Senate passes “Inflation Reduction Act” reconciliation bill

August 8, 2022

In brief

The Senate on August 7 voted 51 to 50 along party lines to pass the “Inflation Reduction Act” budget reconciliation bill (the bill). The tie-breaking vote in the evenly divided Senate was provided by Vice President Kamala Harris.

The Senate action clears the way for the House to return from its August recess on Friday, August 12 to consider the bill. President Biden and Democratic leaders hope to see the narrowly divided House approve the bill without change so it can be signed into law before the end of August.

Key revenue-raising provisions include:

- a 15% book-income alternative minimum tax on corporations with financial accounting profits over $1 billion, which has been estimated to raise $258 billion over 10 years prior to a Senate floor amendment described below;
- a 1% excise tax on a publicly traded US corporation for the value of its stock that is repurchased by the corporation during the tax year, which is estimated to raise $74 billion over 10 years;
- an $80 billion increase in IRS tax enforcement funding, which is projected to increase federal tax receipts by $204 billion over 10 years; and
- a two-year extension of the excess business loss rules under Section 461(l), adopted under a Senate floor amendment which was stated by its sponsor to raise $55 billion over 10 years.

Observation: The stock repurchase excise tax was added to a revised version of the bill that had been released on August 6 to make up for revenue lost by removing a “carried interest” provision and by disregarding certain accelerated cost recovery expenditures from the book-income alternative minimum tax provision. These changes were made to secure the needed support of Senator Kyrsten Sinema (D-AZ), who had objected to the original July 27 version of the Inflation Reduction Act proposed by Senate Majority Leader Chuck Schumer (D-NY) and Senator Joe Manchin (D-WV).

The Senate adopted an amendment to drop a modification to an aggregation rule from the bill’s book-income alternative minimum tax provision. The change was offset by a two-year extension of the limitation on Section
461(l) business loss deductions incurred by noncorporate taxpayers, which under current law is set to expire after 2026. The Senate rejected all other amendments that were offered to modify or strike provisions of the revised August 6 bill text. A provision dealing with an insulin price cap was modified in response to a procedural challenge.

The bill features $370 billion in spending and tax incentives on energy and climate change provisions. These provisions are intended to spur investments not only by traditional energy companies but also by companies in the transportation, real estate, and manufacturing industries, and include significant enhancements if the projects meet certain wage, domestic content, or location requirements. The bill also reinstates certain Superfund excise taxes, imposes a fee on methane-related emissions, and includes various other excise taxes.

The bill features significant changes to federal prescription drug pricing policies that seek to reduce costs for individuals receiving care through Medicare. The bill also includes a three-year extension of expanded Affordable Care Act (ACA) health care benefits through 2025.

At this writing, the Congressional Budget Office (CBO) has not released an updated score for the bill as passed by the Senate. According to a CBO score of the initial legislation that was proposed on July 27, the bill was projected to reduce federal budget deficits by $90.5 billion over 10 years. This score does not include the $204 billion in CBO's projected additional revenue from increased IRS tax enforcement funding, since those savings are excluded from consideration under Senate budget reconciliation procedures. The combined deficit reduction savings of the initial legislation would total roughly $295 billion over 10 years.

**Note:** Additional PwC Insights will follow to provide further analysis of key provisions in the bill.

**Action item:** Stakeholders should analyze the bill and communicate with policy makers on the potential effects of tax increase proposals on their employees, job creation, and investments in the United States.

**In detail**

**Overview**

**Key revenue-raising provisions**

**Corporate book-income alternative minimum tax**

A corporate alternative minimum tax (AMT) based on financial statement income (book minimum tax, or BMT) provision would impose a 15% minimum tax on adjusted financial statement income (AFSI) for corporations with average annual AFSI over a three-tax year period in excess of $1 billion. The provision would impose a minimum tax equal to the excess of 15% of an applicable corporation’s AFSI over the corporate alternative minimum tax foreign tax credit (AMT FTC) for the tax year. This provision would be effective for tax years beginning after December 31, 2022.

**Observation:** The BMT would increase a taxpayer’s tax only to the extent that tentative minimum tax exceeds regular tax plus base erosion and anti-abuse tax (BEAT).

