Four tax treaty protocols clear Senate

The Senate this week overwhelmingly approved resolutions of ratification that would amend four US income tax treaties. In a series of votes held July 16 and 17, the Senate cleared protocols to tax treaties in force with Spain (by a margin of 94-2), Switzerland and Japan (both by a margin of 95-2), and Luxembourg (93-3).

Most US businesses have been eager for the updates – some of which were negotiated and signed as far back as 2009 – because the treaties provide certainty and help protect against double taxation.

"Major parts of proud American businesses and hundreds of thousands of hard-working Americans’ jobs are oriented around trade with these four nations,” Senate Majority Leader Mitch McConnell, R-Ky., said on the Senate floor July 17. “The result is more clarity, more certainty, and a lot less double taxation that has cost American businesses millions and millions of dollars.”
**Busting the backlog**

Until 2011, the Senate typically ratified treaties and protocols by unanimous consent after the Foreign Relations Committee reported them out; but in recent years Sen. Rand Paul, R-Ky., has blocked that expedited process because he believes the information-sharing sections of the agreements violate privacy rights of US citizens. Paul’s opposition delayed action on ratification as Senate leaders chose not to spend the floor time necessary for the standard debate process – until this week.

**Other agreements still on hold**

There are still three pending bilateral tax treaties and a multilateral protocol that the Foreign Relations Committee has not yet taken up. In the case of the treaties with Chile, Poland, and Hungary, the Treasury Department is seeking through "reservation" language to clarify how provisions in those agreements interact with the base erosion and anti-abuse tax (BEAT) enacted in the 2017 tax legislation known informally as the Tax Cuts and Jobs Act (P.L. 115-97). Senate Finance Committee ranking Democrat Ron Wyden of Oregon noted that this week’s votes were “welcome and long overdue” but criticized the Trump administration for the reservations it is pushing on the outstanding treaties.

"The Senate had an opening to get all seven treaties approved, but the administration made the process unnecessarily difficult by pushing last-minute changes,” he said.

Several senators, including Foreign Relations Committee Chairman James Risch, R-Idaho, said after this week’s votes that they are hopeful the remaining treaties will be ratified this year, but it is not clear whether Senate leaders will prioritize further action on them in the coming months.

— Storme Sixeas
Tax Policy Group
Deloitte Tax LLP

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**House votes to repeal ‘Cadillac’ tax on high-cost health plans**

The House of Representatives on July 17 voted by a wide margin to approve legislation that would repeal the so-called "Cadillac" tax on high-cost employer-provided health plans enacted as part of the Patient Protection and Affordable Care Act of 2010 (P.L. 111-148). But when – or whether – the Senate will act on the bill remains unclear.

**Outcome never in question**

Under current law, beginning in 2022, the Cadillac tax – structured as a 40 percent excise tax – is scheduled to apply to the total value (considering both employer and employee contributions) of employer-provided health plans in excess of statutory limits. In 2022, those limits are scheduled to be about $11,200 for an individual plan and $30,100 for a family plan.

At the time of its enactment, the tax was intended to serve two main purposes: raising revenue to help finance the coverage expansion envisioned by the PPACA, and slowing health care cost growth by encouraging employers to offer fewer gold-plated plans and making workers more conscious of the cost of their coverage. Lawmakers structured the tax to be imposed at the insurer level, which was seen as more palatable politically than attempting to achieve similar ends by, for example, limiting the exclusion from taxable income for the value of employer-provided coverage.

But the excise tax – which was originally scheduled to come into force in 2018 but has been twice delayed by lawmakers – has never been popular among Republicans, who almost universally opposed the PPACA. Even many Democrats, responding to the concerns of labor groups – which tend to have higher-cost health plans as part of their compensation arrangements – have come out in strong opposition. On the left, the primary concern is that the statutory limits – which are adjusted periodically based on a relatively slow measure of inflation known as the "chained" Consumer Price Index – will cause increasing numbers of employers to trim their benefit offerings or shift costs onto their workers.
"While the name ‘Cadillac’ tax implies that this excise tax applies to luxury health coverage, it will apply to almost every American with employer-sponsored health insurance,” Ways and Means Committee Chairman Richard Neal, D-Mass, said on the House floor.

As a result, the bill to repeal the tax – the Middle Class Health Benefits Tax Repeal Act of 2019 (H.R. 748), sponsored by Rep. Joe Courtney, D-Conn., sailed through the lower chamber on a 419-6 vote after garnering 369 cosponsors.

