Vulnerable Senate Democrats push for floor action on stalled bipartisan tax package

In the face of tough races this election season that could determine majority control of the Senate next year, several Democrats in the chamber this week urged Majority Leader Charles Schumer, D-N.Y., to schedule a vote on a bipartisan House-passed tax bill that, among other things, would provide temporary tax relief to businesses and short-term enhancements to the child tax credit. The measure has been stalled in the Senate for several months in the face of opposition from the chamber's top Republican taxwriter, but vulnerable Democrats are seeking the opportunity to show their support for family-friendly tax policy ahead of Election Day on November 5.

Democratic Sens. Sherrod Brown of Ohio, Jacky Rosen of Nevada, and Jon Tester of Montana told *Axios* that they have asked Schumer to bring the $78 billion tax package to the floor. Brown and Tester, who both serve on the Senate Finance Committee, are the two Democrats up for re-election this year in states that voted for then-President Donald Trump in 2020. Rosen's seat is another one that Republicans view as top pick-up opportunity, and she specifically cited the child tax credit as the reason she wants a chance to vote on the broader revenue package.

Tax Relief for American Families and Workers Act

The Tax Relief for American Families and Workers Act (H.R. 7024), which was negotiated by Finance Committee Chairman Ron Wyden, D-Ore., and House Ways and Means Committee Chairman Jason Smith, R-Mo., and passed by a large bipartisan majority in the House on January 31, includes provisions to:
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 these provisions 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. The measure also would expand the IRS's authority to investigate questionable ERTC claims.

Crapo remains opposed: Opposition to the broader tax package in the Senate comes chiefly from the Finance Committee's ranking Republican, Sen. Mike Crapo of Idaho, and other GOP senators, 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.

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.

While both Crapo and Wyden have said they want to reach a deal on a tax bill that can pass this year—and elements such as the US-Taiwan tax agreement and disaster relief provisions have the support of both camps—any negotiations that had been taking place between the two tax leaders reportedly have broken down. Without an agreement, Schumer could put the bill directly on the Senate floor, but he has not done so to date given the general consensus that it would not garner enough GOP support to secure the 60 votes he would need to clear procedural hurdles in the chamber.

Passing the bill in the Senate and sending it to President Biden for his signature is the hope of advocates, of course—including businesses that have lobbied for several years on R&D amortization, bonus depreciation, and less stringent business interest deduction limits—but some also see benefit to Democrats in a failed vote that would allow them to highlight Republicans voting against a family-friendly child tax credit and other provisions favored by voters.

"I hope we can get a vote on it, because that's what we're here to do," Tester told *Axios* June 17.

Majority Leader Schumer declined to comment this week on the potential for a vote, according to *Axios*, though he told *Politico* that the bill is "not dead."

"I supported it the minute it was announced. I think it's a good bill," he said June 18. "I'm currently working with Chairman Wyden to try and get something done."

Calendar constraints: The Senate is away for a local work period the week of June 24, followed by a week-long recess for Independence Day, so if there is to be a vote at all it wouldn't come until sometime after July 8. If the Senate does not vote before leaving for its annual August recess, it is viewed as far less likely to occur, given the fiscal year-end workload that will await Congress between its return on September 9 and its planned departure for election campaigning at the beginning of October.

Lawmakers seek clarity on ERTC backlog, IRS provides an update

As already noted, the revenue-raising portion of the Tax Relief for American Families and Workers Act would tighten the rules for employers to claim the pandemic-era employee retention tax credit (ERTC) and strengthen the IRS's audit authority over the credit claims. While the bill is being held up in the Senate, two GOP lawmakers have emphasized to the IRS that its ongoing moratorium on processing new ERTC claims is causing hardship for small businesses. Processing of ERTC claims has been hampered in recent months as the IRS attempts to weed out a growing number of fraudulent or questionable filings—a problem that the ERTC provisions in the House-passed tax bill seek to address—and the agency implemented a moratorium on processing claims received on or after September 14, 2023. The IRS originally said the pause would be in effect through the end of 2023, but it remains in place with no end date in sight. (The agency has attributed the influx of fraudulent ETRC claims to unscrupulous third-party promoters who have convinced unsuspecting businesses to file for the credit when they are not, in fact, eligible for it.)

In a letter to IRS Commissioner Daniel Werfel on June 11, House Ways and Means Committee member Claudia Tenney, R-N.Y., acknowledged "the significant levels of fraud at play" in the ERTC program, but urged the IRS to "expedite [its] work to make sure that all legitimate claims are paid as quickly as possible."

Sen. Tommy Tuberville, R-Ala., asked Werfel for clarity on the ERTC claims backlog and the agency's plans to adjudicate all of the claims in a June 13 letter to the IRS commissioner.

"It is unacceptable to continue punishing American employers who fought through an unprecedented disruption to their businesses while keeping employees on the payroll," Tuberville wrote. "I continually hear from small- and medium-sized business owners in my state that circumstances have become dire."

The IRS, for its part, shed some light on its path forward on the ERTC backlog when it announced June 20 that a just-completed review of 1 million pending claims submitted before the moratorium indicates that between 10 and 20 percent "show clear signs of being erroneous" and present the "highest risk" of fraud. "Tens of thousands" of filings in this group—some of which presented "warning signals that clearly fall outside the guidelines established by Congress"—will be denied in the coming weeks, the IRS said.
URL: https://www.irs.gov/newsroom/irs-enters-next-stage-of-employee-retention-credit-work-review-indicates-vast-majority-show-risk-of-being-improper

A second group, accounting for between 60 and 70 percent of the filings reviewed, "show[s] an unacceptable level of risk" and will be subject to additional scrutiny.

Another 10 to 20 percent of claims reviewed fall into the "low-risk" category. The IRS said it "will begin judiciously processing more of these claims," and "anticipates some of the first payments in this group will go out later this summer." The agency cautioned, however, that "these will go out at a dramatically slower pace than payments that went out during the pandemic period given the need for increased scrutiny." The oldest claims generally will be processed first, the IRS said, and "no claims submitted during the moratorium period will be processed at this time."

Commissioner Werfel emphasized in comments to reporters June 20 that congressional action on the ERTC provisions in the Tax Relief for American Families and Workers Act would be a critical step in enabling the IRS to lift its moratorium on processing new claims.

"We believe it is essential for Congress to enact the [ERTC]-specific provisions in the Wyden-Smith tax bill that will eliminate the risk of a new flood of incoming claims coming if we lift the moratorium," Werfel said.

— Storme Sixeas
Tax Policy Group
Deloitte Tax LLP