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Deloitte Tax looks at section 250 FDII proposed regulations

The Treasury Department and Internal Revenue Service on March 4 released proposed regulations under section 250, pertaining to deductions for Foreign-Derived Intangible Income (FDII) and Global Intangible Low-Taxed Income (GILTI) that were enacted in the 2017 tax cut legislation (P.L. 115-97).


The proposed regulations, which are approximately 170 pages long, provide guidance for determining the amount of the section 250 deduction allowed to a domestic corporation for its FDII and GILTI through:

- Rules for determining the amount of the deduction, including rules for applying the taxable income limitation of section 250(a)(2) (proposed section 1.250(a)-1);
- General rules for computing a domestic corporation’s FDII (proposed section 1.250(b)-1);
• Rules for determining a domestic corporation’s qualified business asset investment (QBAI), which is a component of the computation of FDII (proposed section 1.250(b)-2);
• General rules for determining gross income included in gross foreign-derived deduction eligible income (gross FDDEI), which is a component of the computation of FDII (proposed section 1.250(b)-3);
• Rules for determining gross FDDEI from sales of property (proposed section 1.250(b)-4);
• Rules for determining gross FDDEI from the provision of a service (proposed section 1.250(b)-5; and
• Rules relating to the sale of property or the provision of a service to a related party (proposed section 1.250(b)-6).

Details of specific provisions in the proposed regulations are available in this summary from Deloitte Tax LLP.

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190308_1_suppA.pdf

— Michael DeHoff
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Mnuchin to discuss White House FY 2020 budget blueprint with House, Senate taxwriters at March 14 hearings

The House Ways and Means and Senate Finance committees announced this week that Treasury Secretary Steven Mnuchin will appear at separate hearings on March 14 to discuss the Trump administration’s proposed budget blueprint for fiscal 2020.

According to press reports, the White House is expected to release high-level details of the president’s budget request – such as his budget message, summary details, and a statement of top priorities – on March 11. Additional details – including budgets for federal departments and agencies and the analytical perspectives report – are expected the week of March 18.

The budget release comes more than one month after the statutory deadline (February 4 for fiscal 2020) for the administration to submit its blueprint to Congress. The White House attributed the delay to the 35-day partial government shutdown that began at midnight last December 21.

President Trump has indicated in recent weeks that his budget will include proposals for spending cuts, but he has remained tight-lipped about potential tax proposals. (In his State of the Union message last month, the president extolled in general terms the economic impact of some of the provisions in the 2017 tax cut law – notably, the reduction in income tax rates for businesses and individuals, expansion of the child tax credit, and new limits on the estate tax. But he surprised many observers by not raising the curtain on any new tax initiatives.)

The Ways and Means hearing will be Mnuchin’s first appearance before the panel since Democrats took control of the House in the 2018 midterm elections. In January, Mnuchin was the sole invited witness at a planned hearing to discuss the impact of the partial government shutdown on the 2018 income tax filing season. (The filing season was just about to commence when the January hearing was announced.) But Ways and Means Committee Chairman Richard Neal, D-Mass., canceled that hearing after Mnuchin declined to appear.

In addition to addressing the president’s budget package, Mnuchin is likely to field questions from Democrats at both hearings on the 2017 tax cut legislation informally known as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97) – particularly, a provision that capped the deduction for state and local taxes (SALT) at $10,000. Democrats have also been interested in Mnuchin’s role in the subsequent release of Notice 2018-54, in which Treasury and the IRS announced their intention to issue proposed regulations that would clamp down on efforts by certain states to allow their residents to minimize the impact of the SALT deduction limitation by characterizing payments of certain state and local taxes as deductible payments to state-sponsored charitable agencies. (The proposed regulations were released last August.)

Ways and Means letter to Budget panel outlines legislative priorities

In other budget-related developments, the Ways and Means Committee offered few specifics on tax policy in a March 6 letter to the chamber’s budget writers outlining its legislative agenda for the coming fiscal year.

The so-called “views and estimates” letter identifies legislative priorities that fall under all of the Ways and Means Committee’s areas of jurisdiction and will be sent to the House Budget Committee as that panel gets ready to develop its fiscal year 2020 budget resolution in April. (The letter is required under the Congressional Budget Act. Other House committees will send their own views and estimates letters to the Budget panel outlining their respective legislative priorities.)