**Observation:** The BMT is not expected to be a Qualified Domestic Minimum Top-up Tax (i.e., a domestic minimum tax that is computed using the same rules as the OECD’s IIR and UTPR Pillar Two rules). It is not yet clear how the corporate BMT proposal may interact with the OECD’s Pillar Two rules.
Applicable corporation

An "applicable corporation" subject to the BMT is a corporation (other than an S corporation, regulated investment company, or real estate investment trust) that meets an AFSI test in one or more tax years prior to the tax year and ending after December 31, 2021. A corporation meets the AFSI test if its average AFSI (determined without regard to the adjustment for financial statement net operating loss carryovers) over the three tax years ending with the relevant tax year exceeds $1 billion.

**Observation:** Because AFSI is determined with all other AFSI adjustments (discussed below), a corporation still must compute all of the AFSI adjustments to determine whether it meets the definition of an applicable corporation. Depending on the size of the AFSI adjustments, corporations that believe they are subject to BMT solely from their financial statements may find that they are not applicable corporations because the AFSI adjustments reduce their three-year average AFSI below $1 billion. Alternatively, corporations may find that they meet the definition of an applicable corporation because the AFSI adjustments increase their three-year average AFSI above $1 billion.

A corporation that is a member of a foreign-parented multinational group must include the AFSI (with certain modifications) of all members of the group in applying the $1 billion test, but is an applicable corporation only if its three-year average AFSI (taking into account the AFSI of only US members, US trades or business of foreign group members that are not subsidiaries of US members, and foreign subsidiaries of US members) exceeds $100 million. A foreign-parented multinational group for this purpose is two or more entities (at least one domestic corporation and one foreign corporation) that are included in the same applicable financial statement (AFS) and either have a common foreign corporate parent, or are treated as having a common parent that is a foreign corporation (as determined by Treasury). For this purpose, a US trade or business of a foreign corporation is treated as a separate domestic corporation wholly owned by the foreign corporation.

A corporation’s AFSI is aggregated with the AFSI of all persons treated as a single employer under Section 52(a) or 52(b) to determine if the corporation is an applicable corporation. The AFSI test applies to a corporation that has been in existence for less than three years based on the number of years the corporation has been in existence. AFSI is annualized for a short tax year.

An applicable corporation does not include a corporation that (1) has a change in ownership or (2) does not meet the AFSI test for the most recent tax year and a number (to be determined by Treasury) of consecutive tax years. In either case, Treasury also must determine that it is no longer appropriate to treat the corporation as an applicable corporation.

Determination of AFSI

“Adjusted financial statement income” is defined as the net income or loss on the taxpayer's AFS for a tax year, adjusted to take into account:

1. Financial reporting years that do not coincide with the tax year;
2. Properly allocated items for a corporation in an affiliated group that reports on a consolidated return;
3. For any corporation not included on a consolidated return, only the dividends received from the corporation and other amounts includible in gross income (other than subpart F and global intangible low-taxed income inclusions) or deductible as a loss for the corporation;
4. A taxpayer’s pro rata share (determined under rules similar to Section 951(a)(2)) of items taken into account on the AFS (as adjusted to determine AFSI) of each controlled foreign corporation (CFC) of which the taxpayer is a US shareholder, but not below zero. Negative adjustments would be carried forward to the succeeding year;
(5) AFSI of any disregarded entities owned by the taxpayer that are not included on its AFS; and

(6) Certain amounts related to Alaska native corporations.

The following items reported on a taxpayer’s AFS are disregarded in determining AFSI:

(1) Federal income taxes and income, war profits, or excess profits taxes relating to a foreign country or US possession taken into account on the taxpayer’s AFS, but these foreign taxes may be disregarded under regulations if the taxpayer does not elect to credit foreign income taxes;

(2) Certain amounts related to cooperatives;

(3) Amounts treated as a payment against tax of certain credits;

(4) Certain income related to mortgage servicing contracts; and

(5) Income of a tax-exempt entity, except unrelated trade or business income is not disregarded.

A partner’s AFSI is limited to a distributive share of a partnership’s AFSI, which is the net income or loss reported on the partnership’s AFS, with the required adjustments to determine AFSI.

