Senate Democrats release initial Build Back Better reconciliation tax proposals

December 12, 2021

Senate Finance Committee Chairman Ron Wyden (D-OR) on December 11 released 1,180 pages of draft Finance amendment bill text for Senate consideration of the “Build Back Better” reconciliation bill (H.R. 5376). The Finance amendment bill text would amend H.R. 5376 as passed on November 19 by the House. Chairman Wyden noted that the bill text is subject to further revisions.

Chairman Wyden stated that the Finance amendment includes both substantive changes and technical modifications to tax provisions in the House-passed bill, but does not address some issues, including the House provision increasing the cap on individual itemized deductions for state and local taxes. The Finance amendment also includes some new provisions.

Significant proposed Finance amendment revisions to the House-passed bill include

- **The corporate alternative minimum tax.** The House-passed definition of adjusted financial statement income (AFSI) would be adjusted by the Finance amendment to (1) disregard any book income, cost, or expense with respect to defined benefit pension plans, and (2) include any item of income or deduction included in the computation of taxable income with respect to defined benefit pension plans. AFSI for tax-exempt entities would be adjusted to take into account only unrelated business taxable income or unrelated debt-financed income. The AMT foreign tax credit is modified for foreign corporations.

- **Section 163(n) interest expense limitation.** The House-passed interest expense limitation provision would be revised by the Finance amendment to include an election, which, if made, may not be revoked for five years, to determine the limitation based on the adjusted basis of assets, rather than EBITDA.

- **Section 7874 anti-inversion rules.** The Senate amendment proposes new modifications to current-law Section 7874. Unlike the Biden Administration’s anti-inversion proposal, the Finance amendment does not propose eliminating the inverted corporation regime entirely. Instead, it would lower the 80% threshold for treating an inverted corporation as a domestic corporation to 65%. It also would retain the current law inversion gain regime but lower the threshold for that regime from 60% to 50%. The Senate’s proposed amendments to Section 7874 do not include a management and control test.

- **Base erosion and anti-abuse tax (BEAT).** The Finance amendment includes a change to the BEAT’s treatment of indirect costs associated with cost of goods sold (COGS). While the House-passed bill did not include changes to the indirect costs associated with COGS for purposes for purposes of determining the 3% base
erosion percentage for 2022 and 2023, the Finance amendment would take into account the changes to the treatment of COGS when determining the 3% base erosion percentage for those years.

- **Dividend received deduction (DRD) modifications.** The Finance amendment would retain the current structure of Section 245A, such that it applies to dividends received from specified 10-percent owned foreign corporations (rather than solely dividends received from controlled foreign corporations). The Finance amendment would provide that dividends received by a US shareholder directly from a 10/50 corporation will get a 65% DRD. Further, dividends received by a controlled foreign corporation from a specified 10-percent owned foreign corporation would qualify for the DRD under Section 245A if the US shareholder has an inclusion under section 951a(1)(a).

- **Additional Finance amendment proposed changes** to the House-passed bill include modifications to various climate energy tax incentive provisions, modification of low income housing tax credit provisions, elimination of a proposed expansion of tobacco excise taxes to include vaping products, elimination of a provision dealing with prison operations by real estate investment trusts, and revisions to increased IRS compliance funding that includes $15 million for an IRS study of e-filing.

Senate Democrats currently are preparing for floor action on the Build Back Better legislation. As part of that effort, Chairman Wyden and other Senate committee leaders are releasing bill text for review by the Senate parliamentarian to determine if each provision of the overall legislation complies with Senate budget reconciliation rules.

Senate Majority Leader Chuck Schumer (D-NY) has stated that he wants the Senate to begin voting on amendments to H.R. 5376 during the week of December 13, but it seems increasingly likely that Senate action on the legislation could be delayed until later in the month or early next year.

**Observation:** Majority Leader Schumer must gain the support of all 50 Democratic Senators to agree to begin debate on the legislation. Senator Joe Manchin (D-WV) has expressed general concerns about the size of the House-passed bill as well as opposition to various specific provisions in that bill. Other Democratic Senators have been discussing potential amendments to the House-passed bill.

The Build Back Better bill as passed by the House includes more than $1.5 trillion in business, international, and individual tax increase provisions, as well as other non-tax offsets that include increased funding for IRS compliance programs. The bill would provide targeted individual tax relief that includes a one-year extension of an expanded child tax credit, clean energy incentives, and increased spending on healthcare, education, childcare, and other programs.

**Observation:** Senator Manchin recently expressed concern about the overall cost of the legislation if all of the temporary provisions, like the expanded child tax credit, were to be made permanent. Some economists have projected that the gross cost of the legislation would rise from $2.4 trillion to $4.7 trillion under certain assumptions.

Senate changes to the House-passed Build Back Better legislation will require further action by the House. A final identical version of the legislation must be approved by both the House and Senate before it can be signed by President Biden.

**Observation:** If the Senate does pass an amended version of the Build Back Better bill just before Christmas, it would remain to be seen whether there would be enough time both for the House to return for a final vote and for President Biden to sign the bill before December 31, 2021. Given the challenges of holiday travel and the enrollment process for legislation in advance of a White House signing ceremony, it is possible that even if all legislative steps are completed in 2021, the bill might not be signed into law until early in January 2022.
**Action item:** With the potential for Senate Democrats to have the final say in shaping the tax provisions of the Build Back Better bill, stakeholders, and especially CEOs and CFOs, should communicate with Senate policy makers on the potential effects of tax increase proposals on their employees, job creation, and investments in the United States.

For more information

- Senate Finance proposed amendment [text](#) (1,180 pages); Subtitle H revenue raisers [text](#) (261 pages)

House-passed version of H.R. 5376:

- November 3 substitute amendment [text](#): Corporate, international, and individual revenue-raising provisions [subtitle text](#)
- House Budget Chairman’s amendment [text](#) (includes House-passed version of SALT cap provision)
- JCT [estimates](#) for the revenue provisions of H.R. 5376 as passed by the House
- CBO cost estimate summary for H.R. 5376 as passed by the House
- PwC [Insight](#) on key business and individual provisions of H.R. 5376 as passed by the House

**Let’s talk**

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

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