Appropriators close in on spending pact, but year-end tax deal remains elusive

Democratic and Republican leaders of the two congressional appropriations committees announced December 12 that they have reached a "deal in principle" on a $1.3 trillion spending package that would keep the government's doors open through the remainder of fiscal year 2020.

Senate Appropriations Committee Chairman Richard Shelby, R-Ala., told reporters that staff members are finalizing "a few details" of the agreement and House Appropriations Committee Chairman Nita Lowey, D-N.Y., indicated that her chamber could vote on the package – or parts of it – as early as December 17. (There is some talk that the 12 appropriations bills that form the agreement may be combined into two or more "mini-buses" rather than one omnibus ahead of the House vote.) Shelby did not indicate a timeline for votes in the Senate.

A full-year FY 2020 spending agreement would avert the prospect of a government shutdown when the continuing resolution currently funding government operations expires on December 20. It also would present that last, best hope to carry a tax bill to the president's desk this year. But with taxwriting leaders reportedly still at loggerheads over the contours of a tax package and Congress set to adjourn for the year on December 20, it is unclear just what kind of deal – if any – negotiators will be able cobble together.
Thune: Tax talks at an ‘impasse’

Leaders of the House and Senate taxwriting committees have been exchanging offers in recent weeks around what had the potential to be a fairly expansive tax package. But according to Senate Majority Whip and Finance Committee member John Thune of South Dakota those talks have yielded little fruit.

“At the moment, nothing’s happening,” Thune told reporters December 12.

The logjam revolves around Democratic demands that any extensions of expired or expiring tax provisions (commonly called the “tax extenders”) be accompanied by expansions of refundable credits benefiting low- and middle-income workers and families – namely, the Earned Income Tax Credit and Child Tax Credit.

“We’re going to do everything we can in these negotiations . . . to get some equity in the scales between folks at the top and folks of modest means,” said Sen. Ron Wyden of Oregon, the top Democrat on the Senate Finance Committee.

Similar refundable credit expansions were approved alongside tax extender legislation reported by Ways and Means Committee Democrats earlier this year. (For prior coverage, see Tax News & Views, Vol. 19, No. 21, June 21, 2019.)

But Republicans continue to view those demands as a bridge too far.

“There’s been several offers made back and forth, and [Democrats] continue to hold the line on that,” Thune said. “If there’s going to be a deal, there has to be a reality check among Democrats about what is achievable.”

House Ways and Means Committee ranking Republican Kevin Brady of Texas echoed those concerns, noting that the cost of the policies Democrats are advocating – which, in the legislation reported by House Democratic taxwriters in June, ran roughly $100 billion over 10 years – was “not realistic.”

A long tax wish list: Complicating matters further is the sheer number of tax policies potentially in play – items that have varying levels of support within and across the two parties, but which all have vocal advocates, both on and off Capitol Hill, angling for their inclusion in any year-end bill. In addition to the tax extender provisions that expired in 2017 and 2018 and those that are set to lapse at the end of this year, and the refundable credit expansions favored by Democrats, other policies that have been in the mix include:

- “Green energy” tax incentives, such as an expansion of the electric vehicle tax credit and other provisions included in the green energy discussion draft proposal recently released by House Ways and Means Committee Democrats;
  [URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/191122_2.html]
- Further suspensions of certain taxes enacted as part of the Patient Protection and Affordable Care Act which are slated to come into force next year;
- Technical corrections to (and fixes to address certain unintended consequences of) the 2017 tax overhaul legislation informally known as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97);
- A House measure that would temporarily suspend the TCJA’s $10,000 limitation on the deduction for state and local taxes (see separate coverage on this bill which was approved by House Democratic taxwriters this week);
- New reporting requirements for Qualified Opportunity Zone Funds that were enacted as part of the TCJA; and
- Final action on the SECURE Act (H.R. 1994) – a House-passed retirement security measure that also would address unintended consequences of a change to the so-called “kiddie tax” that was included in the TCJA.

Congressional backers of at least two of these policy priorities – “green energy” tax incentives and Opportunity Zone reporting requirements – made additional moves this week to draw attention to their causes.

‘Green energy’: On the renewable energy and energy-efficiency front, a group of 22 Senate Democrats – including a handful of taxwriters – penned a letter on December 9 to Senate Majority Leader Mitch McConnell, R-Ky., Minority Leader Chuck Schumer, D-N.Y., Senate Finance Committee Chairman Charles Grassley, R-Iowa, and ranking member Wyden urging them to prioritize clean energy tax policies – including those for wind, solar, energy storage, clean vehicles, and efficient homes and buildings – in any tax extender legislation that moves through Congress.