AFSI is adjusted to disregard book income, cost, or expense related to a covered benefit plan (e.g., mark-to-market adjustments related to a defined benefit plan). However, in connection with a covered benefit plan, AFSI is increased by the amount included in the corporation’s gross income under other tax provisions, and reduced by deductions allowed under other tax provisions.

For depreciable property subject to Section 168 and qualified wireless spectrum amortizable under Section 197, AFSI is:

(1) Reduced by deductions allowed in computing taxable income for the tax year with respect to the property or qualified wireless spectrum; and

(2) Appropriately adjusted to disregard the depreciation of the property or amortization of the qualified wireless spectrum that is taken into account on the taxpayer’s AFS, and to take into account other items Treasury specifies to properly account for the property or qualified wireless spectrum.

**Observation:** The adjustment to AFSI for tax depreciation means depreciation for property to which Section 168 applies has the same effect on the tax base for the BMT and the regular tax in any tax year, including any benefit of bonus depreciation under Section 168(k). The rule is beneficial in any year in which total depreciation deductions for the property for tax purposes exceeds total depreciation for book purposes. However, for taxpayers for which book depreciation in the current year exceeds tax depreciation, the adjustment could be disadvantageous.

AFSI also is decreased by the lesser of (1) the aggregate amount of financial statement NOL carryovers to the tax year or (2) 80% of AFSI computed without regard to financial statement NOLs. A financial statement NOL for any tax year may be carried over to each tax year following the tax year of loss. “Financial statement NOL” is defined as the amount of net loss on the corporation’s AFS, after applying the AFSI adjustments, for tax years ending after December 31, 2019.

“Applicable financial statement” has the same meaning as under Section 451(b)(3) and Reg. sec. 1.451-3(a)(5) (or as specified by Treasury in regulations or other guidance), and generally is a financial statement prepared in accordance with GAAP or IFRS, reported to the SEC, or otherwise used for reporting to shareholders or credit purposes.
Observation: The Senate Finance Committee December 2021 draft legislation contained complicated dividend rules, which could have resulted in double counting of income with respect to dividends from CFCs. The Inflation Reduction Act does not prevent double counting by its terms, but instead clarifies that dividends may be included in AFSI, authorizes regulations to prevent double counting, and ensures deductible stock losses are not ignored in determining AFSI.

Observation: The Inflation Reduction Act does not include proposals amending global intangible low-taxed income, foreign-derived intangible income, the BEAT, or a number of other US international tax provisions. Nevertheless, by applying a minimum tax rate higher than the effective tax rate of these provisions, the BMT proposal could result in additional US tax imposed on income subject to these provisions.

AMT FTC

The bill adds a new corporate AMT FTC, which is available to an applicable corporation that claims an FTC for the tax year. The AMT FTC is the sum of:

(1) The lesser of:

(a) The aggregate of an applicable corporation’s pro rata share (as determined under Section 56A(c)(3)) of the amount of income, war profits, and excess profits taxes imposed by a foreign country or US possession that are taken into account in the AFS of, and paid or accrued for federal income tax purposes by, each CFC in which the corporation is a US shareholder; or

(b) The aggregate of the applicable corporation’s pro rata share of the adjusted AFSI (as determined under Section 56A(c)(3)) of CFCs in which the corporation is a US shareholder multiplied by 15%;

and (2) for a domestic corporation, the amount of income, war profits, and excess profits taxes imposed by a foreign country or US possession to the extent that taxes are taken into account on the corporation’s AFS and paid or accrued for federal income tax purposes.

A taxpayer may carry over the excess of the amount in (1)(a) over (1)(b), above, for five succeeding tax years. The carryover increases the amount in (1)(a), above, in a tax year in which the taxpayer claims the AMT FTC, to the extent not previously taken into account.

Observation: The BMT would preserve the value of general business credits (e.g., the research tax credit), would allow applicable corporations an indefinite carryforward of financial statement losses (that were incurred in tax years ending after December 31, 2019), and would allow an indefinite carryforward for an AMT credit to be claimed against regular tax in future years (to the extent regular tax exceeds BMT plus BEAT).

Observation: It appears that the AMT FTC would apply (without an FTC limitation) to direct foreign income taxes and the taxpayer’s pro rata share of creditable foreign taxes from a foreign partnership. Foreign income taxes paid by CFCs would be creditable as well, but subject to an FTC limitation equal to 15% of the taxpayer’s pro rata share of the net income or loss of its CFCs (grossed up for foreign income taxes).

