$1.9 trillion COVID relief package clears House

The House voted 219-212 in the early hours of February 27 to approve the American Rescue Plan, President Biden's $1.9 trillion tax-and-spending package to address the continuing economic and health impacts of the COVID-19 pandemic. As expected, passage came almost entirely along party lines, with all but two Democrats in the 'aye' column and Republicans united in opposition.

The bill now heads to the Senate, but an initial determination by that chamber's parliamentarian that a provision calling for a $15 an hour minimum wage is incompatible with the fast-track budget reconciliation rules that Democrats are relying on to get the measure through Congress means significant changes – including the possible addition of a new revenue-raising tax provision – could be in play once it crosses the Rotunda.

Highlights of tax provisions

On the tax side, the House-approved legislation would provide relief to businesses and individuals by, among other things:

- Extending and modifying the employee retention tax credit (ERTC) originally enacted in the Coronavirus Aid, Relief, and Economic Security Act last March and further extended and expanded in the Consolidated Appropriations Act, 2021, the year-end omnibus package that was signed into law last December 27;
- Extending and modifying the refundable tax credits (enacted last March in the Families First Coronavirus Response Act and extended in the 2020 omnibus package) for certain employers who provide COVID-related paid sick leave and paid family leave to their employees;
- Excluding Economic Injury Disaster Loan grants and Restaurant Revitalization grants from gross income and clarifying that these exclusions would not result in a denial of business deductions, a reduction of tax attributes, or a denial of increase in tax basis;
- Shoring up financially struggling multiemployer pension plans and single-employer plans;
- Providing another round of direct economic impact payments to certain qualifying individuals;
- Enhancing the child tax credit, the earned income tax credit (EITC), and the child and dependent care tax credit for 2021 and making additional permanent changes to the EITC; and
- Temporarily enhancing premium tax credits for health insurance purchased under the Patient Protection and Affordable Care Act.

Revenue raisers: The legislation includes a revenue-raising proposal that would repeal the worldwide interest allocation election under section 864(f), which took effect on January 1 of this year. (For more on the Ways and Means-approved measures, see *Tax News & Views*, Vol. 22, No. 6, Feb. 12, 2021. Detailed descriptions of the tax and pension provisions are also available from the Joint Committee on Taxation staff.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210212_1.html
URL: https://www.jct.gov/publications/2021/jcx-3-21/
URL: https://www.jct.gov/publications/2021/jcx-4-21/

A second revenue-raising provision, added by Democratic leaders shortly before the measure went to the floor, would reduce the reporting threshold for third-party settlement organizations from $20,000 and 200 transactions per payee under current law to $600. (It was unclear from the details available at press time how the proposal would change the threshold with regard to the number of transactions.)

$593 billion and counting: The Joint Committee on Taxation staff estimates that the bill's tax title would increase the federal deficit by $593.1 billion (net) between 2021 and 2031, although that estimate does not factor in the revenue that would be generated by the just-added change to the reporting requirements for third-party settlement transactions.
URL: https://www.jct.gov/publications/2021/jcx-10-21/

On a related note, IRS Commissioner Charles Rettig told members of the House Appropriations Financial Services and General Government Subcommittee at a February 23 hearing that the Service would need $397 million, on top of its current budget allocation, to implement a provision in the legislation that would require the agency to make the child tax credit available to taxpayers through advance installment payments for 2021, though is unclear at this time whether that provision will survive procedural scrutiny in the Senate. (See additional discussion of potential issues with the child tax credit advance payment mechanism below; see separate coverage in this issue for additional details on the subcommittee hearing.)

Nontax proposals: Among its nontax proposals, the measure calls for substantial assistance to state and local governments, increased funding to speed vaccine production and distribution, another extension of the federal supplement to state-level unemployment benefits, additional housing assistance, and nutrition assistance, all in addition to the proposed hike in the minimum wage.

Changes ahead in the Senate

As the American Rescue Plan moves to the Senate, Democratic leaders appear poised to bypass the committee process and bring it directly to the floor for consideration. As of press time, however, a number of questions around its path forward in that chamber remain unresolved.

The bill is moving through Congress under budget reconciliation rules which, provided certain limitations on substance are adhered to, offer procedural protections for qualifying legislation in the Senate. Most notably, the reconciliation rules allow qualifying measures to pass in the Senate by a simple majority vote rather than the three-fifths supermajority typically required to overcome procedural hurdles in that chamber. As a result, Democrats, who control 50 seats in the Senate plus the tie-breaking vote of Vice President Kamala Harris, are in a position to advance the legislation without Republican support. (To date, no Senate Republican has expressed an inclination to vote for the measure in its current form.)

Minimum wage hike won't fly under 'Byrd rule': As the House worked to process its bill this week, key Senate staff on both the Democratic and Republican sides of the aisle presented their respective cases to the Senate parliamentarian as to whether the minimum wage increase (as well as other discrete issues) included in the measure should withstand the so-called "Byrd Rule," a multi-pronged limitation of the budget reconciliation process that can set up 60-vote hurdles against, among other things, provisions that are deemed not to have an impact on the federal budget or for which the budget impact is "merely incidental" to the underlying policy.

Ultimately, however, the parliamentarian ruled on February 25 that the budget effect of the measure's proposed minimum wage increase – which the nonpartisan Congressional Budget Office in a February 8 analysis of a comparable proposal from Senate Budget Committee Chairman Bernie Sanders, I-Vt., estimated would add roughly $54 billion to deficits over the next decade – would, in fact, be sufficiently indirect as to be "incidental" to the proposal's underlying policy aim. That means the provision would require 60 votes to override a sure-to-be-raised GOP point of order on the Senate floor – an extremely unlikely outcome.
URL: https://www.cbo.gov/publication/56975

"We are deeply disappointed in this decision," Senate Majority Leader Charles Schumer, D-N.Y., said after the parliamentarian's ruling. "We are not going to give up the fight to raise the minimum wage to $15 to help millions of struggling American workers and their families."