[URL: https://www.markey.senate.gov/imo/media/doc/Clean%20Energy%20Tax%20Letter%202019.pdf]
"We need to extend, expand, and update current tax policies to increase the adoption of zero-emission generation, energy storage, zero-emission vehicles, and energy-efficient buildings," the letter states.

**Opportunity Zone reporting requirements:** Also in the Senate, Finance Committee member Tim Scott, R-S.C., along with Chairman Grassley and others, announced on December 6 the introduction of the IMPACT Act (short for the Improving and Reinstating the Monitoring, Prevention, Accountability, Certification, and Transparency Provisions of Opportunity Zones Act), which would reinstate and expand upon certain Opportunity Zone reporting requirements that were stripped out of the TCJA during Senate consideration due to the rules of the legislative process (that is, budget reconciliation) under which the bill was moved.

According to a statement released by Sen. Scott, the bill, which builds on legislation he introduced earlier this year, would codify certain reporting requirements for both Qualified Opportunity Funds and investors in those funds, while also adding penalties for noncompliance with those reporting requirements.


**What about a ‘skinny’ tax bill?**

House Ways and Means Committee Chairman Richard Neal, D-Mass., hinted to reporters on December 11 that a slimmed-down tax bill is also under discussion – an implicit acknowledgment of the political and budgetary complications that have arisen as congressional tax leaders have grappled with the broad set of policies represented on the year-end legislative wish list.

Though Neal offered no detail as to what such a "skinny" tax deal might look like, *Politico* reported on December 12 that it could incorporate only two lowest-common-denominator items: the House-passed retirement security bill (H.R. 1994, the SECURE Act) and a package of short-term tax relief measures that would be available to victims of federally declared national disasters. (Ways and Means ranking member Kevin Brady told *Tax Notes* December 11 that there is bipartisan support for including these provisions in a smaller package.)

But even reaching an agreement on a "skinny" bill could prove problematic, given that Neal told *Tax Notes* on December 11 that including expansions of the family tax credits would remain a priority for him.

"We'd like to get that in,” he said.

> — Alex Brosseau  
> Tax Policy Group  
> Deloitte Tax LLP

**House taxwriters approve two-year suspension of SALT deduction cap**

The House Ways and Means Committee on December 11 approved a long-promised proposal from the panel’s Democrats that would temporarily suspend the $10,000 cap on the deduction for state and local taxes (SALT) that was enacted in the 2017 tax overhaul legislation known informally as the Tax Cuts and Jobs Act (TCJA, P.L. 115-97), temporarily eliminate the marriage penalty under the cap, and offset the cost of those changes by increasing the top individual tax rate and adjusting the income thresholds for that bracket.

The Restoring Fairness for States and Localities Act (H.R. 5377), sponsored by Democratic taxwriters Tom Suozzi of New York, Bill Pascrell of New Jersey, and Mike Thompson of California, cleared the committee on a largely party-line vote of 24-17. Only one Republican – Tom Reed of New York – voted to support the measure and only one Democrat – Stephanie Murphy of Florida – broke ranks to oppose it.


**Striking at the TCJA**

The SALT deduction was unlimited before the TCJA was enacted and the $10,000 cap has rankled some in Congress ever since the TCJA became law. The deduction tends to be used more heavily in higher-taxed "blue” states
disproportionately represented by Democrats, such as New Jersey, New York, Connecticut, and California. But House members in both parties who represent jurisdictions with expensive housing markets and steep property and income taxes have decried the cap as unfair to their constituents in the middle class. For the past several months, Rep. Thompson, who chairs the Ways and Means Select Revenue Measures Subcommittee, has led an informal working group to develop a proposal that would modify the provision to address the concerns of those lawmakers.

**Changes to the cap:** Under the Ways and Means Committee legislation, the cap on the deduction for state and local income, property, and sales taxes would be suspended for 2020 and 2021 (that is, taxable years beginning after December 31, 2019, and before January 1, 2022). To prevent taxpayers from deducting taxes imposed for 2022 or later by prepaying those taxes while the suspension is in effect, the measure provides that prepaid amounts would be treated as paid on the last day of the taxable year for which the tax is imposed.

The proposal also would eliminate the marriage penalty in the current-law provision in 2019 by increasing the deduction cap for 2019 to $20,000 for married taxpayers filing jointly. (Under the TCJA as enacted, a married couple filing jointly is limited to a SALT deduction of $10,000, while an unmarried couple is entitled to deduct $10,000 each, for a combined deduction of $20,000.)

**Adjustment to top rate, income thresholds:** The proposal would be offset by increasing the top income tax rate for individuals (currently 37 percent) to its pre-TCJA level of 39.6 percent and expanding the bracket by lowering the income thresholds at which the top rate begins. Under the legislation, the 39.6 percent rate would apply to income over:

- $441,475 for single taxpayers (TCJA level: $518,400);
- $469,050 for heads of households (TCJA level: $518,400);
- $496,600 for married taxpayers filing jointly (TCJA level: $622,050);
- $248,300 for married taxpayers filing separately (TCJA level: $311,025); and
- $12,950 for estates and trusts (unchanged from TCJA level).