Future Treasury guidance

The bill authorizes Treasury to issue regulations or other guidance on a number of issues, including:

- Creation of a simplified method for determining whether a corporation satisfies the $1 billion and $100 million tests;
- Determining when a corporation otherwise subject to the BMT should be exempted;
• Modifications to the determination of AFSI, including treatment of current and deferred taxes;
• How the BMT applies when a corporation changes ownership; and
• Whether guidance is needed on the AMT FTC.

**State tax observation:** The minimum tax would be implemented through Section 55(b)(2), with the calculation and structure contained in a new IRC provision, Section 56A. How the new provision impacts each state will depend on how each state would conform to Section 55(b)(2) as an element of its alternative minimum tax and whether the state automatically conforms to changes in the IRC. For example, although the federal corporate minimum tax was repealed for tax years beginning after December 31, 2017, Alaska continues to have a statutory provision that adopts Section 55. Although Alaska conforms automatically to changes in the IRC, it is uncertain how Alaska will treat the adoption of a new federal minimum tax imposed under Section 55(b)(2). Other states, such as Florida and Maine, also adopt Section 55. However, these states are fixed conformity states and will not adopt changes to the IRC automatically until their state conformity statutes are updated. California and Minnesota are fixed conformity states that could adopt these changes if their IRC conformity is updated, but their provisions are not straightforward and would have to be analyzed when or if they update their federal conformity.

State taxes are not taken into account in determining whether a taxpayer is subject to BMT.

**Tax accounting implications:** The ability to generate a credit against future year(s) regular tax liabilities may indicate that this worldwide “book” minimum tax has certain features that may be similar to the pre-2017 tax reform act corporate AMT regime. Subject to certain valuation allowance considerations, pre-2017 Act corporate AMT obligations generally resulted in the recognition of a deferred tax asset for the indefinite-lived AMT credit carryover received equal to their prior AMT obligation(s). Under the pre-2017 Act AMT guidance, when assessing the rate at which to calculate deferred taxes, ASC 740 required the use of the regular rate to measure deferred taxes. The regular rate was used even if a company anticipated that it would be subject to AMT for the foreseeable future.

**Excise tax on corporate stock repurchases**

The bill would impose a nondeductible 1% excise tax on a publicly traded US corporation for the value of any of its stock that the corporation repurchases during the tax year.

A “repurchase” is defined as a redemption (within the meaning of Section 317(b)) of the stock of the corporation, and any other economically similar transaction as determined by Treasury. A “specified affiliate” of a publicly traded US corporation that performs the buyback of the stock of the publicly traded US corporation also is subject to the excise tax. A specified affiliate of a corporation is (1) another corporation more than 50% of the stock of which is owned (by vote or value), directly or indirectly, by the corporation and (2) any partnership more than 50% of the capital interests or profits interests of which is held, directly or indirectly, by the corporation.

The amount of repurchases subject to the tax is reduced by the value of any stock issued by the corporation during the tax year, including stock issued or provided to the employees of the corporation or a specified affiliate of the corporation during the tax year, whether or not such stock is issued or provided in response to the exercise of an option to purchase such stock.

The provision includes special rules for foreign-parented domestic corporations, which would treat a repurchase of stock by certain affiliates of a publicly traded foreign corporation (including domestic corporations, domestic partnerships, and foreign partnerships with domestic partners) as if it were a repurchase by a publicly traded US corporation. Additional rules apply if the foreign corporation is treated as a surrogate foreign corporation under Section 7874 as a result of a transaction completed after September 20, 2021.
The provision would not apply:

- to the extent the repurchase is part of a reorganization under Section 368(a) and no gain or loss is recognized on the repurchase by the shareholder;
- if the repurchased stock or its value is contributed to an employer-sponsored retirement plan, employee stock ownership plan, or similar plan;
- if the total value of stock repurchased during the tax year does not exceed $1 million;
- if the repurchase is by a dealer in securities in the ordinary course of business;
- to repurchases by a regulated investment company or real estate investment trust; or
- to the extent the repurchase is treated as a dividend.