That level of cosponsorship qualified the legislation to be placed on the House’s “consensus calendar,” bypass a mark-up by the taxwriting Ways and Means Committee, and be brought up for floor consideration “under suspension of the rules,” a scenario that suspends the application of House rules – such as the House Democrats’ pay-as-you-go (PAYGO) rule, which requires the budgetary cost of certain legislation to be offset – that may otherwise apply.

URL: https://www.congress.gov/bill/116th-congress/house-bill/748/text?q=%7B%22search%22%3A%5B%22h.r.748%22%5D%7D&r=1&s=1

(Under current House rules, sponsors of bills with the formal backing of at least two-thirds of the House, or 290 members, may move to have that legislation placed on the “consensus calendar” which then fast-tracks its consideration on the floor after a 25-legislative-day layover period.)

The cost? Who cares?

According to a score of H.R. 748 released by the Congressional Budget Office (CBO) on July 17, repealing the Cadillac tax would increase deficits by almost $197 billion over the next decade – a function mainly of lower excise tax receipts from the levy itself, as well as lower income and payroll tax receipts that estimators figure the government would otherwise collect as employers shift their benefit offerings toward salary and away from health care to avoid the tax.

URL: https://www.cbo.gov/system/files/2019-07/hr748.pdf

But according to the Committee for a Responsible Federal Budget, a Washington-based budget watchdog group, the cost could exceed $1 trillion over the second decade as more and more plans trip the slowly indexed statutory cost limits.

“The Cadillac tax is one of the most important tools we have to control health care cost growth...,” the group said in a statement. “Repealing it will drive up health care costs while adding more than $1.2 trillion to the debt over the next two decades and reducing wages by trillions over that time period.”

URL: https://www.crfb.org/press-releases/house-should-reject-another-deficit-financed-tax-cut

But House lawmakers paid little heed to these warnings and approved the bill with only a handful of dissenting votes.

Senate action forthcoming?

In the immediate wake of House passage of H.R. 748, it remains unclear if or when the Senate will act to repeal the Cadillac tax – either by taking up the House bill or its own related measure (S.684) sponsored by Sen. Martin Heinrich, D-N.M.


S.684 – which bears the same bill name as the House bill – presently has 42 cosponsors, equally split between Democrats and Republicans. That number is shy of the 60 votes needed to overcome procedural hurdles in the upper chamber, but nonetheless demonstrates strong bipartisan support for the concept of repeal.

The fact that the tax is not scheduled to come into force for more than two years may also factor into senators’ thinking in terms of the timing of any action, though supporters of repealing the tax argue the threat of its eventual imposition causes employers and health plans to make changes now to scale back their health plans to stay under the applicable limits.

Gateway to an extenders deal?

For his part, Senate Finance Committee Chairman Charles Grassley, R-Iowa, suggested that the House’s action this week to repeal the Cadillac tax – without offsetting its cost – could be a positive sign for an unrelated tax effort Grassley is championing: renewing a collection of expired (and potentially, expiring, depending on the scope of the package) business and individual tax provisions collectively known as the “tax extenders.”
“They’re talking about passing without PAYGO the elimination of the Cadillac tax,” Grassley said on July 16. “So that kind of sets a pattern that maybe we don’t need to pay for other extenders.”

Disagreements over whether to offset the cost of an extenders package have in part hobbled efforts to reach a bicameral deal to renew some two dozen temporary tax deductions, credits, and incentives such as lookthrough treatment of payments between related controlled foreign corporations under the foreign personal holding companies rules, credits for electricity produced from nonwind renewable resources, the New Markets Tax Credit and the Work Opportunity Tax Credit, the seven-year recovery period for motorsports entertainment complexes, and expensing of certain qualified film and live theatrical productions. (A complete list of expired and expiring provisions from 2017-2019 is available from Deloitte Tax LLP.)


Both parties have traditionally argued that extensions of current law need not be paid for, and Grassley, along with Finance Committee ranking Democrat Ron Wyden of Oregon, unveiled an unoffset extenders package in late February that would renew provisions that expired in 2017 and 2018 through the end of this year; however, that proposal has not yet been marked up. (For prior coverage, see Tax News & Views, Vol. 20, No. 8, Mar. 1, 2019.)

