% of the Lease portion of the Total Initial Payment and all Renewal Payments made by me as of the date of my purchase.”
- The Lease Purchase Agreement contains a provision that there is no obligation or requirement that the customer continue renting or using the Tangible Property beyond the 30-day initial lease term.
- If the customer returns the Tangible Property during a renewal term, the customer is obligated to make the full renewable payments and other charges through the date of surrender or return.
- The Lease Purchase Agreement provides for various other charges, such as a late charge of \$5.00, and return-of-check charge of \$15.00, and a repossession charge of \$10.00.
- Risk of loss is born by The Business due to normal wear and tear, or any flood or windstorm, and the customer is only responsible should the merchandise be lost, stolen or damaged.
- Should the Tangible Property break or malfunction, The Business will repair the item at no charge to the customer, which is included in the “service plus fee,” for which the customer is charged \$4.50 per month, or \$2.77 semi-monthly.
- The Business retains legal title to the Tangible Property unless title passes to the customers pursuant to the Lease Purchase Agreement.

### **Taxing Inventory**

- Inventory is one of the most common business ad valorem tax exemptions.
- According to the Tax Foundation, in 2016 some 10 States imposed a tax on inventory: Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Maryland, Kentucky, West Virginia, Virginia and Vermont.
- According to the Tax Foundation, a partial local inventory tax is imposed by some municipalities in four states: Alaska, Massachusetts, Georgia and Michigan.
- States have explored ways to repeal or limit the burden of inventory taxes, but local funding is a common sticking point.
- Because property taxes tend to be locally assessed and collected, the bulk of the revenue generated goes to local governments, meaning that elimination could strain local budgets.
- Some states, such as Louisiana, have sought to solve this issue by creating state income tax credits to offset a business’s inventory tax liability.
- Localities still get to assess the tax and reap the revenue, but the business’s liability disappears. However, a system like this adds complexity to the tax code and could create an environment where games with income tax credits can occur.

#### **Louisiana, like other states, has guidelines for ascertaining FMV of Inventory:**

- Inventory includes goods in waiting, work in process, raw materials and supplies.
- Inventory is to be reported at cost or purchase price at the point of origin, plus any carrying charges.
- The average value for the preceding year is the basis for the assessed value of a taxpayer’s inventory.
- Inventory is reported on LAT5 Form, per business location.

#### **Louisiana Law Governing Assessment of Inventory:**

§ 1701. *Guidelines for Ascertainning the Fair Market Value of Inventories*. The term “inventory” is defined as the aggregate of those items of tangible personal property, which are: (1) held for sale in the ordinary course of business; (2) are currently in the process of production for subsequent sale; (3) are ultimately to be consumed in

the production of the goods or services to be available for sale; or, (4) are utilized in marketing or distribution activities.

The term “inventory” embraces the following: (1) goods awaiting sale—goods or commodities awaiting sale which include, but, are not limited to: the merchandise of a retail or wholesale concern; the finished goods of a manufacturer; commodities from farms, mines and quarries; goods which are used or trade-in merchandise and by-products of a manufacturer; (2) work in process—goods or commodities which are in the course of production, *i.e.*, work in process; (3) raw materials and supplies—goods which will be consumed or used in either the Louisiana manufacturing process or in any other manner by the taxpayer, directly or indirectly. This category would include, but, not be limited to: raw materials, supplies, repair parts, expendable tools and samples; (4) does not include oil stored in tanks held by a producer prior to the first sale of the oil. Oil stored in tanks held by a producer prior to the first sale of the oil, shall not be subject to ad valorem tax.

#### **Inventory Records.**

The law provides that: all persons engaged in business in Louisiana, whose gross sales shall be in excess of \$15,000, shall make and keep an inventory of their merchandise, fixtures, machinery, equipment and other assets within the state showing the quantity, description and value thereof as of the first day of January of each year; such persons shall likewise make and keep on hand a true and accurate record of all other business transactions had in connection with their stores, mercantile or manufacturing establishments.

#### **Inventory Values.**

The law provides that: in the assessment of merchandise or stock in trade on hand, the inventory value of the merchandise shall be ascertained by computing the cost or purchase price at the point of origin, plus the carrying charges to the point of destination, and the average value as so determined during the year preceding the calendar year in which the assessment is made shall be the basis for fixing the assessed value (R.S. 47:1961).

#### **Assessment of Inventory.**

The assessed value shall be based upon 15 percent of the average inventory cost for the preceding calendar or fiscal year. Any IV-3 (2017) inventory that existed less than a full year shall be averaged for the months it had situs at the reported location. However, this does not mean to annualize the monthly inventory costs if less than 12 months are used to calculate the average inventory to be assessed.

## **Is Leased Property Inventory?**

Inventory is the most common business ad valorem tax exemption. According to the Tax Foundation, in 2016 some 10 States imposed a tax on inventory: Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Maryland, Kentucky, West Virginia, Virginia and Vermont. According to the Tax Foundation, a partial local inventory tax is imposed by some municipalities in 2016 four states, Alaska, Massachusetts, Georgia and Michigan.