The provision authorizes Treasury to issue guidance necessary or appropriate to carry out and to prevent the avoidance of the provision. The provision would apply to repurchases of stock after December 31, 2022.

**Observation:** This provision is largely unchanged substantively from the language that was included in the Build Back Better bill that the House passed in November 2021. The principal changes relate to updating the effective date and clarifying that the adjustment for stock issued during the tax year includes stock issued or provided to the employees of the corporation or employees of a specified affiliate of the corporation during the tax year.

**Observation:** Under this provision, corporations considering stock buybacks would need to consider the impact of the excise tax and applicability of the exceptions in assessing the cost of the stock buyback. For example, the language of the provision seems to suggest that the excise tax could apply -- to some extent -- in all asset reorganizations involving a boot component, to the extent the boot does not result in dividend treatment. Further, corporations attempting to satisfy the exception for repurchases treated as dividends will need to determine whether the repurchases from each shareholder qualify for sale-or-exchange treatment or dividend treatment, typically a shareholder-level determination.

**State tax observation:** State corporate income tax implications of the excise tax on corporate stock repurchases initially will be limited to whether it is deductible based on whether a state has a fixed-date or select conformity versus rolling conformity to IRC changes. If a state does not conform to the amendment to Section 275, which would preclude a deduction for the excise tax on corporate stock repurchases, taxpayers may be able to deduct the excise tax expense for state tax purposes.

**Tax accounting implications:** Taxes that are not based on income are outside of the scope of ASC 740. The design features of the excise tax in the bill suggest that the tax is levied on a gross amount (i.e., the tax base excludes any expenditures or other adjustments). Therefore, the tax effects of the excise tax generally are not expected to be included in a company’s income tax provision.

**IRS funding**

The Inflation Reduction Act would appropriate an increase in IRS funding over 10 years as follows:

- $45,637,400,000 for enforcement,
- $25,326,400,000 for operations support,
- $4,750,700,000 for business systems modernization, and
$3,181,500,000 for taxpayer services.

The bill states that these appropriated funds are to remain available until September 30, 2031, and no use of the funds is intended to increase taxes on any taxpayer with taxable income below $400,000. The provision also provides $15 million for the IRS to prepare and deliver a report to Congress on the cost of developing and operating a free direct efile tax return system. The provision permits Treasury to exercise greater flexibility with respect to personnel, including certain “direct hire” authority.

Climate and clean energy provisions

The Inflation Reduction Act includes numerous incentives for clean energy. The bill would reinstate and significantly expand current incentives by providing an estimated $370 billion of new energy-related tax credits over the next 10 years. The bill also would have a significant impact for companies relying on financing arrangements for energy-related projects, permitting more flexibility with direct-pay and transferable credit options.

Observation: Collectively, the energy tax provisions in the bill would represent the largest US effort to date to spur reductions in greenhouse gas emissions and are intended to catalyze material investments by the corporate sector, with several major themes:

- **Clean energy generation**: The bill extends the current system of tax credits for renewable energy through 2024 and then transitions those incentives into a “technology-neutral” clean electricity credit beginning in 2025. New credits would support nuclear energy and other lower-carbon technologies.

- **Clean energy transportation**: The bill includes major extensions, expansions, and enhancements of credits intended to support the widespread adoption of electric vehicles for both passenger and commercial use.

- **Building energy efficiency**: The bill contains extended and expanded provisions to support investments in building energy efficiency by both commercial real estate owners and homeowners.

- **Carbon capture**: The bill enhances the existing tax credits for carbon capture and utilization or storage, including a new provision intended to incentivize the commercialization of direct air capture technologies.

- **Lower carbon manufacturing and green jobs**: Most of the credits in the bill are available at significantly higher levels if prevailing wage and apprenticeship requirements are met. In addition, the bill revives the tax credit program for building advanced energy manufacturing facilities in the United States.

- **Credit monetization**: The bill allows eligible taxpayers to elect to be treated as having made a payment of tax equal to the value of the credit for which they otherwise would be eligible under numerous credits. Taxpayers ineligible for the direct-pay election instead could opt to transfer any applicable credit to another taxpayer.

- **Continuity of alternative fuel incentives**: The bill retroactively and prospectively extends the biodiesel and biodiesel mixture credits (which also are available for renewable diesel) the alternative fuel credit, and the alternative fuel mixture credits, while transitioning to a technology-neutral clean fuels credit beginning in 2025.