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190301_1.html

But Democrats on the House Ways and Means Committee have so far insisted that extenders legislation should be fully offset. The panel last month approved a bill that would renew through 2020 the bulk of the extenders provisions that expired in 2017 and 2018 and a handful of others that are set to lapse at the end of this year and would offset the cost by accelerating by three years (to 2022) the scheduled expiration of the increased estate and gift tax exemption that was enacted in the 2017 tax cut legislation known informally as the Tax Cuts and Jobs Act (TCJA). The TCJA change to the estate tax rules, which basically doubled the prior-law estate tax exemption amount, is currently set to lapse at the end of 2025, along with other tax relief for individuals and passthrough entities enacted in that legislation. (For prior coverage, see Tax News & Views, Vol. 20, No. 21, June 21, 2019.)

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190621_1.html

Because as a constitutional matter revenue measures must originate in the House, H.R. 748 could in theory also be used as a legislative vehicle to move the tax extenders through the Senate, though Grassley did not speculate on that specific prospect.

Some lawmakers also have suggested recently that an extenders package could be incorporated into an upcoming deal to raise the statutory caps on annual appropriations for fiscal year 2020, which begins on October 1, and to increase or further suspend the federal debt ceiling. The most recent suspension of the debt limit lapsed on March 2 and since then the Treasury Department has relied on a series of so-called “extraordinary measures” that have enabled it to borrow additional funds without breaching the ceiling. But recent Treasury Department projections suggest that the government could run out of money as early as mid-September, and congressional leaders hope to have a deal on spending caps and the debt ceiling in place before lawmakers leave for the August recess. Debt ceiling legislation is also being eyed by some as a vehicle to move the Setting Every Community Up for Retirement Enhancement (SECURE) Act (H.R. 1994), a bipartisan retirement savings reform package that cleared the House in May but has become stalled in the Senate.


— Alex Brosseau
Tax Policy Group
Deloitte Tax LLP

House, Senate Dems seek to invalidate final regs limiting SALT cap workarounds

Democratic lawmakers in the House and Senate this week introduced joint resolutions of disapproval (H.J. Res. 72 and S.J. Res. 50) which, if passed in both chambers and signed by the president, would invalidate recently issued final regulations from the Treasury Department and Internal Revenue Service that clamp down on efforts by certain states to allow their residents to minimize the impact of the $10,000 cap on the federal deduction for state and local taxes
(SALT) that was enacted as part of the 2017 tax cut legislation informally known as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97).

URL: https://www démocrats.senate.gov/imo/media/doc/KAT19129.pdf

The resolutions were introduced under the Congressional Review Act, which allows Congress to review certain rules issued by federal agencies before those rules take effect and also allows Congress to disapprove new rules. Resolutions moved under the Congressional Review Act require only a simple majority vote for passage in each chamber – something that can be particularly important in the Senate, where a three-fifths supermajority typically is needed to overcome procedural hurdles.

**Federal cap, state workarounds**

Before the TCJA was enacted, taxpayers who itemized could deduct all their state and local income taxes (or sales taxes) as well as their property taxes paid against their federal tax liability; but the new law capped the SALT deduction at $10,000, effective for taxable years beginning after January 1, 2018. (The deduction tends to be used more heavily in higher-taxed “blue” states disproportionately represented by Democrats, such as New Jersey, New York, and California; but lawmakers in both parties who represent jurisdictions with expensive housing markets and steep property and income taxes have decried the $10,000 cap as unfair to their constituents.)

Since the TCJA took effect, a number of states have contemplated workarounds – which typically involve allowing taxpayers to characterize payments of certain state and local taxes as deductible payments to state-sponsored charitable agencies in exchange for a state or local tax credit – and programs have been enacted in New York, New Jersey, Connecticut, and Oregon.

But in final regulations released last month, Treasury and the IRS held that, in general, a taxpayer who makes payments or transfers property to an entity eligible to receive tax-deductible contributions must reduce its charitable deduction by the amount of any state or local tax credit the taxpayer receives or expects to receive.


House Ways and Means Committee member Bill Pascrell, D-N.J. – one of the leading critics of the SALT deduction cap in the House and an original co-sponsor of the disapproval resolution in that chamber – said in a July 16 release that “New Jersey and other states did the right thing in seeking to work around the devastating hit [from the SALT deduction cap] and Trump’s IRS blocked us in an act of pure vindictiveness. This measure will give needed tax relief to millions by telling the IRS what it can do with its spiteful regulations.”

