

TAX NEWS & VIEWS



Proposed House COVID-19 legislation

Jonathan Traub discusses the key tax features found in the House coronavirus relief package, including a proposed change to the net operating loss carryback provision in the CARES Act. He also discusses the Senate's perspective on the bill, some of the important areas of controversy, and what might happen next on the COVID-19 legislative front.

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Ian Solomon: Jon, welcome back on the podcast. Always great to catch up with you and hear the latest.

Jonathan Traub: Great to be with you, Ian.

Solomon: So, House Democrats will soon be voting on their phase four bill. What are some of the key tax features in that? And what are some of the things that that taxpayers should be thinking about?

Traub: So we're recording this on Thursday afternoon, and presumably the House will vote on this on Friday. So to some extent, we are previewing what's going to happen in the next few days. The bill does contain a surprisingly robust tax section, much more robust than many of us would have expected. Much of it on the individual side, including, most notably, another round of rebate checks, albeit with somewhat looser eligibility rules than the first round that were enacted in the CARES Act at the end of March. Also for individuals is a temporary repeal of the deduction limits on state and local taxes. That's been very important to people who live in so-called blue states. There's an expansion of EITC and child tax credits.

On the business side, the most notable change would be a revision of the CARES Act provisions allowing companies to carry back net operating losses. It would make a couple of major changes in that, which are generally taxpayer-unfriendly. There are, however, some taxpayer-friendly provisions for businesses,

like an expansion of the employee retention tax credits and clarification that companies to take that that except for given PPP loans, would still be able to also defer payroll taxes for the rest of this year. So it's sort of a mixed bag for companies. Most notably, on the negative side, the NOL carryback changes some business are paying a lot of attention to.

Solomon: So assuming it passes the House, what would be the outlook for this bill in the Senate? Is it likely to be amended substantially?

Traub: For sure. At this point, it's being given what I would say is a very frosty reception by the US Senate. I think there's a lot of concerns about the tax provisions, notably the unfavorable rule for companies under the carrybacks of NOLs, I think the overall price tag. We haven't seen an official revenue estimate from government scorekeepers, but the back-of-the-envelope numbers suggest the total cost of this will be exceed \$3 trillion, which will be more than was spent on the first three stimulus bills, or the first three coronavirus bills, combined. That's giving some pause to many members.

In addition, we've seen Senate Republicans say that the bright line for them is they have to have a protection against liability for employers who follow reasonable safety precautions if some of their workers or customers suddenly get coronavirus, and that is not present in the bill introduced by the Speaker on Tuesday. It is for sure going to be a flashpoint for discussions going forward.

Solomon: So in addition to the liability issue that you mentioned, what are some of the other major areas of controversy that that could potentially hold up action on a phase four bill?

Traub: Well, I mentioned, Ian, the overall price tag is one that we're seeing some heartburn about as people get concerned about the overall impact on the US deficit of this massive spending binge we've been on. We've also seen Republicans somewhat concerned about the extent of assistance being provided to state and local governments. This is not a uniform view among all Republicans, but some seem to be concerned that a big bailout for state and local governments has two negative effects. One is, it is bailing out states for bad decisions they made prior to coronavirus—that is, they made irresponsible deals about future pension obligations, etc., and were already digging themselves deep holes. And this is sort of rewarding them for their fiscal irresponsibility in the past.

And secondly, there may be some concern that . . . if we, as a government at the federal level, give lots of money to state and local governments to relieve the pressure on them, to open back up their businesses, to get the economy going back again. So that's going to be a flashpoint. And we also will eventually see the president weigh in with his priorities, which may include things like a payroll tax cut, a restoration of tax deductions for business meals and expenses, and maybe capital gains tax cut changes. All of those will factor into a very complex negotiation as the three relevant parties—the House, the Senate, and the White House—try to reach a conclusion on a phase four bill.

Solomon: So you mentioned the proposed change to the net operating losses. And it seems like, you know, that sort of change, and maybe some of the other things that have

been proposed are . . . let's say reversing the pro-liquidity actions that Congress took in the CARES Act. How should businesses sort of make sense of those conflicting messages?

Traub: It's a great question, Ian, and one that I've talked to a lot of companies about in the last 48 hours, right? They were told in the CARES Act to carry back your losses up to five years. There was a relaxation of rules for individual business owners who have business losses—461L rules. And this would undo those changes. And so how do you make sense of that? And I think what would be the clearest expression of the intent of lawmakers writ large is what was enacted on the CARES Act with respect to NOLs.

So I think we've seen that Senate lawmakers have given a pretty chilly reception to what the House is putting forward. So the odds of the House, Senate, and White House agreeing to roll back those pro-liquidity measures from the CARES Act, to me, are pretty small. Now, I'm not going to say that there is zero risk, but current law—and my best expectation about what the law will continue to be—is the provisions in the CARES Act, which should guide business planning around the use of net operating losses.

Solomon: There are also other provisions that seem much more taxpayer-friendly on both the individual and business side. Does that provide the basis for a possible deal with the Senate and the White House?

Traub: Well, it's not always as easy as whether something is taxpayer-friendly or not; for example, the House bill proposes to undo the cap for two years on state and local taxes. That's something Republicans are not particularly amenable to. They view it as a big tax giveaway to the wealthiest people living in the bluest of states. Similarly, the House substantially expands the earned income tax credit and the child tax credit, which is

really what Republicans would say is really a disguised spending program wrapped up in the tax code. So even though those provisions are taxpayer-friendly, they aren't necessarily ones that will attract a ton of attention or support from Senate Republicans.

Having said that, there are all provisions in the law, such as a proposal from the House which is expanding the employee retention tax credit and cleaning up the tax deductibility of PPP loans, that are things that the Senate Republicans, I think, on the whole, will be interested in doing. The question, of course, is whether there is enough of those things to counteract the negative things they see with respect to the lack of liability protection, state and local funding, a large price tag, etc., that may make them less enthusiastic about this package.

Ultimately, I think something gets signed into law sometime . . . probably in June or maybe July, because I think that all sides recognize the need to take more actions to help keep the economy going through this unprecedented pandemic in which we're living, but it's not going to be easy. And it is so difficult to look at the outline of what the House is putting forward and see that as the basis of a robust compromise with the Senate.

Solomon: Last question for you, Jon. So if we're looking at June, maybe July, before legislation is passed, what should taxpayers be looking at in terms of news or updates coming out of Congress over the next few weeks?

Traub: Well, I think it'd be to watch the reaction in the Senate once the House passes its bill. Do their discussions internally ramp up about what sort of they want in a phase four bill? Do they release a draft at some point in the next few weeks for discussion and votes? And what's the reaction from the House as to the direction taken by the Senate? And also, I'll be watching, of course, what does the president do? He has

an important role in this. And does he bless what the Senate does, or does he try and put further of his own imprints on it, to shape it, to be more like what he's looking for?

And so I wouldn't say it's a special sauce to understanding the dynamic here. You have three strong players, each with their own agendas and its own dynamics and drivers.

And they will all be looking to use the course of this process to shape a bill most amenable to their specific needs and circumstances. And so I think, as you watch, I wouldn't expect a ton of surprises in terms of the process. I think it's pretty predictable. But clearly, there's obviously a lot of grappling going on to gain the upper hand in the substance of what eventually emerges from the Congress.

Solomon: Jon, as always, great information, great insights. Thanks again for coming on the podcast.

Traub: My pleasure, Ian. Be safe, and say well.

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