#### **What is inventory?**

Traditionally, inventory is a term for goods available for sale, and raw materials used to produce goods available for sale. Finished goods is often termed as “merchandise.” Inventory is classified as a current asset on a company’s balance sheet. When inventory is sold, its carrying cost is transferred to cost of goods sold.

#### **Florida Dept. of Revenue defines inventory as:**

“Inventory” means only those chattels consisting of items commonly referred to as goods, wares, and merchandise (as well as inventory) which are held for sale or lease to customers in the ordinary course of business. Supplies and raw materials shall be considered to be inventory only to the extent that they are acquired for sale or lease to customers in the ordinary course of business, or will physically become a part of merchandise intended for sale or lease to customers in the ordinary course of business. Partially finished products, which when completed will be held for sale or lease to customers in the ordinary course of business, shall be deemed items of inventory. All livestock shall be considered inventory. *Items of inventory held for lease to customers in the ordinary course of business, rather than for sale, shall be deemed inventory only prior to the initial lease of such items.* For the purposes of this section, fuels used in the production of electricity shall be considered inventory. From 2018 FLA Statutes, Title XIV, 192.001, Definitions.



**Texas imposes ad valorem taxes on inventory.**

Texas has specific rules for valuing what it describes as “Special Inventory.” Texas law provides for the special appraisal of dealers’ inventory, including heavy equipment, motor vehicles, vessels and outboard motors, and manufactured housing retailers. Special inventory appraisal is generally based on sales. Dealers and retailers must file inventory declaration forms with the county appraisal district each year, listing the total sales, leases or rentals, as applicable, in the preceding year, and an inventory tax statement with the tax office each month.

## **Litigation in Louisiana**

**I. In Louisiana, Taxpayer has argued that its property leased in a Rent-to-Own Transaction is exempt from ad valorem taxation.**

La. Const. Art. VII, §21(C)(9) exempts the owner of Tangible Property used by the owner in his or her home from parish ad valorem taxes. In other words, it prevents the assessor from imposing ad valorem taxes on the owner of Tangible Property when the owner uses the property in his or her home. Otherwise, a homeowner would be subject to parish ad valorem taxes on his or her living room couch, kitchen table, dishwasher, etc. La. R.S. §47:1951.

La. Const. Art. VII, §21(C)(9) provides an exemption for “personal property used in the home or on loan in a public place.”

Taxpayer now claims that the Tangible Property it owns, and which has been leased to customers pursuant to its “rent-to-own” program, is exempt from ad valorem taxes under La. Const. Art. VII, §21(C)(9). La. Const. Art. VII, §21(C)(9) provides an exemption for “personal property used in the home or on loan in a public place.”

The Assessor argued to the Court that it is well-settled law that any claim for exemption from ad valorem taxation is strictly construed in favor of the taxing authority and against the party desiring the exemption. The Assessor argued the intent behind the exemption afforded by La. Const. Art. VII, §21(c)(9) is to exempt *owners* of Tangible Property *used by them in their home*, such as furniture, electronics and appliances, from the imposition of ad valorem taxes. Without the exemption, the property owner would be subject to ad valorem tax on Tangible Property in their home. La. R.S. §47:1951.

**II. Taxpayer’s argument, that a Rent-to-Own Transaction is a sale under Louisiana law, is contrary to Louisiana law.**

Taxpayer argues, pursuant to the “Louisiana Rental Purchase Act Agreement” set forth in La. R.S. §§9:3351, *et. seq.*, that the transaction in question, namely a Rent-to-Own Transaction, is in fact a sale for state and local tax purposes. Specifically, Taxpayer argues that La. R.S. §9:3362 applies to all state and local taxes, including ad valorem property taxes. La. R.S. §9:3362 provides as follows:

Rental-purchase agreements, as defined by R.S. 9:3362, shall be deemed to be sales for state and local tax purposes only. The tax due on such transactions shall be payable in equal monthly installments over the entire term of the rental-purchase agreement, rather than at the inception of the agreement.

**III. Taxpayer has taken a contrary position in its 2013 litigation against the Louisiana Department of Revenue.**

In that litigation, which involved the availability of a tax credit against state income tax for ad valorem taxes paid, Taxpayer took the position that it was entitled to a credit against its state income taxes for ad valorem taxes it paid on its inventory it leased pursuant to its Rent-to-Own Agreements. Taxpayer filed a refund suit against the Louisiana Department of Revenue, taking the position that it was entitled to an inventory tax credit for ad valorem taxes paid for the property out on lease. The outcome of litigation was that the Louisiana Department of Revenue agreed that the property out on lease was, in fact, inventory subject to ad valorem taxes. Taxpayer took the position that it was the owner of the property out on lease for ad valorem tax purposes.

**IV. Rent-to-Own Transaction is not a sale under Louisiana law; rather, the contract is a lease to purchase agreement under Louisiana law.**

The local Assessor argued to the Court that the Louisiana Civil Code defines a lease as a bilateral contract by which one party, the lessor, binds himself to give

the other party, the lessee, the use and enjoyment of a thing for a term in exchange for a rent that the lessee binds himself to pay. La. Civ. Code. art 2668.