On taxes, the Ways and Means letter states that the committee “will examine policies that deliver economic growth that supports and grows America’s middle class,” including infrastructure investment, retirement savings, workforce development, access to higher education, and small business growth. Other priorities include reviewing the administration of tax laws by the Internal Revenue Service and “closely scrutiniz[ing]” the revenue recommendations in the Trump administration’s upcoming fiscal year 2020 budget blueprint.

The Ways and Means Committee has not yet marked up proposals in any of these areas, although it has held hearings on issues such as infrastructure and retirement security, and the Select Revenue Measures Subcommittee has scheduled a hearing on temporary tax laws for March 12. (For details on the retirement security hearing, see Tax News & Views, Vol. 20, No. 6, Feb. 8, 2019; for more on infrastructure and extenders, see separate coverage in this issue.)


Ways and Means Chairman Richard Neal also has said the panel will hold a series of hearings on issues related to the TCJA as it contemplates making technical corrections and other changes to that legislation, which moved through Congress on the strength of Republican votes alone. (One recent hearing by the Select Revenue Measures Subcommittee considered the TCJA’s impact on middle-class families. For prior coverage, see Tax News & Views, Vol. 20, No. 7, Feb. 15, 2019.)


The Ways and Means letter also offers broad comments on the other legislative issues within the committee’s purview, including health care, Social Security, trade, and worker and family support.

Limited tax talk at Budget Committee members’ day hearing: In related news, discussion of tax policy likewise was confined largely to generalities at a March 6 House Budget Committee “members’ day” hearing, which was held to give lawmakers who are not on the Budget panel a chance to offer their views on tax and spending issues ahead of the fiscal year 2020 budget resolution mark-up next month.

Democratic Rep. Steve Cohen of Tennessee argued that some of the provisions of the 2017 tax cut law should be rolled back to help pay for what he called “compelling” domestic spending needs such as health care, education, infrastructure, foreign aid, and diplomacy.

Cohen stated that these proposed spending hikes should be matched dollar-for-dollar by cuts in defense spending. But in response to questions from Budget Committee member Chip Roy, R-Texas, Cohen also said that Congress should look at raising revenue “in a major way” and commented that many of the 2017 tax cuts were “wasteful” and “didn’t spur the economy” as promised. He called on Congress to impose a new top rate on individuals with income over $10 million, and although he did not propose a specific target he noted that the 70 percent rate recently floated by Democratic Rep. Alexandria Ocasio-Cortez of New York was too high. Cohen also called for increasing the top estate tax rate to 55 percent and lowering the exemption amount to $3.5 million for unmarried individuals and $7 million for couples. (Budget Committee Chairman John Yarmuth, D-Ky., has indicated in recent weeks that the upcoming budget resolution may seek to modify the TCJA through proposals for new rate brackets targeting individuals on the upper end of the income scale and an increase of several percentage points in the corporate tax rate. For prior coverage, see Tax News & Views, Vol. 20, No. 5, Feb. 1, 2019.)

For his part, House Majority Leader Steny Hoyer, D-Md., offered no specific tax policy proposals in his remarks to the panel, but he questioned whether the 2017 tax cuts would pay for themselves as Republicans had promised.

Texas Republican Rep. Michael Cloud of Texas argued that revenue estimates prepared by the Congressional Budget Office and Joint Committee on Taxation staff provide an incomplete picture of the cost of tax and spending legislation because they do not factor in the cost of interest payments on the federal debt for measures that are not offset. He urged Congress to pass legislation (H.R. 638) he has offered that would require these agencies to include debt service costs in their estimates where practicable.

**Budget resolution offers guideposts; taxwriters develop legislation:** Any budget resolution that eventually clears the Budget Committee and is adopted by the House will serve primarily as a messaging document that outlines the Democratic majority’s tax and spending priorities. Actual tax legislative proposals will be developed in the Ways and Means Committee.

It’s also worth bearing in mind that any broad-scale tax increases on corporations or individuals that the Democratic majority may move through the House are unlikely to be embraced in the Republican-controlled Senate and make their way to the president’s desk. Senate Budget Committee Chairman Mike Enzi, R-Wyo., has not yet indicated when – or if – his panel intends to take up an FY 2020 budget resolution of its own reflecting the GOP majority’s policy priorities.