Across the Capitol, Senate Finance Committee ranking Democrat Ron Wyden of Oregon – one of the lead sponsors of the disapproval resolution in the Senate – said in a July 15 release that the GOP-sponsored TCJA “created financial pain for middle-class families in Democratic states so [Republicans] could shovel tens of billions of dollars more in tax cuts to the most well-off companies in America. Democratic states responded to being targeted by President Donald Trump and congressional Republicans, but the Treasury Department has now overstepped its bounds and blocked efforts to shield families from tax increases when just last year it gave businesses a free pass on these limitations.” The disapproval resolution, Wyden said, “is about fairness – families should get the same deal as Trump’s donors and cronies.”

**Unlikely to become law**

It is currently unclear when the measures will be taken up in their respective chambers. The proposal is expected to clear the Democratic-controlled House but won’t secure even a simple majority vote in the GOP-controlled Senate unless several Republicans back it. It’s also worth noting that a joint resolution of disapproval would need President Trump’s signature in order to take effect, and the president is unlikely to strike down rules put in place by his own Treasury Department. So even if the resolution does manage to clear the House and Senate, it would be very unlikely to garner the two-thirds supermajority support in both chambers that would be needed to override a presidential veto. (Indeed, the Congressional Review Act has been used successfully only following a change in presidential administration when the House and Senate were controlled by the new president’s party.)
Nonetheless, the effort to quash the Treasury regs is expected to become part of the political discussion in the coming months as lawmakers continue to debate the merits of the SALT deduction cap – and, more broadly, the TCJA – in Congress and on the campaign trail.

— Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

Senate Dems slam renewed White House talk of regulatory action on capital gains indexing

A group of 15 Senate Democrats – including 7 members of the Senate Finance Committee – sent a letter to Treasury Secretary Steven Mnuchin on July 12 urging him not to pursue administrative action to index capital gains to inflation. The letter was sent in response to recent press reports suggesting that the White House is once again thinking about bypassing Congress and instead using the regulatory process to make such a policy change.

Capital gains indexation is something that some conservative economists – including National Economic Council Director Larry Kudlow – have long advocated, arguing that without it, investors who sell assets that have gained nominal value over time are being taxed in part on gains that are due solely to inflation.

Legislation to index capital gains to inflation did not make it into 2017’s Republican tax overhaul – or into the Tax Cuts 2.0 package that House Republicans advanced last fall. But the notion of making indexing a reality through regulations rather than legislation has arisen periodically during the Trump presidency. Last summer, Treasury Secretary Mnuchin was said to be studying whether the Treasury Department has legal authority to act on its own on this issue. (For prior coverage, see Tax News & Views, Vol. 19, No. 25, Aug. 3, 2018.) And the issue bubbled up again in January of this year when a group of 41 anti-tax and conservative organizations urged the president to “swiftly” use his executive authority to eliminate what they dubbed the “inflation tax.” (For prior coverage, see Tax News & Views, Vol. 20, No. 5, Feb. 1, 2019.)

The Democrats noted that the George H. W. Bush Treasury Department explored a possible administrative approach to indexing capital gain income but ultimately rejected it after consulting with the Justice Department.

“President Bush wisely abandoned this plan,” the Democrats wrote. “It is our expectation that you will show similar prudence and urge the president to abandon this proposal which, in addition to being legally suspect, will only worsen inequality while failing to ‘pay for itself,’ just as the other tax cuts have,” they told Mnuchin.

Among the signatories on the letter are Finance Committee ranking Democrat Ron Wyden of Oregon, as well as Democratic taxwriters Sherrod Brown of Ohio, Tom Carper of Delaware, Ben Cardin of Maryland, Michael Bennet of Colorado (who is also one of the contenders for the 2020 Democratic presidential nomination), Bob Casey of Pennsylvania, and Sheldon Whitehouse of Rhode Island. Democratic presidential hopefuls who signed the letter (in addition to Bennet) include Sens. Amy Klobuchar of Minnesota and Bernie Sanders of Vermont.
Mnuchin remains noncommittal

For his part, Mnuchin has remained noncommittal on the question of whether Treasury intends to (or has the authority to) pursue administrative action to change the tax treatment of capital gain income. During an interview this week in Chantilly, France (where he was attending a meeting of finance ministers and central bank governors from the Group of Seven leading industrial nations), Mnuchin said “[r]ight now there’s no commitment to getting it done or not getting it done. It’s a policy that has been under consideration and remains under consideration.”