Where there is a conflict between the general law of leases contained in the Civil Code and the terms of the specific contract, the contract prevails unless the terms of the contract are contrary to public policy; the articles in the Civil Code regulate the relationship between lessor and lessee when the lease is silent. *Tassin v. Slidell Mini-Storage, Inc.*, 396 So.2d 1261, 1264 (La. 1981); *Pace v. Loyal Order of Moose, Metairie Lodge No. 2195*, 538 So.2d 299, 304 (La. App. 5 Cir. 1989).

The contractual terms of a Lease Purchase Agreement are clear; the business owner retains ownership of the leased property until all payments are made by the customer. Title and ownership to the lease property is not conveyed to the customer until after all payments are made. After the customer makes all lease payments, the business then furnishes in writing evidence that it is transferring ownership of the leased property to the customer, and is also transferring all warranties in reference to the leased property.

The property is leased to the customer through a series of short-term leases, and the customer has the option to return the leased property to Taxpayer at the end of these short-term leases without further obligation, and without any right or claim to the property that had been leased. In other words, the title at all times stays with Taxpayer during the lease period, and is only transferred to the customer upon the payments of all lease payments called for under the Lease Purchase Agreement.

### **Outcome of Litigation in Louisiana**

The District Court ruled in favor of the Assessor in this litigation, and found that property out on lease in Louisiana was, in fact, subject to ad valorem tax. The Taxpayer has appealed this ruling and the case is currently pending before the Louisiana Court of Appeal.

#### **Litigation in North Carolina— In the Matter of the Appeal of Aaron's, Inc. No. COA18-607**

- North Carolina does *not* impose ad valorem taxes on inventory.
- Taxpayer filed written exception to the deficiency, arguing that the property subject to its Lease Purchase Agreements, as property that was “in the process of being sold,” qualified as “inventories” and was therefore exempt from taxation.
- After conducting an audit, on November 6, 2015, the Sampson County Office of Tax Assessor sent Taxpayer a notice and appraisal assessing a tax deficiency of \$2,636,576.00 for the tax years 2010 through 2015.
- Taxpayer argues that such property constitutes “inventories owned by retail and wholesale merchants,” and is thus exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34).

#### **The N. Carolina Tax Commission and Court of Appeal:**

- Looked at the Lease Purchase Agreement and concluded the taxpayer retained title to and ownership of the tangible personal property.
- Taxpayer maintains that the transfer of its property to the possession of a lessee, pursuant to a Lease Purchase Agreement, effects a form of “sale,” such as a conditional sale, and that such property thus constitutes exempt inventory under N.C. Gen. Stat. § 105-275(34).
- The Tax Commission and Court of Appeal disagreed and found that the transfer of possession of property following the execution of Taxpayer’s Lease Purchase Agreement is not properly categorized as a “sale,” and therefore the property held thereunder does not fall within the class of exempt “inventories” described in N.C. Gen. Stat. § 105-275(34).

We reach this conclusion primarily due to the fact that Taxpayer’s lessees are, in fact, under no obligation to either purchase the subject property or to pay the “Total Cost to Own” the property pursuant to the terms of Taxpayer’s Lease Purchase Agreements.

The Court of Appeal also analyzed the Rent-to-Own transaction and noted that ordinarily it would cost a customer \$1,639.12 if purchased through a direct sale, while a rent-to-own transaction would cost \$2,917.63—or an additional \$1,278.51—

if the customer were to purchase that same item by exercising the purchase option under a Lease Purchase Agreement.

The substantial increase in cost is consistent with the denomination of Taxpayer's "rent-to-own" transactions as a lease, rather than a sale of the property.

Ultimately, the North Carolina Tax Commission ruled against the Taxpayer and its claim for exemption, concluding the evidence shows that the property of Taxpayer is primarily used for rental purposes, and therefore, "Taxpayer, by renting the equipment to third parties, is not entitled to the inventory tax exclusion for the rented equipment."

Interestingly, this Taxpayer is taking a contrary position in Louisiana, and claiming it is no longer the owner of Tangible Property once it is leased, since the transaction is a "sale" for ad valorem tax purposes.

### **How Other States Classify Rent-to-Own Transactions**

All States, except for Oklahoma, exempt personal property used in the home. Even most counties in Oklahoma exempt the property.

There are no federal laws that specifically regulate the rent-to-own industry. There are, however, two proposed laws awaiting approval by Congress: the Rent to Own Protection Act and the Consumer Rental Purchase Agreement Act.

The Rent to Own Protection Act would regulate rent-to-own as credit sales. This would mean federal laws like the Truth in Lending Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act, would also apply to rent-to-own transactions.

#### **State Rent-to-Own Legislation**

In the United States, 47 states have state laws regulating rent-to-own transactions. These laws require that businesses disclose to customers the rules rent-to-own contracts must follow. California, for instance, has the *Karnette Rental-Purchase Act*. This Act defines the terms of rent-to-own agreements and provides consumer protection provisions. For example, it is illegal for rent-to-own businesses to enter agreements where the total of "payments" toward an item is higher than 2.25 times its cash price.

#### **States Without Rent-to-Own Specific Legislation**

Only four states do not have working rent-to-own legislation: Minnesota, New Jersey, North Carolina and Wisconsin. Minnesota does have rent-to-own legislation, but the Minnesota Supreme Court has ruled that rent-to-own agreements are also a credit sale, and thus limited to an 8 percent annual rate of interest. Similar rulings have occurred in New Jersey, North Carolina and Wisconsin.