— Michael DeHoff
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**House taxwriters at odds over infrastructure funding, priorities**

Just about everyone in Congress – as well as the president – agrees that the federal government needs to undertake a long-term infrastructure improvement plan. But that’s largely where the agreement appeared to end as lawmakers debated questions of how to pay for an infrastructure program and what kinds of infrastructure should be prioritized at a March 6 House Ways and Means Committee hearing.

For several years now, there has been talk of a $1 trillion federal infrastructure package. President Trump campaigned on it. House Democrats included it as a plank in their successful pitch to retake the chamber last year; and Senate Democrats followed suit. Funding proposals have run the gamut from raising the federal gas tax to public-private partnerships to rolling back some of the 2017 tax cuts. But even though many legislators declare that “everything is on the table,” some Democrats and Republicans have appeared reluctant to move from their entrenched positions.

**The $1 trillion dollar question**

At this week’s Ways and Means hearing, Chairman Richard Neal, D-Mass., stayed noncommittal on the issue of raising revenue for infrastructure spending and in comments to reporters afterwards he said only that the committee would “talk about the acknowledged need for revenue.”

But many of the committee’s Republicans, led by ranking member Kevin Brady of Texas, opposed raising new revenue for infrastructure investment, focusing instead on the need to improve the permitting process for construction projects, stop mass transit from receiving 20 percent of the Highway Trust Fund, shift more responsibility for and ownership of infrastructure projects to the state and local level, and look to private investment and private activity bonds as potential funding sources.

**Transportation Committee leaders debate gas tax v. VMT:** Discussion about raising the gas tax – which has stood at 18.4 cents per gallon since 1993 – and/or moving to a vehicle miles traveled (VMT) program was front and center, though. Kicking off the hearing were the top Democrat and Republican on the House Transportation Committee, which has jurisdiction over developing the House infrastructure plan (but will likely require a funding plan from the taxwriters at Ways and Means).
Transportation Committee Chairman Pete DeFazio, D-Ore., advocated for raising and indexing the gas tax, while ranking Republican Sam Graves of Missouri rejected a gas tax hike and labeled a VMT “the most promising long-term solution.”

“The ‘user pays’ principle has been a hallmark of federal surface transportation investment for over 60 years,” said DeFazio in his hearing statement. “However, by letting existing user fees – the gasoline and diesel tax – sit unadjusted for over 25 years, Congress has undermined this longstanding notion and shaken the stability of highway and transit funding in recent years. Since 1993, federal gas and diesel taxes have lost over 40 percent of their purchasing power.”

DeFazio did not dismiss a VMT (also called a mileage-based user fee, or MBUF) as a potential longer-term revenue source – and, in fact, noted that it has the advantage of applying a user fee to electric vehicles – but said there were still challenges to work through and that such a program would need to be tested at the national level. He also noted that financing solutions for infrastructure “have merit” but that government revenue is still needed to repay bonds and other loans.

Graves commented in his prepared testimony that “while gas and diesel taxes have historically served as sufficient mechanisms for sustaining the [Highway] Trust Fund, they will not meet our future needs. The situation will only get worse as the car, bus, and truck fleet become more fuel efficient and electric vehicles become more popular.” In contrast, “a VMT has the potential to be a true user-funded program that captures everyone and gets the Highway Trust Fund back to where it needs to be to maintain our network and improve it,” he said.

Private sector weighs in: Of the five witnesses on a separate panel representing the private sector, all but one – Marc Scribner of the Competitive Enterprise Institute, who was invited by the committee’s GOP members – registered their support for raising the gas tax. Scribner backed a VMT; AFL-CIO President Richard Trumka and Gregory DiLoreto, representing the American Society of Civil Engineers (ASCE), endorsed a VMT or a gas tax increase; and US Chamber of Commerce President Tom Donohue and American Trucking Associations President Chris Spear said they would be willing to consider a VMT in the longer term but insisted that a gas tax increase is necessary more immediately.

The Chamber of Commerce has proposed (and ASCE has endorsed) increasing the gas tax by 5 cents each year for five years, while the Truckers have proposed a 5-cents-per-year increase for four years, along with a new fee for electric and hybrid vehicles.