- **Creation of a sustainable aviation fuels credit**: The bill creates a new income and excise tax credit for the sale or use of a qualifying sustainable aviation fuel mixture. The credit would be $1.25 per gallon of sustainable aviation fuel plus an applicable supplementary amount.
**Tax accounting implications:** While credits and incentives often arise in the tax laws and may be claimed on a tax return, they ultimately may not be accounted for within the income tax accounting standard. A number of features can make them more akin to a government grant or subsidy versus a credit related to a net income tax. Therefore, each credit and incentive must be analyzed carefully to determine whether it should be accounted for under ASC 740 or whether, in substance, it constitutes a government grant and, thus, is subject to other guidance.

The application of income tax accounting is warranted if a particular credit or incentive can be claimed only on the income tax return and can be realized only through the existence of taxable income. When there is no connection to income taxes payable or taxable income and when the credits are refundable regardless of whether an entity has an income tax liability, we believe the benefit should be accounted for outside of the income tax model and presented within pre-tax income.

**Excise taxes**

*Superfund excise taxes*

The bill would reinstate, beginning January 1, 2023, the hazardous substances superfund financing (HSSF) rate under Section 4611 on crude oil used in the United States, crude exported from the United States, and petroleum products imported and consumed in the United States. (The US Court of Appeals for the Fifth Circuit recently denied the government’s request for rehearing in a case involving the applicability of the Section 4611 tax to exported crude oil. A Fifth Circuit panel in March upheld the district court’s ruling that the Oil Spill Liability Trust Fund (OSLTF) imposition on exports was unconstitutional.)

The bill increases the HSSF rate from the 9.7 cents per barrel imposition that applied when it last expired at the end of 1995 to 16.4 cents per barrel. The HSSF rate, together with the related OSLTF financing rate imposed under Section 4611(c)(2)(B), would create an effective tax/fee of 25.4 cents per barrel on crude oil and petroleum products (with the HSSF portion inflation-adjusted in future years). The changes to the HSSF rate would become effective on January 1, 2023. However, the OST currently is set to expire on December 31, 2025, and the provision would not extend that date without future action by Congress.

*Observation:* The provision addresses a perceived gap in the bipartisan infrastructure legislation enacted in 2021, as that legislation reinstated environmental excise taxes related to certain chemicals and substances but did not reinstate the HSSF rate in Section 4611. Additional information on the superfund excise taxes that were reinstated by the bipartisan infrastructure legislation can be found in this PwC Insight.

**Methane fee**

The bill imposes a charge on methane emissions over specified thresholds on the owner/operator of certain facilities emitting more than 25,000 metric tons of carbon dioxide equivalent of greenhouse gasses per year. The charge would be $900 per ton of emissions beginning in 2024, rising to $1,200 for 2025 and $1,500 for 2026 and thereafter.

The charge applies only to the extent the facility exceeds the specified waste emissions thresholds:

- For petroleum and natural gas production, exceeding 0.2% of the natural gas sent to sale from the facility, or 10 metric tons of methane per million barrels of oil sent (if the facility sent no natural gas to sale).
- For nonproduction petroleum and natural gas systems, exceeding 0.05% of the natural gas sent to sale from or through the facility.
- For natural gas transmission, exceeding 0.11% of the natural gas sent to sale from or through the facility.
Netting would be allowed for emissions under the thresholds across industry segments at a facility under common ownership or control. The bill also provides exemptions from the charge for unreasonable delays in certain environmental permitting or where the facility is subject to and in compliance with certain methane emissions requirements.

**Prescription drug pricing provisions**

The bill features significant changes to federal prescription drug pricing policies that seek to reduce costs for individuals receiving care through Medicare. The bill’s prescription drug pricing provisions would:

- enable Medicare to negotiate the price of some high-cost, single-source prescription drugs;
- institute new inflationary rebates under Medicare;
- cap Medicare Part D prescription drug out-of-pocket costs at $2,000 per year; and
- redesign the Medicare prescription drug program.