According to the Association of Progressive Rental Organizations, the lack of legislation and adverse judicial rulings have severely restricted the growth of rent-to-own businesses, and in the case of Minnesota, done away with the industry altogether.

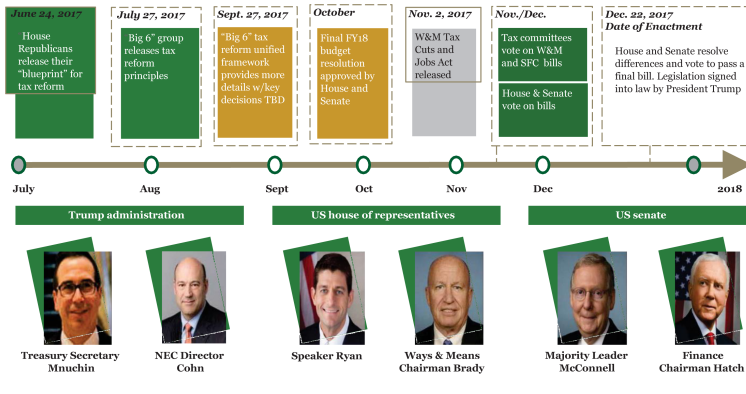
## Weiler and Rees

### OVERVIEW OF THE 2017 TAX CUTS AND JOBS ACT

PRESENTED BY: CHRISTIAN WEILER, LL.M.  
A board-certified tax law specialist

#### *An ambitious timeline in 2017*

- The 1986 Tax Reform Act took approximately 18 months.
- Compromises were made to finish, and to comply with the budget rules.



## Summary of Selected Tax Cuts and Jobs Act Tax Rates & Thresholds

Individual Rates	<ul style="list-style-type: none"> <li>◆ 10% rate - first \$9,525 (ind.)/\$19,050 (joint)</li> <li>◆ 12% rate - \$9,525/\$19,050</li> <li>◆ 22% rate - \$38,700/\$77,400</li> <li>◆ 24% rate - \$82,500/\$165,000</li> <li>◆ 32% rate - \$157,500/\$315,000</li> <li>◆ 35% rate - \$200,000/\$400,000</li> <li>◆ 37% rate - \$500,000/\$600,000</li> </ul>	◆ Taxable years beginning after 2017 and before 2026.
Individual Alternative Minimum Tax (AMT)	<ul style="list-style-type: none"> <li>◆ Exemption - \$70,300/\$109,400</li> <li>◆ Phase-out - \$500,000/\$1,000,000</li> </ul>	◆ Taxable years beginning after 2017 and before 2026.
Standard Deduction	◆ \$12,000/\$24,000 (indexed)	◆ Taxable years beginning after 2017 and before 2026.
Estate, Gift, and Generation-skipping Tax (GST)	◆ Exemption - \$10 million (indexed from 2011)	◆ Taxable years beginning after 2017 and before 2026.
Top Corporate Rate	◆ 21% (no graduated rates)	◆ January 1, 2018.
Corporate Alternative Minimum Tax (AMT)	◆ Repealed -- AMT credit refunds - 50% per year (100% for years beginning in 2021)	◆ Taxable years beginning after 2017.
Top Pass-through Rate	<ul style="list-style-type: none"> <li>◆ 29.6% (20% deduction)</li> <li>◆ Wage limitation - \$157,500/\$315,000</li> <li>◆ Specified service business exclusion (phase-in) - \$157,500-\$207,500/\$315,000-\$415,000</li> </ul>	◆ Taxable years beginning after 2017 and before 2026.
Limitation on Pass-through Losses	◆ \$250,000/\$500,000 (indexed)	◆ Taxable years beginning after 2017

## Summary of Selected Tax Cuts and Jobs Act Tax Rates & Thresholds

Type of system	◆ Territorial, 100% dividends received deduction	◆ After 2017
Transition Tax	◆ 15.5% (cash, etc.)/8% (other).	◆ Greater of E&P on November 2, 2017 or December 31, 2017.
Global Intangible Low-Taxed Income (GILTI)	<ul style="list-style-type: none"> <li>◆ GILTI - Net CFC Tested Income minus (10% x QBIA).</li> <li>◆ Deemed-paid foreign tax credit - 80%.</li> </ul>	◆ Taxable years beginning after 2017.
Foreign-Derived Intangible Income (FDII) and GILTI Deduction	<ul style="list-style-type: none"> <li>◆ GILTI (before 2026) - 50% (10.5% effective tax rate).</li> <li>◆ GILTI (after 2025) - 37.5% (13.125% effective tax rate).</li> <li>◆ FDII (before 2026) - 37.5% (13.125% effective tax rate).</li> <li>◆ FDII (after 2025) - 21.875% (16.406% effective tax rate).</li> </ul>	
Base Erosion and Anti-Abuse Tax (BEAT)	<ul style="list-style-type: none"> <li>◆ Gross receipts test - \$500 million average preceding 3 years.</li> <li>◆ Base erosion percentage test - 3% (base erosion payments to total deductions) for non-banks/dealers and 2% for banks/dealers.</li> <li>◆ Base erosion minimum tax - excess of [%] of modified taxable income (MTI) over regular tax, reduced by a portion of credits other than R&amp;D.</li> <li>◆ [%] of MTI: <ul style="list-style-type: none"> <li>◆ First taxable year beginning after 2017 - 5% (6% for banks/dealers).</li> <li>◆ Taxable years beginning after 2018 and before 2025 - 10% (11% for banks/dealers).</li> <li>◆ Taxable years beginning after 2025 - 12.5% (13.5% for banks/dealers).</li> </ul> </li> <li>◆ For taxable years beginning after 2025, regular tax is reduced by all credits in full.</li> </ul>	◆ Taxable years beginning after 2017.