President Trump reportedly has told lawmakers in private that he wants to increase the gas tax by 25 cents, but he has not made such comments publicly.

Brady nixes corporate rate hike for infrastructure: Ways and Means ranking member Kevin Brady, who served as chairman of the committee when the 2017 tax overhaul was passed, emphasized at this week’s hearing that he would not support any increase in the corporate tax rate to provide infrastructure funding.

“I must caution that it would be a mistake to fund infrastructure by raising taxes on local businesses and corporations, making them uncompetitive in the global market,” he said.

And while Senate Democrats proposed such an idea last year (raising the corporate rate to 25 percent was one element of their March 2018 infrastructure plan), at least one House Democratic taxwriter is not on board. Ways and Means member Earl Blumenauer, D-Ore., told reporters at a press conference March 5 that he opposes rolling back elements of the Republicans’ tax bill for this purpose.

“There are paths forward that do not involve a food fight,” Blumenauer said.

No real danger of breaking the speed limit

The most recent legislation to shore up the Highway Trust Fund was the FAST Act (P.L. 114-94), enacted in 2015. It will expire September 30, 2020, and so will need to be addressed in some way by the current Congress.

Blumenauer told reporters March 5 that House leaders “have tentative time reserved on the floor for infrastructure for late spring,” adding that “the timeframe [for action on infrastructure] is the next 100 days.”
However, this week’s hearing seemed to demonstrate that taxwriters still have a wide gap to close when it comes to funding what most of them have agreed is a vital legislative effort.

— Storme Sixeas
Tax Policy Group
Deloitte Tax LLP

**Ways and Means Select Revenue Measures panel to hold hearing on temporary tax policies**

The House Ways and Means Select Revenue Measures Subcommittee announced this week that it will hold a hearing on March 12 to consider “temporary policy in the Internal Revenue Code.”

A witness list for the hearing was not available at press time.

This issue has taken on a particular sense of urgency for taxpayers preparing their 2018 returns, since Congress has not yet addressed the fate of some two dozen temporary tax “extenders” provisions that expired at the end of 2017 and a handful of others that lapsed at the end of last year. And without further congressional action, several other significant provisions – including the New Markets Tax Credit, the Work Opportunity Tax Credit, the lookthrough treatment of payments between related controlled foreign corporations for purposes of subpart F, and the beginning-of-construction date for wind facilities eligible to claim the electricity production tax credit (or the investment tax credit in lieu of the production credit) – will lapse at the end of this year.

Moreover, in addition to the traditional tax extenders, key individual elements of the 2017 tax cut law known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97) are set to expire at the end of 2025, meaning a future Congress will need to consider whether to temporarily renew, make permanent, or allow to lapse changes to marginal rates, the standard deduction, the 199A deduction for certain business income, the estate tax, and a number of other provisions that were enacted in that legislation.

In the Senate, Finance Committee Chairman Charles Grassley, R-Iowa, and ranking Democrat Ron Wyden of Oregon released a proposal on February 28 that would retroactively renew the 2017 and 2018 extenders through the end of this year and provide targeted tax relief to businesses and individuals who suffered losses in certain federally declared disasters. (For prior coverage, see *Tax News & Views*, Vol. 20, No. 8, Mar. 1, 2019.)


Ways and Means Committee Chairman Richard Neal, D-Mass., who took the gavel in January, has held off on addressing the traditional tax extenders in part to give the 14 members who joined the committee this year – one third of the panel’s total headcount – an opportunity to become conversant on the relevant policy issues.

**2019 filing season issues**

In other Ways and Means subcommittee action, the Oversight panel on March 7 discussed the ongoing 2019 tax filing season with National Taxpayer Advocate Nina Olson.

This was possibly her final testimony to Congress. After 18 years in the role, Olson announced on March 1 that she would be retiring as taxpayer advocate at the end of July. The decision on who will replace her technically falls to Treasury Secretary Steven Mnuchin – though Olson has indicated she hopes to play a role in choosing her replacement.


“"It’s important that my successor have the same passion and independent perspective that I brought to the job,” Olson noted in her opening statement.

**Effects of TCJA, government shutdown:** Much of Olson’s testimony focused on the impacts to the filing season from the sweeping changes made by the Tax Cuts and Jobs Act that are being reported by individual taxpayers as they...
file their 2018 tax returns, as well as the 35-day partial government shutdown during December and January that resulted in the furloughing of thousands of Internal Revenue Service employees.


