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No apparent signs of life for Smith-Wyden tax bill as Senate lurches toward August recess

The Senate wrapped up another week without holding a floor vote on bipartisan tax legislation crafted by House Ways and Means Committee Chairman Jason Smith, R-Mo., and Senate Finance Committee Chairman Ron Wyden, D-Ore., that would, among other things, provide temporary tax relief to businesses and short-term enhancements to the child tax credit. And with no announced plans by Democratic leaders to bring the bill to the floor before lawmakers adjourn in just a matter of days for an extended summer recess, and with work on fiscal year 2025 appropriations bills expected to dominate the legislative agenda once lawmakers return to Capitol Hill for what is expected to be an abbreviated pre-election work period in September, prospects that the chamber will vote on the long-stalled bill before the November elections appear to be dwindling.

Tax Relief for American Families and Workers Act

The Smith-Wyden tax package, dubbed the Tax Relief for American Families and Workers Act (H.R. 7024), includes provisions that, at a high level, would:
URL: https://www.congress.gov/bill/118th-congress/house-bill/7024/text

- Reverse (through 2025) certain business-unfriendly tax provisions related to the treatment of research expenditures, bonus depreciation, and the deduction for business interest expenses that were included in the Tax Cuts and Jobs Act of 2017 (TCJA, P.L. 115-97) but did not take effect until several years after that measure was enacted;
  URL: https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf
- Enhance the child tax credit;
- Expand the low-income housing tax credit;
- Relieve double-taxation on investments between the US and Taiwan; and
- Provide tax relief for victims of certain federally declared disasters.

The cost of this tax relief would be offset by provisions that would tighten the rules for claiming the pandemic-era employee retention tax credit (ERTC)—notably, by accelerating the deadline for filing new claims to January 31, 2024 (from the current-law deadline of April 15, 2025)—and by expanding the IRS's authority to investigate questionable ERTC claims.

Approved in the House, stuck in the Senate: The measure passed by a large bipartisan majority in the House on January 31, but it remains stuck in the Senate, where opposition has come chiefly from the Finance Committee's ranking Republican, Sen. Mike Crapo of Idaho, and other GOP lawmakers who have criticized the bill for, among other things, including a lookback rule in the child tax credit provision that would allow taxpayers to qualify for the expanded credit (for tax years 2024 and 2025) based on their prior-year income—something they argue would disconnect the credit from work. Republicans also have expressed concerns about the inclusion of a revenue offset—the proposed strictures on ERTC claims—arguing that paying for extensions of current law would set a risky precedent when lawmakers confront the multi-trillion-dollar expiration of large swaths of the TCJA at the end of 2025. (Many Republicans have argued in the past that, as a matter of principle, extensions of current law should not be offset.)

While a handful of GOP senators have publicly expressed their support for the bill, most have indicated that they will follow Crapo's lead in opposing it. With Republicans hoping to retake the Senate majority in the upcoming election, Crapo could be the incoming chair of Finance, and, in any event, he will hold significant sway in next year's high-stakes tax discussions.

GOP Sen. Roger Marshall of Kansas, who has backed the measure, basically said the quiet part out loud this week when he told reporters, “I think that [Republicans have] decided that if we wait [until] we [have] the Senate majority, that we will have a better chance of getting a little bit better bill through the finish line.”

Crapo and Finance Committee Chairman Wyden have previously said they want to reach a deal that would allow the bill to move through the Senate this year, but any negotiations that had been taking place between the two tax leaders reportedly have long since broken down.

In the absence of a compromise between the Senate’s two top taxwriters, Majority Leader Charles Schumer, D-N.Y., thus far has resisted calls from Democratic members facing tough re-election bids in November to bring the measure directly to the chamber floor. Such a move is seen as almost guaranteed to fail, given the general consensus that the bill would not garner enough GOP support to secure the 60 votes it would need to clear procedural hurdles in the chamber, although some Democrats have argued that such an outcome would give them a politically useful opportunity to showcase Republicans as standing in the way of family-friendly tax policy changes.

Talking to reporters this week, Wyden described the prevailing attitude among Senate Republicans this way: “It sounds a little bit like, ‘Hey, we’ll wait until 2025, then we can get [those] corporate tax breaks for our buddies, and who cares about the family stuff.’”