**Individual income tax rates**

Lowers rates to 10%, 12%, 22%, 24%, 32%, 35%, and 37%; adjusts rate bracket thresholds.

Roughly doubles standard deduction; suspends deduction for personal exemptions; repeals overall limitation on itemized deductions; repeals all miscellaneous itemized deductions subject to the 2% floor under present law.

**Alternative minimum tax (AMT)**

Retains the individual AMT.

Increases the exemption amounts (\$70,300 single/\$109,400 married filing jointly) and phase-out thresholds (\$500,000 single/\$1m married filing jointly).

**State and local tax deduction**

Caps deduction at \$10,000 which can be taken for the aggregate of state and local real property and income taxes or state and local sales taxes.

**Mortgage interest deduction**

Caps deduction at \$750,000 of debt; \$1m for debt incurred before 12/15/17. Reverts back to \$1m 1/1/26, regardless of when debt incurred. Available for second homes.

Eliminates deduction for interest on home equity debt.

**Medical expense deduction**

Applies to expenses that exceed 7.5% of adjusted gross income (AGI) in 2017 and 2018, and expenses that exceed 10% of AGI thereafter.

**Child tax credit**

Increases child tax credit to \$2,000 per qualifying child (of which \$1,400 refundable); phase-out starts at AGI over \$400,000 (mfj). New \$500 nonrefundable dependent credit.

**Estate tax**

Retains estate, gift, and generation-skipping transfer taxes; doubles \$10m basic exclusion and indexes it for inflation.

**ACA individual mandate**

Reduces shared responsibility payment (individual mandate) to zero, effective months beginning after 12/31/18.

Provision does not sunset.

**Charitable donations**

Retains deduction for charitable donations and increases the AGI limitation for charitable contributions from 50% to 60%.

**Deductions for higher education**

Continues to allow graduate students to exclude the value of reduced tuition from taxes.

Continues to allow deductions for student loan interest and for qualified tuition and related expenses.

**Section 529 plans**

Allows distributions of up to \$10k per student tax-free from 529 accounts to be used for elementary, secondary and higher tuition; can be used for some expenses associated with home school.

**Tax-free retirement vehicles**

Retains retirement savings options such as 401(k)s and Individual Retirement Accounts (IRAs).

Generally repeals rule allowing IRA contributions to one type to be recharacterized as a contribution to the other type.

#### **Capital gains and dividends**

Net capital gains and qualified dividends would continue to be taxed at the current 0%, 15%, and 20% rates, and also would continue to be subject to the 3.8% net investment income tax.

#### **Deductions**

Repeals deductions for tax preparation, moving expenses and alimony payments (after 2018).

All itemized deductions subject to the 2% floor would be repealed (*e.g.*, home office deductions, license and regulatory fees, dues to professional societies).

#### **Gain from sale of principal residence**

Retains current law ownership period for the exclusion of gain from the sale of a principal residence

#### **Other credits**

Retains adoption credit.

#### **Corporate tax rate and corporate AMT**

21% tax rate, effective 1/1/18.

Eliminates corporate AMT.

#### **Interest expense deduction**

Limits deduction to net interest expense that exceeds 30% of adjusted taxable income (ATI). Initially, ATI computed without regard to depreciation, amortization, or depletion. Beginning in 2022, ATI would be decreased by those items. Regulated utilities generally excepted.

#### **Net operating losses (NOLs)**

Limits NOLs to 80% of taxable income for losses arising in tax years beginning after 2017. Repeals carryback provisions, except for certain farm and property and casualty losses; allows NOLs to be carried forward indefinitely.

Expands the Section 162(m) \$1 million deduction limit that applies to compensation paid top executives of publicly held companies for TY beginning after 12/31/17.

Covered employees would include the CFO and all executives once identified.

Eliminates the performance-based compensation exceptions and extends deduction limitation to deferred compensation paid to executives who previously held a covered employee position.

Expands applicability of the deduction limitation to certain foreign private issuers and private companies that have publicly traded debt.

Provides a transition rule for compensation paid pursuant to a plan under a written binding contract that is in effect on 11/2/17 and is not materially modified thereafter.

Eliminates deduction for certain fringe benefit expenses.

Business entertainment activities and membership dues; transportation or commuting expenses are not excludable from income or deductible by the employer.

Employee achievement awards may not be deducted or excluded from income if the award is paid in cash, gift cards, meals, lodging, tickets, securities, or other similar items.