Changes to the top rate and thresholds would be effective for taxable years beginning after December 31, 2019 and would remain in effect through 2025. (The bulk of the TCJA provisions affecting individuals and passthrough entities – including the SALT limitation – are scheduled to expire in 2026.)

A description of the proposed changes to the cap and the top rate bracket is available from the Joint Committee on Taxation (JCT) staff. [URL](https://www.jct.gov/publications.html?func=startdown&id=5235)

**Deductions for teachers and first responders:** A substitute amendment to the proposal that was released before the mark-up added two provisions unrelated to the SALT deduction that would (1) increase the current-law above-the-line deduction for certain out-of-pocket professional expenses of eligible educators to $500 (from $250) effective for taxable years beginning after December 31, 2018, and (2) create a new above-the-line deduction of $500 (indexed for inflation) for certain out-of-pocket expenses incurred by first responders, effective for taxable years beginning after December 31, 2019.

**Net revenue gainer**

The JCT staff estimates that the changes to the SALT deduction cap would reduce federal receipts by $184.5 billion between 2019 and 2029 and the deductions for professional expenses incurred by teachers and first responders would reduce receipts by another $3.8 billion. [URL](https://www.jct.gov/publications.html?func=startdown&id=5236)

The proposed changes to the top individual rate would increase receipts by $190.7 billion over the same period, resulting in a net 10-year revenue gain of $2.4 billion.

**A familiar debate**

Debate over the proposal broke largely along familiar lines. Supporters of the measure – mostly Democrats – argued that the 2017 cap on the SALT deduction penalizes middle-class taxpayers and deprives localities of revenue that otherwise would be used to fund priorities such as public schools, infrastructure projects, and emergency services.
New Jersey Democrat Bill Pascrell contended that two-thirds of households in his state with income between $75,000 and $100,000 use the SALT deduction and the average deduction amount in 2017 was over $19,000. And New York Democrat Tom Suozzi told the panel that the average SALT payment exceeds $10,000 in 25 states and the District of Columbia. Suozzi also predicted that the number of taxpayers with SALT payments exceeding the cap will increase over time since the deduction cap is not indexed for inflation.

Opponents of the proposal – mostly Republicans – countered that the SALT deduction primarily benefits the wealthiest taxpayers and that the TCJA left the middle class better off overall thanks to lower tax rates, an expanded standard deduction, and relief from the alternative minimum tax. Ways and Means ranking Republican Kevin Brady of Texas argued that lifting the cap on the SALT deduction would be “a starter pistol for a new race among state and local leaders to raise property taxes, sales taxes, and income taxes even higher on working families and local businesses.”

**Distributional issues:** On the issue of exactly who would benefit most from this proposal, Brady cited a JCT distributional analysis indicating that of the estimated $61.2 billion in net tax benefits (that is, the combined effect of lifting the deduction cap but hiking the top income tax rate) that would be generated under the proposal in calendar year 2021, $22.2 billion – just over 36 percent – would flow to taxpayers with household income of $1 million or more, and a combined $38.6 billion – 63 percent of the total benefit – would accrue to households with income between $100,000 and $1 million. (In all, then, households with income ranging from $100,000 to over $1 million would receive 99 percent of the benefits in 2021.)

But Democrats noted during the mark-up that the wealthiest households ultimately would bear the cost of the proposal through the higher top income tax rate. And on that point, the JCT analysis shows that in calendar year 2023, when the SALT deduction cap would be back in force but the 39.6 percent bracket would still be in effect, households with income over $1 million would pay $27.1 billion – nearly 87 percent – of the $31.2 billion in estimated additional taxes that the bill would generate, while and households with income between $500,000 and $1 million would kick in another $3.9 billion – 12.5 percent – of total new revenue.

**GOP amendments rejected:** The committee rejected along party lines several Republican-sponsored amendments offered during the mark-up that, among other things, called for shielding small-business passthrough income from the increase in the top individual tax rate, sunsetting the changes to the cap if local jurisdictions increased their income or property tax rates, and eliminating the SALT deduction for the top 10 percent of income earners and allowing an unlimited deduction for the bottom 90 percent.

**House action this year?**

Ways and Means Committee Chairman Richard Neal, D-Mass., reportedly told House Democratic leaders on December 11 that he would like to see a floor vote the week of December 16 – the final week the chamber is scheduled to be in session this year. Leaders are said to be canvassing the Democratic caucus to determine the level of support for the measure, and in a sign that floor action may be forthcoming, the House Rules Committee has announced a hearing on the bill for December 16.