Calendar constraints: The Senate is currently scheduled to remain in session through August 2 before adjourning for a five-week summer recess. If a vote is not held by the start of the recess, it is viewed as far less likely to occur ahead of the presidential and congressional elections, given the mountain of appropriations bills that will await Congress between its return on September 9 and its planned departure for a final trek down the campaign trail at the beginning of October. To date, the House has passed 5 of the 12 appropriations bills required to fund the federal government for fiscal year 2025, which begins on October 1, and the Senate has approved none. (See separate coverage in this issue for details on recent appropriations developments in both chambers.)
URL: https://crsreports.congress.gov/AppropriationsStatusTable

Wyden told reporters this week that he is “continuing to prosecute the case” for a pre-recess Senate floor vote and is “making the point of what’s at stake” if lawmakers do not act.

Smith pushes for full R&D expensing at Ways and Means field hearing

In a related development, House Ways and Means Committee Chairman Jason Smith used a recent committee field hearing in Salt Lake City on how the tax code can foster medical innovation as a platform to reiterate his call for a return to immediate deductibility of expenses for research and development under section 174. (Under the TCJA, R&D expenditures paid or incurred in taxable years beginning after December 31, 2021, must be capitalized and amortized over 5 years for research conducted within the US and 15 years for research conducted outside the US. Reversing this provision through 2025 is one of the key components of the Smith-Wyden tax package.)

Fostering R&D investments: Smith commented in his opening statement at the July 12 hearing (which the panel's Democrats chose not to attend) that House GOP taxwriters are looking ahead to 2025 and considering how the tax code can "foster an economy where innovators want to take risks and invest in more R&D." He specifically pointed to restoring the prior-law treatment of R&D expenses, noting that the deduction supports 2 million jobs directly and 21 million more indirectly."

One of the GOP's invited witnesses, Frank Watanabe of Arcutis Biotherapeutics, agreed with Smith that full deductibility of R&D expenses is critical for small start-up companies such as his.

"The challenge there is that small companies are paying taxes even though they're not making any money, because they're not able to fully deduct their R&D expenses. In particular for smaller companies, that can be crippling," Watanabe said.

Another witness, Kelvyn Cullimore of BioUtah, told the panel in his opening statement that "[r]obust R&D is essential to creating solutions to serious medical conditions; however, policies like the Inflation Reduction Act or changes to R&D expensing under the Tax Cuts and Jobs Act can put brakes on the R&D momentum."

Corporate tax rate: Taxwriter Carol Miller, R-W.Va., who chairs one of the 10 GOP tax teams that Chairman Smith and Ways and Means Tax Subcommittee Chairman Mike Kelly, R-Pa., have formed to examine specific issues related to the TCJA and consider how lawmakers might address them in 2025, commented that the issue she hears about most frequently in her role as leader of the Supply Chains team is the corporate tax rate. She asked Watanabe to discuss how the 21 percent rate enacted in the TCJA has benefited his company.
URL: https://waysandmeans.house.gov/2024/04/24/ways-means-chairman-smith-and-tax-subcommittee-chairman-kelly-announce-tax-teams-to-avert-2025-tax-cliff/

Watanabe replied that most smaller start-ups such as his are not currently profitable and therefore don't currently pay taxes. He noted, though, that "small biotechs exist inside of a much larger ecosystem" and that "any change that fosters the health of overall biotechnology sector in America, like the corporate tax code, will have a very positive effect on R&D."

"Large pharmaceutical companies . . . invest immense amounts of money in research and development," he said. "To the extent that they have to pay higher tax bills, all of those dollars are dollars that they will not then spend on R&D. . . ."

Monetizing NOLs: Responding to a broader question from Chairman Smith about how Congress could modify the tax code to encourage innovation among start-ups, Watanabe said that permitting unprofitable early-stage businesses to monetize their net operating losses (NOLs) "could make a meaningful difference in capital access for smaller companies."

Watanabe explained in a subsequent exchange with GOP taxwriter Blake Moore of Utah that under current law, "you can't use your NOLs until you're profitable." Having the ability to "sell our NOLs to another company and bring that money in to invest in R&D immediately would make a huge difference for us and for earlier-stage companies."

Kelvyn Cullimore of BioUtah likewise told Moore that allowing unprofitable companies to monetize their NOLs would “generate capital that further advances the work of start-up companies.”

Watanabe also pushed for changes to section 382, contending that under the current rules, bringing in new investments can cause a company to lose its ability to use NOLs.

Other suggested tax code changes: Watanabe cited the partial exclusion for gain from small-business stock under section 1202 as another critical tool for many small start-ups. “Preserving and expanding” the current law would be “an important opportunity to foster investment, especially in early-stage R&D companies,” he told Smith.