No longer exempts employer-provided eating facilities from 50% deduction limitation; in 2026, deductions are completely disallowed for employer-provided eating facilities and meals provided for the convenience of the employer.

Adds a new income inclusion deferral election allowing deferral of tax for options and restricted stock units issued to qualified employees of private companies; applies on or after 12/31/17.

New section 199A generally provides a deduction for 20% of the “Qualified Business Income” (“QBI”) from an S corporation, partnership, LLC (taxed as a partnership) or a sole proprietorship.

Although new Section 199A also provides rules for dividends from qualified real estate investment trusts, dividends from qualified cooperatives and income from publicly traded partnerships, we will focus on the deduction applicable for owners of S corporations, partnerships, LLCs and sole proprietorships.

For taxable years beginning after December 31, 2017 and before January 1, 2026, a taxpayer other than a corporation (which includes estates and trusts under the final bill) may generally deduct 20% of the QBI of an S corporation, partnership, LLC or a sole proprietorship allocable to such shareholder, partner, member or sole proprietor.

In order to obtain the full benefit of the deduction without being subject to the wage and capital limitations, the taxable income of the shareholder, partner, member or sole proprietor must be less than \$157,500 or less than \$315,000 in the case of a married taxpayer filing jointly.

The deduction reduces a taxpayer’s taxable income but not his or her adjusted gross income (*i.e.*, it is a “below the line” deduction). However, the deduction is available whether the taxpayer itemizes deductions or takes the standard deduction.

QBI generally means the net amount of “qualified items of income, gain, deduction and loss” with respect to any “qualified trade or business” of the taxpayer.

Qualified items of income, gain, deduction and loss means items of income, gain, deduction and loss to the extent such items are effectively connected with the conduct of a trade or business within the United States.

QBI generally only includes domestic income and not foreign income.

However, in the case of a taxpayer who otherwise has QBI from sources within the commonwealth of Puerto Rico, provided all of the income is taxable, the taxpayer’s income from Puerto Rico will be included in determining the individual’s QBI.

This provision does not define what constitutes a “trade or business” for purposes of determining the deduction. There are several definitions elsewhere in the Code and regulations—guidance may be necessary.

Qualified items also do not include specified investment-related income, deductions or losses. Specifically, qualified items do not include short-term capital gain or loss, long-term capital gain or loss, dividend income or interest income. Additionally, QBI does not include any amount paid by an S corporation that is treated as reasonable compensation to the taxpayer, nor does it include any guaranteed payments made by a partnership to a partner for services rendered with respect to the trade or business or any other amounts paid or incurred by a partnership to a partner who is acting other than in his or her capacity as a partner for services.

A qualified trade or business includes a trade or business other than a “specified service trade or business” and other than the trade or business of being an employee.

For businesses other than a “specified trade or service business” and for which the taxpayer’s taxable income exceeds \$207,500, or \$415,000 if married filing jointly, the deductible amount for each trade or business carried on by the S corporation, partnership, LLC or sole proprietorship **is the lesser of:**

20% of the taxpayer’s allocable share of QBI with respect to the qualified trade or business; **or**

the greater of:

(a) the taxpayer’s allocable share of 50% of the W-2 wages with respect to the qualified trade or business, or

(b) the taxpayer’s allocable share of the sum of 25% of the W-2 wages with respect to the qualified trade or business, plus 2.5% of the unadjusted basis immediately after acquisition of all “qualified property” (the “wage and capital limitations”).

W-2 wages are wages paid to an employee, including any elective deferrals into a Section 401(k)-type vehicle or other deferred compensation. W-2 wages do not in-



clude, however, payments to an independent contractor or management fees or similar items.

For purposes of the provision, “qualified property” means tangible property of a character subject to depreciation that is held by, and available for use in, the qualified trade or business at the close of the taxable year, which is used in the production of QBI sometime during the taxable year, and for which the depreciable period has not expired before the close of the taxable year.

The depreciable period with respect to qualified property of a taxpayer means the period beginning on the date the property is first placed in service by the taxpayer and ending on the later of (a) the date ten years after such date; or (b) the last day of the full year in the asset’s normal depreciation period.

For taxpayers having taxable income between \$157,500 and \$207,500 (\$157,500 plus \$50,000), or with respect to married individuals filing jointly having taxable income between \$315,000 and \$415,000 (\$315,000 plus \$100,000), the wage and capital limitations are phased in.

That is, if the wage and capital limit is less than 20% of the taxpayer’s QBI with respect to the qualified trade or business, the taxpayer’s deductible amount is determined by reducing 20% of QBI by the same proportion of the difference between 20% of the QBI and the wage and capital limit as the excess of the taxable income of the taxpayer over the threshold amount bears to \$50,000 (\$100,000 in the case of a joint return).

If the taxpayer has \$207,500 of taxable income, or \$415,000 of taxable income in the case of a married individual filing a joint return, the wage and capital limitations apply fully to the taxpayer.

The provision defines a “specified service trade or business” as any trade or business involving the performance of services in the fields of health, law, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees who are owners, or which involves the performance of services that consist of investing and investment management trading, or dealing in securities, partnership interests, or commodities.

It should be noted that engineering and architecture services are specifically excluded from the definition of a specified service trade or business.