But scheduling a vote could prove difficult nonetheless, as there are other pressing matters – including votes on legislation to fund the federal government for fiscal year 2020 before the current spending authorization expires on December 20 (see separate coverage in this issue), ratification of the US-Mexico-Canada Free Trade Agreement, and articles of impeachment against President Trump – that are likely to consume much of the available floor time in the chamber between now and the end of the legislative session. Lawmakers are scheduled to adjourn for their holiday recess on December 20, which would leave just five legislative days to wrap up work for the year.

**Dim prospects in the Senate**

Whenever it comes to the floor, the Ways and Means proposal is likely to clear the House since Democrats control the chamber by a comfortable margin and few lawmakers in that party would be expected to vote against it. But the measure is likely to encounter resistance in the Republican-controlled Senate. Generally, Senate Republicans – like their House counterparts – have resisted calls to suspend or otherwise modify the limitation and are unlikely to embrace an increase in the top individual tax rate.
If the proposed limitation on the deduction cap ultimately fails in the Senate as expected, Democrats in both chambers likely will use the issue as a political talking point as they head into the 2020 election season.

— Michael DeHoff
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Prescription drug pricing bill – with excise tax component – clears House

The House of Representatives approved on a largely party-line vote of 230-192 a prescription drug pricing bill that includes an excise tax penalty that would be imposed on drug manufacturers that do not participate in mandatory price-setting talks with the government.

No Democrats voted against the bill, while two Republicans crossed party lines to vote for it.

The Elijah E. Cummings Lower Drug Costs Now Act of 2019 (H.R. 3) cleared the chamber on December 12. Broadly speaking, the bill would require prescription drug manufacturers to negotiate with the federal government to determine maximum prices for certain selected prescription drugs and insulin products. Negotiated prices would have to be offered under Medicare and Medicare Advantage, and could be offered under private health insurance unless the insurer opts out.


Manufacturer excise tax

Under the bill, drug manufacturers that do not participate in the price-setting program would be subject to a new excise tax under Internal Revenue Code Chapter 32 that would apply to all sales by a manufacturer, producer, or importer of those products that are subject to a negotiated price cap.

The initial tax rate would be set at 65 percent and would increase incrementally, up to a maximum of 95 percent, for taxpayers that fail to meet certain compliance benchmarks that are laid out in the bill. Certain civil penalties also would apply. The provision would be effective for sales after the date of enactment. A description of the drug pricing program and the excise tax provision is available from the Joint Committee on Taxation (JCT) staff.

URL: https://www.jct.gov/publications.html?func=startdown&id=5224

The excise tax is not expected to have an effect on federal budget receipts for fiscal years 2020 through 2029, the JCT staff says.

End of the road?

H.R. 3 as passed by the House is unlikely to become law. Senate Majority Leader Mitch McConnell, R-Ky., has already stated that he does not intend to take up the bill when it reaches his chamber (although because it is a revenue bill the Senate conceivably could strip out the House language and use the measure as a vehicle to move tax legislation of its own at some point in the 116th Congress). The White House, for its part, announced on December 10 that the president would veto the measure if it came to his desk in its current form.


Four prominent House Republicans – Ways and Means Committee ranking member Kevin Brady of Texas, Energy and Commerce Committee ranking member Greg Walden of Oregon, Education and Labor Committee ranking member Virginia Foxx of North Carolina, and Judiciary Committee Chairman ranking member Doug Collins of Georgia – have taken a similar approach in legislation (H.R. 19) they introduced on December 9.  

On the tax side, H.R. 19 includes incentives that would permanently extend the 7.5 percent of adjusted gross income threshold for claiming the medical expense deduction (a key 2018 tax extender), provide a safe harbor for high-deductible health plans that do not include a deductible for insulin, allow all tax-favored health accounts to be used to purchase over-the-counter medical products, and add feminine or menstrual care products to the list of qualified medical expenses for the purposes of those accounts.

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Holding to leave Congress after 2020

House Ways and Means Committee Republican George Holding of North Carolina announced December 6 that he will not seek re-election to his House seat in 2020. The four-term congressman’s district was recently redrawn by state lawmakers as part of a statewide redistricting plan and is now considered to lean Democratic.

According to press reports, Holding has not ruled out a return to Congress in the future. He has expressed interest in a bid to replace North Carolina Republican Sen. Richard Burr, who has said he will not run again after his term ends in 2022. Holding also has indicated that he might consider another run for the House in 2022 after the state’s districts are once again redrawn to reflect the results of the 2020 census.

Holding joined the Ways and Means Committee in 2015. He is the second House taxwriter to announce plans to leave Congress after the end of the current term. Rep. Kenny Marchant, R-Texas, revealed in August that he will not run for re-election next year.

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