The bill approved by the Senate reflects changes made in response to a review by the Senate parliamentarian on whether the bill’s provisions comply with Senate reconciliation rules. The parliamentarian ruled that a requirement for pharmaceutical companies to pay a rebate if the prices of certain prescription drugs exceeded a specified rate of inflation was permitted under Senate rules to apply to Medicare plans but could not be applied to private sector health plans.

A provision to impose a $35 per-month cap on the copay amount individuals can be charged under private-sector insurance plans for insulin also was dropped from the bill in response to an objection that the provision violated Senate reconciliation rules. The Senate voted 57 to 43 to waive the objection but failed to secure the 60 votes required under Senate rules. The bill retains the $35 per-month cap on insulin copay charges for Medicare participants.

**Prescription drug pricing negotiation noncompliance excise tax**

The bill seeks to achieve its goal of lowering prescription drug costs for Medicare patients by imposing a nondeductible excise tax on manufacturers, producers, or importers that fail to enter into negotiated drug pricing agreements. The tax would apply to each sale made during specified “noncompliance periods.”

**Observation:** CBO and the staff of the Joint Committee on Taxation (JCT) expect that no pharmaceutical company would fail to negotiate or assume that a manufacturer unwilling to comply with the bill’s negotiation requirements would remove its drug from the US market rather than pay the excise tax. As a result, no direct revenue gain is estimated to be raised from this excise tax provision.

The tax would be “an amount such that the applicable percentage is equal to the ratio of (1) such tax, divided by (2) the sum of such tax and the price for which so sold.”

The “applicable percentage” is:

- 65%, for sales during the first 90 days of the noncompliance period,
- 75%, for sales during the 91st day through the 180th day of the noncompliance period,
- 85%, for sales during the 181st day through the 270th day of the noncompliance period, or
• 95%, for sales during any subsequent day.

The applicable percentages correspond to tax rates of 186%, 300%, 567%, and 1900%, respectively, on the price of the drug before the tax.

The noncompliance periods begin on specified dates following the publishing of selected drugs subject to price negotiation or the deadline for these prices to be renegotiated. There also is a noncompliance period for days on which the Secretary of Health and Human Services (HHS) certifies that information required to be submitted under an agreement is overdue.

The bill includes an “anti-abuse” rule under which, “in the case of a sale which was timed for the purpose of avoiding the tax,” the HHS Secretary may treat the sale as occurring during a noncompliance period.

Observation: It is unclear how the timing of a sale would be deemed to be for the purpose of avoiding this excise tax or how far back this anti-abuse rule could be applied. Excise tax provisions generally would apply to sales made after the date of enactment.

The bill prohibits administrative appeals of the tax, and no suit would be allowed until full payment of the tax is made, including interest and penalties.

Extension of ACA subsidies

The bill would lower ACA health care insurance premiums by extending for three years the premium tax credit that was temporarily expanded as part of the 2021 American Rescue Plan Act. Specifically, the expansion of affordability percentages used in calculating the premium tax credit to make credits available for individuals with incomes above 400% of the federal poverty line, as well as credit amounts for those already qualified, would apply through 2025. Without the extension, these provisions would expire at the end of 2022.

Provisions not included in the Inflation Reduction Act

The Inflation Reduction Act does not include various provisions that previously had been addressed as part of the House-passed Build Back Better reconciliation bill, including:

• Numerous other revenue-raising provisions affecting businesses, including international tax provisions, some of which were intended to address OECD Pillar Two global minimum tax proposals;

• Individual income tax revenue-raising provisions, including extending the application of the 3.8% net investment income tax, a new surtax on high-income individuals, and provisions affecting retirement plans;

• A provision increasing the federal individual itemized deduction cap for state and local taxes; and

• A provision reinstating current expensing of Section 174 research expenditures that became subject to capitalization in 2022 under a provision of the 2017 tax reform act.

The Inflation Reduction Act also does not include several rate increases that have been proposed by President Biden, including proposals to increase the US corporate tax rate to 28%, to increase the top individual marginal income tax rate to 39.6%, and to tax capital gains income for certain high-income individuals at ordinary income tax rates.
For more information

Text of the Inflation Reduction Act of 2022 as passed by the Senate

Note: updated text of the bill as passed by the Senate with the changes noted in this Insight will be posted when available.

Let’s talk

For a deeper discussion of how this issue might affect your business, please contact:

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