Determining whether a business is a specified service trade or business because it includes “any trade or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees who are owners,” may be difficult.

Though a specified service trade or business is not a qualified trade or business, such business may nevertheless be eligible for the 20% of QBI deduction provided that the taxpayer’s taxable income is less than the threshold amounts of \$315,000 in the case of married individuals filing joint returns and \$157,500 for all other taxpayers.

The ability to take the deduction for 20% of QBI for a specified service trade or business is phased out for a taxpayer having taxable income between \$315,000 and \$415,000 in the case of married individuals filing joint returns, and between \$157,500 and \$207,500 for all other taxpayers.

Specifically, for a taxpayer with taxable income within the phase-out range, the taxpayer takes into account only the “applicable percentage” of qualified items of income, gain, deduction or loss, and of allowable W-2 wages. The applicable percentage with respect to any taxable year is 100% reduced by the percentage equal to the ratio of the excess of the taxable income of the taxpayer over the threshold amount bears to \$50,000 (or \$100,000 in the case of a joint return).

Consequently, the deduction for 20% of QBI is not available at all for shareholders, partners, members or sole proprietors of a specified service trade or business whose taxable income is \$207,500 or above, or in the case of married individuals filing a joint return, \$415,000 or above.

## QUESTIONS SUBMITTED FOR THE RECORD TO CHRISTIAN N. WEILER

## QUESTION SUBMITTED BY HON. CHUCK GRASSLEY

*Question.* Generally, a best practice in protecting and promoting healthy whistleblowing is to secure whistleblowers' access to independent judicial reviews of their claims. This is no less true for those who blow the whistle on tax fraud to the Internal Revenue Service. In 2006, I authored an amendment that established a mandatory IRS whistleblower award program and transferred review of whistleblower cases away from the U.S. Court of Claims to the U.S. Tax Court. The Tax Court has, in the past, decided whistleblower cases using a de novo standard of review, but hadn't made a decision on the standard of review for over 12 years. However, the Tax Court, in *Kasper v. Commissioner of Internal Revenue* (2018), applied an arbitrary and capricious standard of review. I am concerned that the *Kasper* case may negatively affect whistleblowers coming forward in the future, though I am pleased to know that the Tax Court has decided to revisit the standard of review for whistleblowers in Tax Court case 11099-13W. To that end, my question to you is this:

Will you commit to having an open mind when considering the appropriate standard of review for whistleblower cases—looking to the plain language of the statute and the meaning of the words when the statute was adopted in 2006?

*Answer.* Yes, I am committed to having an open mind, when considering the Tax Court's appropriate standard of review for a whistleblower claim brought under IRC § 7623 (b)(4), governing a taxpayer's right to challenge a reduction or denial of a statutory whistleblower award. I will also look to the plain language and meaning of the statute, at the time the law was enacted, for the Tax Court's interpretation of congressional intent with respect to the Tax Court's independent judicial review of whistleblower claims.

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 QUESTIONS SUBMITTED BY HON. TODD YOUNG

*Question.* The Tax Court's decision to conduct remote proceedings reflects the new "normal" that we are all experiencing during these unprecedented times.

As a result, parties must take steps to ensure that they and their witnesses have adequate technology and Internet resources to participate in a remote proceeding.

Today, the vast majority of Americans have, or can use, a telephone. But proceedings that require a personal computer with Internet service may not be accessible to many litigants.

With that said, I have concerns with how remote proceedings will work for vulnerable, low-income taxpayers.

How do you plan to address the socioeconomic "digital divide" with respect to remote proceedings and ensure there's an easily accessible platform so low-income taxpayers can fairly participate?

How do you anticipate the general use of remote proceedings will impact the current lengthy delay in issuing a judgment in the Tax Court, while still ensuring a just process?

*Answer.* Thank you for this question. I plan to address the so-called "digital divide" by being flexible and empathetic with the parties, particularly pro se taxpayers. I believe the digital divide applies to many pro se taxpayers, including low-income taxpayers, as well as other taxpayers, such as the elderly and those who do not speak English. Technology can be daunting for many, and it will particularly impact unsophisticated and low-income taxpayers. Therefore, I am committed to flexibility and do not intend to require taxpayers to use a remote proceeding. It is my understanding that the Tax Court intends to use ZoomGov for remote proceedings, which is a user-friendly cell phone app and allows petitioners to also call in.

Also, I believe the parties should be given the option at any point during a remote proceeding to ask for a continuance of the matter and to keep the trial record open until the parties and the Court have a chance to meet and complete an in-person trial. There are also other options at the Tax Court's disposal for resolution of the case, including submission of the trial by full stipulation of facts and by a summary judgment motion. Although the current impact of the digital divide and remote pro-

ceedings makes things less than ideal for pro se petitioners, it is something that has come about due to necessity and will likely not be used permanently.

Finally, I do anticipate remote proceedings will delay the time in which a case will be heard or submitted to the Court; however, I believe there should be no substantial delay on the part of the Tax Court in issuing a judgment, unless the parties or the Court agree to keep the record open until a remote trial can be completed in person.

*Question.* Like any other court proceeding, there is a waiting period that may be required.