Despite the setback, House Speaker Nancy Pelosi, D-Calif., indicated almost immediately after the parliamentarian's ruling that the proposal would remain in the version of the bill to be considered by the House.

"House Democrats believe that the minimum wage hike is necessary," Pelosi said in a statement released February 25. "Therefore, this provision will remain in the American Rescue Plan…."

In reality, the $15 minimum wage provision included in the House plan – even had it received the Senate parliamentarian's blessing on procedural grounds – may have faced a rocky path in the upper chamber, where both Sens. Joe Manchin, D-W.Va., and Kristen Sinema, D-Ariz., have in recent weeks expressed opposition. Manchin, for his part, has floated the possibility of an $11 minimum wage as a proposal that could potentially garner his support.

But given the parliamentarian's ruling that the policy would only incidentally affect the federal budget, even an $11 minimum wage would likely require 60 votes to remain in any Senate-passed version of the legislation – and whether any GOP senators would cross over to support such a policy given the perceived partisan nature of the broader bill is highly uncertain (notwithstanding the fact that a group of Republican senators led by Mitt Romney of Utah and Tom Cotton of Arkansas have offered a proposal to tie a $10 minimum wage to enhanced immigration enforcement as part of hiring decisions through the so-called "E-Verify" system.)

Sanders, Wyden to push tax-centric alternative: This reality has prompted some Democratic senators, including Sen. Bernie Sanders and Senate Finance Committee Chairman Ron Wyden of Oregon, to push a reworked version of the minimum wage policy that offers carrots and sticks through the tax code – an approach that they argue would be more directly budget-related and thus Byrd Rule compliant.

"In the coming days, I will be working with my colleagues in the Senate to move forward with an amendment to take tax deductions away from large, profitable corporations that don't pay workers at least $15 an hour and to provide small businesses with the incentives they need to raise wages," Sanders said in a statement released February 25.

"That amendment must be included in this reconciliation bill," Sanders continued.

In a statement released February 26, Wyden indicated he is working on a proposal that "would impose a 5 percent penalty on a big corporation's total payroll if any workers earn less than a certain amount." The penalty, he said, "would increase over time." Wyden added that he also intends to propose a tax credit to encourage "the smallest of small businesses" to increase employee wages.
URL: https://www.finance.senate.gov/chairmans-news/wyden-statement-on-minimum-wage-plan-b

While a tax-based approach that raises taxes on companies not paying wages of at least $15 per hour may survive the Byrd Rule (though even that isn't guaranteed), it is far from certain that there will be at least 50 votes to protect such a provision from a likely amendment to strike it offered by a member of the Senate.

Overrule the parliamentarian?: A separate line of thinking within the progressive wing of the Democratic party holds that, since the Senate parliamentarian's rulings are advisory in nature, Senate Democrats – or Vice President Kamala Harris in her capacity as president of the Senate – could ignore the advisory opinion of the parliamentarian and make a minimum wage increase in order under reconciliation.

"…[A]n unelected parliamentarian does not get to deprive 32 million Americans [of] the raise they deserve," said Rep. Ro Khanna, D-Calif., on February 25. "This is an advisory, not a ruling. VP Harris needs to disregard and rule a $15 minimum wage in order."

But again, Senate Democrats ultimately may not have the votes even within their own ranks to execute on such a move.

As a result, some observers feel the likeliest path forward for a direct change in the minimum wage might be on a separate track outside the budget reconciliation process – a notion supported by the White House itself in a statement released February 25 by Press Secretary Jen Psaki.

"[President Biden] respects the parliamentarian's decision and the Senate's process," Psaki said. "He will work with leaders in Congress to determine the best path forward because no one in this country should work full time and live in poverty."

Other Byrd rule pronouncements in the wings?: There also has been some discussion that a provision in the House-passed measure that would require the Treasury Department to set up a mechanism to make the expanded child tax credit available to taxpayers in the form of advance monthly installment payments in 2021 may not have a direct budget impact and therefore also may run afoul of the Byrd Rule. Democratic leaders reportedly planned to modify the language of the provision to call for "periodic" rather than "monthly" payments in an effort to ensure Byrd Rule compliance.

At press time, however, the parliamentarian had not yet issued a formal ruling – at least not publicly – on whether that provision could move under reconciliation without being subject to a 60-vote point of order.

Coming up: Another ‘vote-a-rama’

The Senate is expected to take up the House-passed legislation during the week of March 1. Under the rules governing the process, reconciliation legislation is afforded 20 hours of debate on the Senate floor. However, much like consideration of a budget resolution that can tee-up the reconciliation process, after the set debate time has lapsed there is a process – known as the “vote-a-rama” – that typically unfolds which allows lawmakers to offer an unlimited number of amendments to the underlying measure with little or no debate.

Exactly what amendments may be offered and voted upon – including the expected tax-focused minimum wage amendment from Sen. Sanders – and when those votes will take place, remain unclear at press time.

The fact that the Senate will have to amend the House-passed bill to address Byrd Rule concerns (and possibly make other changes) means that once the Senate completes its work, the amended legislation will have to return to the House for another vote before it can be forwarded to President Biden’s desk. House Democratic leaders have indicated that they hope to take up the amended bill the week of March 8.

Democrats aim to complete action on the American Rescue Plan prior to March 14 when certain federal enhancements to unemployment insurance most recently enacted as part of the Consolidated Appropriations Act, 2021, are scheduled to lapse.

— Alex Brosseau and Michael DeHoff
Tax Policy Group
Deloitte Tax LLP