He also commented that the current passive activity loss rule “has significantly impaired the ability of investors to benefit from flowthrough losses from their investments.” Addressing that issue “would particularly foster investment in early-stage companies,” he said.

— Michael DeHoff
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House departs DC for summer recess, leaving FY 2025 appropriations in limbo

The House of Representatives cut its July work period short by one week and announced it would adjourn until Monday, September 9, after it became clear that the chamber’s efforts to advance fiscal year 2025 appropriations bills—including the one funding the Treasury Department and the IRS—had run aground due to internal GOP divisions and staunch Democratic opposition.

See you in September . . .

The House originally had been scheduled to be in session the week of July 29 in an effort to continue processing FY 2025 appropriations measures, but those plans fell apart July 23 when GOP leaders were forced to scrap a vote on legislation funding the Department of Energy and the Army Corps of Engineers due to conservative opposition.

Other spending bills, including the Financial Services and General Government (FSGG) appropriations bill—which would provide full-year funding to the Internal Revenue Service—have met similar fates in recent weeks. In the case of the FSGG bill, a provision that would block the District of Columbia from using federal funds for abortion-related services drew the ire of some moderate Republicans.

Meanwhile, that bill's steep cuts to the IRS budget—the measure would trim $2.2 billion, or more than 16 percent, from current-year funding levels—further cemented Democratic opposition. (For prior coverage, see *Tax News & Views*, Vol. 25, No. 21, June 14, 2014.)
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240614_1.html

Although the chamber has managed to pass 5 of the 12 annual appropriations bills—including for the Departments of Defense and Homeland Security—for the upcoming fiscal year which starts on October 1, GOP lawmakers have struggled to unite around the others.

House Republican leaders can afford to lose only a small handful votes from within their own ranks given their razor-thin majority and the blanket opposition from Democrats.

"With a small [Republican] majority and no Democratic votes, they're all tough," House Majority Leader Steve Scalise, R-La., said July 23, referring to Republicans' challenge in passing their partisan spending bills.

In crafting their spending measures for fiscal year 2025, House GOP appropriators generally have adhered to the debt limit and appropriations pact agreed to last summer by President Biden and former Speaker Kevin McCarthy, R-Calif., known as the Fiscal Responsibility Act of 2023 (P.L. 118-5), but have ignored certain informal "side deals" that Biden and McCarthy reached in negotiating that legislation.
URL: https://www.congress.gov/118/plaws/publ5/PLAW-118publ5.pdf

The Fiscal Responsibility Act, among other things, placed statutory caps on appropriations for fiscal years 2024 and 2025, although the various side deals allowed for an additional amount of spending above those caps. One such agreement, for example, called for rescinding $10 billion in each of fiscal years 2024 and 2025 from the $80 billion tranche of mandatory funds the IRS received as part of the Inflation Reduction Act of 2022 (P.L. 117-169) and reallocating it toward other domestic accounts; ultimately, however, the entire $20 billion was rescinded and reallocated as part of the fiscal year 2024 appropriations process.
URL: https://www.taxnotes.com/research/federal/legislative-documents/public-laws-and-legislative-history/inflation-reduction-act-of-2022-p.l-117-169/7dybc

House Republicans not only have bypassed the Biden-McCarthy side deals, they have in fact gone a step further by proposing to cut domestic accounts in favor of higher spending levels for defense, homeland security, and veterans.

Senate developments

Meanwhile, across the Capitol, Democrats and Republicans on the Senate Appropriations Committee have been advancing appropriations bills for the upcoming fiscal year that adhere to the Fiscal Responsibility Act's cap (as modified by the Biden-McCarthy side deals) and in some cases exceed it by designating certain spending as "emergency supplemental" funding, thus placing it outside the statutory cap's enforcement mechanism.

To that end, a deal notched by Senate Appropriations Committee Chair Patty Murray, D-Wash., and ranking member Susan Collins, R-Maine, would add $34.5 billion in fiscal 2025 spending—$21 billion for defense and $13.5 billion for nondefense—through an emergency designation.

Action on IRS funding expected August 1: The Appropriations Committee is expected to address the IRS budget for the coming fiscal year when it takes up its version of a Financial Services and General Government package during a mark-up scheduled for August 1. Although the text of that legislation has not yet been released, the measure is expected to match the Biden administration's proposed topline request for the IRS of $12.3 billion—an amount consistent with the agency's fiscal year 2023 and 2024 allocations and in line with the Fiscal Responsibility Act's discretionary spending cap.