"Delivering a successful filing season is the IRS's most significant responsibility, and this year, the task has been made more difficult by [these] two developments," Olson noted.

Olson also made reference to her office's most recent Annual Report to Congress, which was released on February 12 and includes, among other things, myriad recommendations to the IRS for modernizing information technology, combatting tax-related identity theft, and improving taxpayer service, along with a request for Congress to provide additional funding to the agency in order to achieve those ends.


Waiving underpayment penalties: Freshman Democrat Brendan Boyle of Pennsylvania asked Olson about whether the Taxpayer Advocate Service had any recommendations to the IRS for dealing with taxpayers who in this first year of filing under the TCJA find themselves significantly underwithheld and owing penalties as a result. Boyle focused in particular on filers who may owe additional income tax this year on account of the new $10,000 limit on the deduction for state and local income and property taxes.

Olson agreed with the thrust of Boyle’s concerns and suggested that the IRS would be within its authority to completely waive underpayment penalties for the 2019 tax filing season. (The agency has previously announced that penalties will be waived this year if the taxpayer has withholding or estimated payments that total at least 85 percent of their prior year tax liability, down from the usual 90 percent threshold.)

"There’s really no prohibition against it for the administration to say, yes, let’s do that. …[L]et’s get it right this first year, give [taxpayers] a break,” Olsen said.

Olson noted that the Tax Reform Act of 1986 provided a statutory exemption from underpayment penalties for the first year of filing, along with a requirement that taxpayers submit new Form W-4s to fine-tune their withholding under the new system.

Under the TCJA, Olson noted, filing an updated Form W-4 is optional.

Private debt collection: Subcommittee Chairman John Lewis, D-Ga., asked Olson about the IRS’s recently revived authority to contract with private companies to assist in the collection of tax debts, and in particular reports that some taxpayers were receiving over 100 calls from debt collection agencies on behalf of the IRS.

"One of my first objections...is that the IRS declined to create a complaint board where taxpayers who were getting 165 calls or whatever could let the IRS know that was happening to them,” Olson said.

That is unlike the program’s first iteration, Olson noted, in which taxpayers could avail themselves of a formal process for registering complaints.

"I project [the private debt collector program] will be on the list of the most serious problems going forward, regardless of who is the taxpayer advocate,” Olson said.

Support for working families

Also this week, a March 7 hearing by the Ways and Means Worker and Family Support Subcommittee on how to level the economic playing field for working families focused largely on the need to improve access to affordable child care and for employers to provide paid family leave for employees dealing with family care-giving responsibilities.

Subcommittee member Stephanie Murphy, D-Fla., commented that the two main provisions in the tax code that address child care costs – the child tax credit and dependent care flexible spending accounts (FSAs) – offer only limited benefits to the working poor and middle-class families. She touted legislation she intends to introduce with Ways and Means Committee Republican Jason Smith of Missouri that would increase the child tax credit rate, make the
credit fully refundable, and increase the pre-tax contribution caps for dependent care FSAs. (Sens. Richard Burr, R-N.C., and Angus King, I-Maine, intend to introduce companion legislation in that chamber.)

Jane Waldfogel of the Columbia University School of Social Work, who appeared as a witness at the hearing, told Murphy that the poorest families often qualify for income subsidies that they can use to help with child care expenses and wealthy families can afford to pay for high-quality child care outright but low- and middle-income families often find themselves struggling. She commented that the some of these families are unable to take full advantage of the child tax credit as it is currently structured because it is not refundable.

Enhancing the child tax credit and dependent care FSAs would be “a fabulous thing to do,” she said.

— Alex Brosseau and Michael DeHoff
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House-passed ethics, campaign reform legislation includes tax-related provisions

A sweeping Democratic election, campaign finance, and ethics reform bill that cleared the House of Representatives March 8 includes provisions that would require a president and vice president, as well as candidates for those offices in a general election, to release 10 years’ worth of their personal tax returns.

The For the People Act of 2019 (H.R. 1), which cleared the House on a strictly party-line vote of 234-193, also includes provisions addressing tax-exempt political organizations.

