Finance Republicans press Batchelder on White House tax proposals

Republican members of the Senate Finance Committee pressed New York University School of Law Professor Lily Batchelder with questions about the Biden administration's proposal to change the rules for global intangible low-taxed income (GILTI), multilateral discussions on international tax reform, and efforts to address the tax gap during a May 25 hearing to consider her nomination to serve as Treasury assistant secretary for tax policy.

The panel also questioned nominees for other Treasury posts, including Jonathan Davidson (assistant secretary of legislative affairs), Nellie Liang (undersecretary for domestic finance), and Ben Harris (assistant secretary for economic policy).

GILTI

Sen. Rob Portman, R-Ohio, expressed concern that a proposal in the president's American Jobs Plan to double the tax rate on GILTI to 21 percent – especially while retaining the 20 percent foreign tax credit "haircut" on GILTI – would put US companies at a competitive disadvantage against other multinationals.

Batchelder, who was the Finance Committee's chief tax counsel from 2010-2014 under then-Chairman Max Baucus, D-Mont., told Portman that she has a different perspective on the president's proposal.

"While I agree that no other country has a minimum tax exactly like ours, they do have many provisions in place designed to limit the ability to shift profits to low-tax jurisdictions by companies resident in their countries that I think are analogous to GILTI," she said.

Portman characterized their views on this issue as "a fundamental disagreement."

OECD negotiations

The committee's top Republican, Sen. Mike Crapo of Idaho, also spoke to the plan to increase the GILTI rate, especially while negotiations are still ongoing through the G-20 and Organisation for Economic Cooperation and Development (OECD) about a global minimum tax.

"I'd encourage you if you're confirmed to use your voice at Treasury to advocate that the US…not pursue raising our taxes before there is even an OECD agreement," Crapo said. (Crapo discussed his concerns about the international tax negotiations at length in a May 24 letter to Treasury Secretary Janet Yellen. See separate coverage in this issue for details.)

Continuing the discussion of OECD negotiations, Sen. James Lankford, R-Okla., raised a concern that an agreement reached through these talks might not include China or might even provide some kind of exception for China. Such a result, he said, could give that nation a further competitive advantage over the US.

Batchelder said she shared the concern about US competitiveness but added she does not believe that would be the outcome, even if China was not part of the agreement – while noting that she has "no reason to think they wouldn't be."

"As I understand the way these negotiations are being structured, if there was an agreement on an international minimum tax, it would not be necessary for every country to sign on in order for it to apply, with some large force, throughout the globe," she said, referencing the enforcement mechanisms proposed in the most recent blueprint from the OECD on its minimum tax plan (known as Pillar 2).

Lankford also pressed Batchelder on the question of whether the administration might be able to agree to international tax changes that would impact US companies without seeking approval from Congress, even as she committed to keeping Congress fully informed about international negotiations and stated her understanding that any treaty would have to go through the Senate.

"You don't know of a way taxes could be increased on American companies or American taxpayers through [an] executive agreement the administration would make without going through Congress?" Lankford asked in response. "There has been some conversation that the administration is examining ways to be able to change tax policy without going through Congress, and so we'll follow up on that in the days ahead," he said.

Tax gap

Several members of the committee brought up the tax gap, the difference between the amount of tax owed to the government and the amount actually collected. This issue has been an active area of discussion recently as the Biden administration hopes to increase IRS funding specifically for enforcement activities so that the agency is better equipped to identify sophisticated noncompliance activities by corporate entities and wealthy individuals and collect a greater share of the revenue owed to the government.

In line with comments from IRS Commissioner Charles Rettig in April, Batchelder said she believes the current official estimate of the gross annual tax gap – $442 billion a year – is likely understated. (For prior coverage of Rettig's comments, see *Tax News & Views*, Vol. 21, No. 20, Apr. 16, 2021.) That estimate is based on data from 2011-13, and Batchelder noted that the IRS's budget has declined since then, which she speculated has led to weaker enforcement, and the US economy has grown. She recommended that the tax gap estimates be updated "much more frequently – ideally annually."
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210416_3.html

Batchelder endorsed the Biden administration's proposals in the American Families Plan to increase audits of large corporations and high-net-worth individuals and said she believes the revenue the White House assumes could be raised through this activity – $700 billion in the first decade and $1.6 trillion in the second – "might be an underestimate," as it does not account for improved IT systems, additional taxpayer services, or the indirect effects of enforcement on voluntary compliance. On this last point, she noted one statistic that "amazed" her is the low audit rate of partnerships.

“There are some large law firms with thousands of attorneys. Partners make more than $1 million a year, and I find it hard to believe that if one knows that your audit rate is 0.00004 percent that that would not affect voluntary compliance,” Batchelder said.

Sen. Elizabeth Warren, D-Mass., took the opportunity to highlight the Restoring the IRS Act, a bill she introduced May 24 that would classify the enforcement component of the IRS’s budget as mandatory spending so the Service can better focus its audit efforts on the corporations and wealthy individuals.

Stepped-up basis

GOP Sens. Charles Grassley of Iowa and John Thune of South Dakota both expressed concern that a proposal in President Biden’s American Families Plan to repeal stepped-up basis at death would have detrimental effects on family farms and closely held businesses.

Batchelder replied that she understands the American Families Plan proposes an exception for farms and small businesses as long as they continue to be owned and operated by the family. This exception would be in addition to the administration’s proposed increase in the capital gains rate that would also protect the first $1 million in gains for a single filer or $2 million for a couple.

Federal unemployment insurance assistance

Echoing a concern that has been raised by some businesses and Republican lawmakers, Sen. Lankford asked nominee Ben Harris about the economic effect of the federal supplement to state-level unemployment assistance programs that was enacted on a short-term basis in COVID relief legislation in 2020 and renewed in the American Rescue Plan earlier this year. According to Lankford, Oklahoma currently has “the largest number of job openings in history” and the enhanced unemployment benefits mean some people are making more money from this assistance than they would if they accepted a job.

“In my discussions with various business leaders and companies, I have heard this concern, that they were having a hard time in certain instances hiring workers,” Harris replied, but added, “I also committed to being evidenced based, and looking at studies that have come out from the San Francisco Fed [and] various other educational institutions, universities, I have not seen evidence showing that the $300 plus-up has yet been a substantial detriment to hiring.”

“I would invite you meet with any business you want to in Oklahoma,” Lankford countered. “I can drive you around and let you get to meet a lot of folks who would disagree with the San Francisco Fed.”

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