Daines urges cuts to OECD discretionary funding: In other tax-related developments, National Republican Senatorial Campaign Committee Chairman and Senate Finance Committee member Steve Daines, R-Mont., spearheaded a letter to Appropriations Chair Murray and ranking member Collins calling for elimination of US discretionary funding for the OECD, the organization leading the global tax pact that would revise the existing profit allocation and nexus rules determining who gets to tax businesses (known as Pillar One) and implement a global minimum tax to ensure large multinational businesses pay a certain level of tax somewhere (known as Pillar Two).
URL: https://www.daines.senate.gov/wp-content/uploads/2024/07/2024.7.25_Final-OECD-Appropriations-Letter1.pdf

The letter, which was first reported by *Politico* and is signed by eight Senate Republican taxwriters—including Finance Committee ranking Republican Mike Crapo of Idaho—contends that "the OECD's global tax policy agenda has fallen woefully short of its original mission and strayed far from its historical role, shifting from recommendations and best practices to complex, anti-growth mandates" and that the emerging Pillar One and Pillar Two agreements have "resulted in outcomes adverse to US economic interests."

House and Senate Republicans have long opposed the OECD agreement and have accused the Biden administration of negotiating with the OECD on behalf of the US without adequately consulting with Congress—a claim the White House disputes. At a Senate Finance Committee hearing this past March to discuss President Biden's FY 2025 budget blueprint with Treasury Secretary Janet Yellen, Daines denounced the OECD agreement as "a terrible deal" that would "raise taxes on US companies" and "send that money overseas to Communist China and line the pockets of European bureaucrats." (For prior coverage, see *Tax News & Views*, Vol. 25, No. 13, Mar. 22, 2024.)
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240322_1.html

It's worth noting that Senate appropriators this week voted 24-5 to approve a State, Foreign Operations, and Related Programs appropriations bill for the coming fiscal year that, according to a committee summary, "fully fund[s] our dues to the United Nations . . . and other international organizations, consistent with applicable statutory caps." Committee approval came on July 25—the same day as Daines' letter to the panel's leaders.
URL: https://www.appropriations.senate.gov/imo/media/doc/fy25_sfops_senate_bill_summary.pdf

The House version of that legislation (H.R. 8771), which cleared the chamber of June 28, zeroes out US assessments for the OECD. A House Appropriations Committee report notes that the GOP majority "does not

support the work of the OECD that promotes higher tax rates, corporate tax floors, and digital tax schemes that target the American tax base."
URL: https://www.congress.gov/118/bills/hr8771/BILLS-118hr8771eh.pdf
URL: https://www.congress.gov/118/crpt/hrpt554/CRPT-118hrpt554.pdf

Continuing resolution almost assured

The vast gap between House Republicans and Senate Democrats on fiscal 2025 appropriations virtually guarantees that a "continuing resolution" (CR) at current-year spending levels will need to be enacted in order to keep the government's doors open past September 30 when fiscal year 2024 draws to a close.

Even Rep. Marjorie Taylor Greene, R-Ga., a persistent thorn in the sides of Republican leaders and Democrats alike and an opponent of continuing resolutions, appeared resigned to a CR in a July 24 social media post.

"Trying to pass 12 separate Republican appropriations bills, that the Democrat controlled Senate will NEVER vote on," Greene wrote. "For what? Messaging?"

"When the reality that we ALL know is that we will be forced to vote on a CR by Sept 30th which is the government funding deadline."

It remains unclear, however, whether lawmakers will seek to punt the funding discussion into the post-election "lame duck" session or instead seek a longer-term stopgap into 2025.

— Alex Brosseau and Michael DeHoff
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Senate confirms one Tax Court judge, Finance Committee advances three more nominees

The Tax Court came closer to having a full bench this week as the Senate confirmed one new judge to a 15-year term and queued up a floor vote on a second nominee, while the Finance Committee sent another three nominees to the chamber for consideration. Added to the two others that the taxwriting panel already approved this summer, there are now five nominees waiting for approval by the Senate who, if confirmed, would fill the last remaining vacancies on the 19-seat court.

Way confirmed, floor vote for Landy pending

Kashi Way, who has served as a senior legislation counsel at the Joint Committee on Taxation, was confirmed by the Senate on July 25 by a vote of 79-16.

A day earlier, the Senate invoked cloture on the nomination of Adam Landy, who currently is a special trial judge on the Tax Court. Landy's nomination is scheduled for a floor vote on July 29.