— Michael DeHoff
Tax Policy Group
Deloitte Tax LLP

G7 leaders endorse direction of OECD consensus project on digital taxation

Despite an ongoing clash between the US and France over a new French digital services tax (DST), as well as between the US and the United Kingdom over a proposed DST in the UK, finance ministers and central bank governors from the Group of Seven (G7) leading industrial nations this week agreed to endorse the direction of an international consensus project on digital taxation being undertaken by the Organisation for Economic Cooperation and Development (OECD).

Working through the OECD, 131 countries – including the US, France, and the UK – have begun a multilateral effort to review international taxing rights, including potential ways in which to allow countries to collect more tax revenue from companies with limited, if any, physical presence in a country but a strong online presence or customer base. The group hopes to reach a consensus by the end of next year, and the G7 ministers endorsed a proposed work plan that envisions a two-pillar approach – a reallocation of global taxing rights (pillar 1) and a minimum tax (pillar 2) – and targets a global agreement on the outlines of the architecture by January 2020. (For prior coverage, see Tax News & Views, Vol. 20, No. 19, June 7, 2019.)

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190607_5.html

“Considering the need to improve the current international tax framework, without undermining its principles, Finance Ministers agreed that it is urgent to address the tax challenges raised by the digitalization of the economy and the shortcomings of the current transfer pricing system,” read the Chair’s Summary released after the July 17-18 meeting in Chantilly, France.

Agreeing to disagree – for now

There had been some concern going into the meeting about whether tensions between the US and France would stymie agreement in this area. After France’s legislature recently passed a 3 percent DST that will impact a number of large US technology companies – retroactively effective January 1, 2019 – the Trump administration opened what is known as a “301 investigation” to look at the tax as a potentially harmful trade practice and is also considering using an Internal Revenue Code provision that would allow the US to impose higher taxes on French citizens and corporations. Taxwriting leaders in Congress have backed both retaliatory actions. (For prior coverage, see Tax News & Views, Vol. 20, No. 23, July 12, 2019.)

URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/190712_5.html

Chip Harter, the US Treasury deputy assistant secretary for international tax affairs, noted July 17 at the National Association for Business Economics’ annual transfer pricing symposium in Washington that the administration must carefully balance its interests.

“We do want to show that the United States objects in a robust way against such unilateral actions,” he said, referring to the French DST. “At the same time, we do want to maintain a positive atmosphere for going forward in the OECD to reach a multilateral consensus.”

The UK also recently unveiled a refined version of a 2 percent DST it initially floated last year, with a proposed effective date of April 2020. This drew sharp criticism from the senior Democrat on the Senate Finance Committee, Ron Wyden of Oregon, who told UK officials that it would jeopardize a post-Brexit trade deal with the US. Both France
and the UK have said their DSTs would be rescinded when and if an OECD agreement comes to fruition, but some US lawmakers, including Wyden, are skeptical.

Following this week’s session with his G7 counterparts, Treasury Secretary Steven Mnuchin told reporters July 18 that although the US has "very significant concerns" with both the French and UK unilateral moves, he was "pleased" that both countries remain committed to reaching an international consensus that would replace their DSTs. Wyden told Politico that the G7 agreement was "encouraging."

Harter noted in his July 17 remarks that the stakes are high for the OECD negotiations.

"Although this timeline is very aggressive, I’m hopeful that countries and taxpayers will recognize the importance of this undertaking and will work expeditiously to reach a successful outcome,” he said. “The prospect of not succeeding at this undertaking is pretty dire in my view, given that the status quo is not the amount of tax being paid around the world today; the status quo is a downward spiral in terms of the erosion of the coherence of the international tax system that’s been a pillar of global prosperity the last 50 years.”

Mnuchin: No discrimination against US firms

Mnuchin said that he spoke out at this week’s meeting to insist that any new international tax standards shouldn’t discriminate against US firms and that the G7 ministers concurred.

"There’s an agreement that whatever we put in place shouldn’t discriminate against US tech companies,” he said.

House Ways and Means Committee Chairman Richard Neal, D-Mass., who joined other congressional tax leaders on a statement in April decrying the DSTs as discriminatory to the US, told Politico July 18, “I think we’ve gotten their attention.”


— Storme Sixeas
Tax Policy Group
Deloitte Tax LLP

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