There is no fixed time in which a judge must make a decision, but in most cases, it can be at least 6 months between when the petition is filed to when the case is called for trial, and then another 6 months or year before an opinion is issued—especially given the current backlog.

With the possibility of interest continuing to accrue on an individual's unpaid tax balance throughout the course of the proceeding, do you plan to address the waiting period and the time it takes to render a decision? If so, what are your plans?

Will you commit to issuing opinions within a year of the trial date?

*Answer.* Thank you for this question. I am unaware of the current practices at the Court with respect to minimum delays between the date in which all issues have been joined (meaning the date after a petition and answer by IRS have been filed) to the date of trial. It is my general understanding that the Clerk or Chief Judge waits until there are a minimum number of filed petitions to set a trial calendar for a specific city. I believe as a judge of the Tax Court, I could examine these waiting period practices and recommend best practices to ensure all cases are being heard efficiently and timely.

With respect to the period between trial and a decision, I am committed to allowing the parties prompt and simultaneous briefing of the legal issues (when possible) and issuing a prompt decision of those cases that can be handled quickly. I suspect certain type of cases, particularly factual determinations, can be promptly ruled on by the Court.

Finally, yes, I will commit to issuing the vast majority of my opinions within a year or hopefully in a much shorter period of time.

*Question.* Given your previous experience with the Southeast Louisiana Legal Service Pro Bono Tax Clinic, how will you commitment to ensuring low-income individuals are fairly represented—especially those with tight financial situations?

How important was your service in this clinic to better understanding the needs of taxpayers?

*Answer.* Thank you for this question. In my mind, adequate representation of low-income taxpayers is a critical issue for the Tax Court. I am committed to making all taxpayers aware of the pro bono calendar call and other pro bono services offered by the various pro bono tax clinics. I am also committed to working with the ABA Tax Section and other State Bar Tax Sections to expand pro bono representation for pro se taxpayers appearing before the Tax Court, including the Court's recently adopted policy governing a practitioner's limited entry of appearances.

I believe my experience at the tax clinic has been critical in developing my understanding of the unique needs and types of claims commonly faced by low-income taxpayers. Without my experience at the tax clinic, I would not have been exposed to the types of cases that are routinely before a Tax Court Judge.

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PREPARED STATEMENT OF HON. RON WYDEN,  
A U.S. SENATOR FROM OREGON

The Finance Committee meets today to discuss two nominations to the U.S. Tax Court and one for a position as Deputy U.S. Trade Representative. The Tax Court is all about fairness for the taxpayer—giving them a venue to dispute potentially mistaken charges before having to pay. And USTR is facing big challenges, because the Phase One China trade deal that the President called the biggest deal anywhere in the world is already failing. The new NAFTA is in danger of becoming only so many words on paper if this administration does not step up on implementation of the labor obligations and other commitments. In the fight against trade cheats,

American workers and businesses need USTR to do better. So these are both important roles, and the nominees before the committee today are qualified to fill them.

With that said, this is the committee's first meeting after a recess that the Senate should not have taken. In this pandemic, virtually every new day is the worst day yet. And tens of millions of jobless Americans are headed over an income cliff if the Senate does not act in the coming days. So, while the nominations before this committee are important and I'm looking forward to the discussion with our witnesses, the committee also needs to move quickly past business as usual.

There are COVID hot spots all over the country. Just like in March and April, the testing cannot keep up with the spread of the virus. Health-care workers don't have adequate PPE. You can count on one hand the States that have the pandemic under control.

Parents are afraid to send their kids back to school, and too many school districts don't know when or how they'll be able to bring kids back safely. It's a disaster for teachers and staff, for kids and for parents, many of whom might have to drop out of the workforce to provide their own child care.

Any hope for a quick economic rebound is disappearing. Consumer spending is dropping. Short-term furloughs are turning into permanent layoffs. The number of new weekly unemployment claims, which before this year had never crossed 700,000, has been a million or more for 17 weeks straight.

Everyone understands that this country is at the beginning of a once-in-a-century unemployment crisis. But if not for supercharged unemployment benefits keeping families afloat, this country would also be in the middle of a second Great Depression. Those benefits, however, will expire in a matter of days. They will lapse if Senate Republicans refuse to act by July 25th. That will be a moral and economic disaster that would hit this country like a wrecking ball.

Colleagues, the Trump administration doesn't have a real plan for any of it. The administration is hiding COVID data from the public. Going by media reports, their big economic idea is to cut jobless workers' incomes and give others a fake tax cut they'll have to repay after the election.

Renewing supercharged unemployment benefits at \$600 per week cannot wait any longer. Leader Schumer and I have a proposal called the American Workforce Rescue Act that would tether those benefits to the economic conditions on the ground, instead of going by arbitrary extensions. The Senate should have passed it 2 weeks ago, instead of leaving town for recess.

By delaying on unemployment benefits, the Republican leader is exploiting for political leverage all those Americans who are walking an economic tightrope. It is wrong, and it ought to end this week.

So today's hearing will examine some important nominations. I appreciate why Chairman Grassley called this hearing. I look forward to Q&A. And in the days ahead, I hope that this committee turns again to address the economic cliff and the pandemic that has killed 140,000 Americans and is threatening to do extraordinary, long-lasting damage to our economy.