Way and Landy were cleared by the Finance panel last month. (For prior coverage, see *Tax News & Views*, Vol. 25, No. 21, June 14, 2024.)
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240614_2.html

Latest Finance Committee developments

Also on July 25, the Finance Committee voted to advance the nominations of Jeffrey Arbeit, Cathy Fung, and Benjamin Guider III. The votes for Arbeit and Guider were unanimous (27-0), while eight GOP members voted against Fung (for a tally of 19-8).

Arbeit has spent the past nine years as a staff lawyer at the Joint Committee on Taxation and previously clerked for a Tax Court judge; Fung, who has worked in the IRS Office of Chief Counsel since 2009 and currently is a deputy counsel, began her legal career as an attorney-advisor at the court; and Guider is an affordable housing lawyer, currently with Longwell Riess. (For coverage of their appearance before the Finance Committee, see *Tax News & Views*, Vol. 25, No. 24, July 12, 2024.)
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240712_3.html

A sixth nominee, Rose Jenkins, who was advanced by the Finance Committee last month (along with Way and Landy) also awaits a vote by the full Senate. Jenkins is currently an attorney in the office of the IRS Associate Chief Counsel (Procedure and Administration).

Finance Committee Chairman Ron Wyden, D-Ore., said July 25 that he hopes for a floor vote on Jenkins soon, noting that Senate Majority Leader Charles Schumer, D-N.Y., "has assured me that it's a priority for him."

"Hopefully we can move all of these nominations soon," Wyden said.

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Treasury and IRS release final rules on the calculation of gain or loss on digital assets

The Treasury Department and the IRS released final regulations on June 28 addressing the calculation of gain or loss in digital asset transactions under sections 1001 and 1012. The final regulations will govern the

determination of a taxpayer's amount realized and adjusted basis in digital asset transactions and the allocation of digital asset transaction costs.
URL: https://www.taxnotes.com/research/federal/treasury-decisions/final-regs-address-digital-asset-sales-and-exchanges/7kf03

These regulations accompanied final rules on digital asset broker reporting. (For coverage of the broker reporting rules, see *Tax News & Views*, Vol. 25, No. 24, July 12, 2024.) The package of final regulations finalized proposed regulations that were published on August 29, 2023.
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240712_6.html

In connection with the final regulations, the IRS released Rev. Proc. 2024-28, which provides transition guidance to assist certain taxpayers in applying the final regulations to digital assets acquired prior to 2025.
URL: https://www.taxnotes.com/research/federal/irs-guidance/revenue-procedures/irs-provides-basis-allocation-safe-harbor-digital-assets/7kf04

Find out more

A new alert from Deloitte Tax LLP provides an overview of the final regulations.
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240726_4_suppA.pdf

— Michael DeHoff
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Menendez to resign from Senate, creating Democratic Finance Committee vacancy

Senate Finance Committee member Robert Menendez, D-N.J., announced this week that he will resign from Congress in the wake of his recent conviction on federal bribery and corruption charges. His resignation takes effect on August 20.

Menendez joined the Senate in 2006 after serving 13 years in the House of Representatives. He was appointed to the Finance Committee in 2009 and is the fourth-ranking Democrat on the panel. He currently serves on the Subcommittee on Taxation and IRS Oversight, the Subcommittee on Health Care, and the Subcommittee on International Trade, Customs, and Global Competitiveness.

Menendez's resignation will leave the Finance Committee with 13 Democratic members and 13 Republicans. As of press time, Senate Democratic leaders had not announced a timeline for filling the pending vacancy on the taxwriting panel.

His departure from Capitol Hill also will leave Democrats with just a single-vote majority on the Senate floor until his Senate seat is filled. (The party headcount in the chamber following his resignation will be 46 Democrats, 4 Independents who receive their committee assignments from the Democratic majority, and 49 Republicans.) New Jersey Democratic Gov. Phil Murphy is expected to name a replacement to serve out the remainder of Menendez's Senate term, which expires next January, although it is unclear when that appointment will be announced.

— Michael DeHoff
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Finance Committee to hold hearing on economic development tax incentives

The Senate Finance Committee announced this week that it will hold a hearing on July 30 at 10:00 a.m. to discuss "tax tools for local economic development."

Invited witnesses as of press time include C. LaShea Lofton, deputy city manager for the City of Dayton, Ohio; Julia Nelmark, president and CEO of the Midwest Minnesota Community Development Corporation in Detroit Lakes, Minn.; Michael J. Novogradac, managing partner at Novogradac in San Francisco; and Shay Hawkins, president of the Opportunity Funds Association in Washington.

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