Tax return disclosure

The legislation would require “a candidate of a major party in a general election for the office of president or vice president” (a “covered candidate”) to submit to the Federal Elections Commission (FEC) a copy of his or her income tax returns “for the 10 most recent taxable years for which a return has been filed with the IRS.” This requirement would apply within 15 days after an individual has become a covered candidate. The measure also would require sitting presidents and vice presidents, not later than the return due date for each taxable year, to submit to the FEC copies of their income tax returns for the taxable year and the nine previous taxable years.

A transition rule would require the president and vice president who are in office when H.R. 1 is enacted into law to submit to the FEC a copy of their income tax returns for the 10 most recent taxable years for which a return has been filed with the IRS.

If a covered candidate or officeholder does not comply with the disclosure requirements, the legislation would authorize the FEC to submit a written request for the returns to the Treasury Secretary.

The FEC would make tax returns submitted by candidates and officeholders available to the public after working with the Treasury Department to make any necessary redactions to protect against identity theft.

Political spending disclosure

The bill would require covered organizations – nonprofit organizations, section 527 organizations, corporations, and others – to report their campaign-related spending if they spend more than $10,000 in an election cycle. These organizations also would be required to disclose their donors who give $10,000 during an election cycle. Campaign-related spending is defined to include independent expenditures, electioneering communications, and advertisements that promote, attack, support, or oppose the election of candidates.

IRS guidance on political activity by tax-exempts

The legislation also would repeal a rider in the recently enacted omnibus appropriations legislation for fiscal year 2019 that prohibits the IRS from using funds to issue regulations related to political activity by nonprofit organizations.
CBO weighs in

According to an estimate from the Congressional Budget Office released March 1, H.R. 1 would cost $367 million in 2019 and $2.44 billion between 2019 and 2024, due mainly to provisions that would make appropriations for grants to states to enhance the security and integrity of elections.

URL: https://www.cbo.gov/system/files/2019-03/hr1.pdf

The CBO indicated that the bill is not subject to the House’s recently reinstated pay-as-you-go rules, as the spending for election security is not mandatory but instead must be appropriated in a future spending bill.

Going nowhere, but sending a message

The measure is not expected to become law this year. Senate Majority Leader Mitch McConnell, has called the Democratic reform package a “sprawling proposal to grow the federal government’s power over Americans’ political speech and elections,” and has said he will not bring it up for consideration on the Senate floor.

For their part, Democratic leaders intend to use the legislation – and the GOP’s resistance to it – as a messaging tool ahead of the 2020 congressional and presidential elections.

— Michael DeHoff
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Democratic lawmakers introduce financial transaction tax legislation

Rep. Peter DeFazio, D-Ore., and Sen. Brian Schatz, D-Hawaii, introduced companion bills March 6 that would impose a 0.1 percent tax on the sale of stocks, bonds, and derivatives.

URL: https://www.schatz.senate.gov/imo/media/doc/WSTA%20Final.pdf

According to a joint release from DeFazio and Schatz, the tax would apply to the fair market value of equities and bonds, and the payment flows under derivatives contracts. Initial public offerings and short-term debt (with a maturity of less than 100 days) would be exempted.

DeFazio and Schatz state that their proposal – dubbed the Wall Street Tax Act – would increase federal receipts by $777 billion over 10 years. An official revenue estimate from the Joint Committee on Taxation staff has not been released.


Senate co-sponsors include Democrats Chris Van Hollen of Maryland, Jeff Merkley of Oregon, and Kirsten Gillibrand of New York. (Gillibrand is also one of several senators seeking the Democratic nomination for the presidency in 2020, and Merkley is thought to be contemplating joining the fray.)

No Republicans in either chamber have signed on to the legislation.

No obvious path forward this year

The legislation faces an uncertain path forward in Congress and likely will serve primarily as a messaging vehicle for Democrats ahead of the 2020 presidential and congressional elections. DeFazio and Schatz said their proposal “would generate billions in revenue, while addressing economic inequality and reducing high risk and volatility in the market.”
None of the sponsors or co-sponsors are members of a congressional taxwriting committee. Ways and Means Committee Chairman Richard Neal, D-Mass., has not indicated whether he intends to take up the proposal this year and Senate Finance Committee Chairman Charles Grassley, R-Iowa, is unlikely to bring it before his panel.

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