Wyden plugs mark-to-market tax regime, knocks 199A deduction during hearing on the 2025 tax cliff

Senate Finance Committee Chairman Ron Wyden, D-Ore., this week called on Congress to adopt an annual mark-to-market regime for high-income households and also criticized the design of the section 199A deduction for certain passthrough business income.

In his opening statement at the September 12 Finance Committee hearing he convened to examine "the 2025 tax policy debate and tax-avoidance strategies," Wyden argued that the federal tax code as currently enacted gives the wealthiest individuals, whose income typically is derived from investment gains, the flexibility to choose when—or if—they will have to pay income taxes based on when they decide to realize those gains. Lower- and middle-class taxpayers, on the other hand, have income that generally is derived from wages and are required to pay tax as that income is earned. Moreover, Wyden noted, income from investment gains generally is taxed at more favorable rates than income from wages.

'Buy, borrow, die'

One particularly notable—and legal—example of how the tax code allows the most affluent individuals to minimize their tax bills, according to Wyden, is the so-called "buy, borrow, die" strategy in which a wealthy investor buys an asset such as a business, borrows against that asset's appreciating and untaxed value over a period of years and then passes the asset on to their heirs at death subject to minimal taxes, or in some cases no tax at all.

"If billionaires want to avoid paying taxes forever, they buy, borrow, die," Wyden said.

"An ultrawealthy investor uses his riches to acquire valuable assets," Wyden continued. "He watches them appreciate, and he borrows against that value to generate cash. Then he sits on those assets, enjoys all the cash he's pocketed, and when he dies, any tax owed on that increase in value disappears into the ledgers of history."

Wyden cited the prevalence of the "buy, borrow, die" strategy as the basis for his criticism of a report released by the Joint Committee on Taxation staff in conjunction with the hearing that stated, among other findings, that the nation's wealthiest individuals paid an average federal tax rate of 34 percent in 2019.
URL: https://www.jct.gov/publications/2024/jcx-47-24/

"I would just urge Americans not to be fooled here. This is the funny math you come up with when you ignore, 'buy, borrow and die,'" Wyden said.

Republican taxwriter John Barrasso of Wyoming subsequently countered that "[w]hen you look at the data, instead of listening to the misleading rhetoric we're hearing, it looks like high income earners shoulder a massive amount of the tax burden."

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Mark-to-market proposals: Although Wyden did not discuss a specific mark-to-market tax proposal at the hearing, he released a detailed white paper in 2019 proposing an annual mark-to-market regime for high-income households that would also tax resulting capital gains at ordinary rates. (For details on the white paper, see *Tax News & Views*, Vol. 20, No. 29, Sep. 13, 2019.) He also released a draft proposal for a "billionaires income tax" with a mark-to-market component in 2021.
URL: https://www.finance.senate.gov/imo/media/doc/Treat%20Wealth%20Like%20Wages%20RM%20Wyden.pdf
URL: https://dhub.deloitte.com/Newsletters/Tax/2019/TNV/190913_2.html
URL: https://www.finance.senate.gov/chairmans-news/wyden-unveils-billionaires-income-tax

It is worth noting that Vice President Kamala Harris—the 2024 Democratic presidential nominee—has also confirmed her support for a broadly similar Biden administration proposal that would impose an annual 25 percent minimum tax on the unrealized gains and other income of taxpayers with wealth over $100 million. Harris also recently said that she supports raising the total capital gains rate (inclusive of an increased, 5 percent net investment income tax rate) to 33 percent for individuals with income over $1 million, a rate substantially lower than the 44.6 percent all-in capital gains rate proposed by President Biden for high-income taxpayers, but higher than the maximum combined rate of 23.8 percent that applies under current law. (See related coverage in this issue for additional details.)

Stepped-up basis: President Biden has also proposed eliminating so-called stepped-up basis at death—a policy which Vice President Harris has at least tacitly endorsed and is included in the Democratic platform for 2024 that the party officially adopted at its convention in Chicago last month, but which was strongly opposed by multiple GOP senators during this week's hearing.
URL: https://democrats.org/wp-content/uploads/2024/08/FINAL-MASTER-PLATFORM.pdf

Section 199A deduction

Wyden also came out swinging against the 20 percent deduction under tax code section 199A that applies to the qualified business income of certain passthrough businesses and which was enacted under the GOP's Tax Cuts and Jobs Act of 2017 (TCJA, P.L. 115-97).
URL: https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf

"Congress also needs to address the passthrough loophole [President] Trump created in 2017," Wyden said. "He claimed it was all about small businesses, but it was another bait and switch. It became another Trump policy that made the biggest winners out of high-income individuals like real estate moguls and oil and gas tycoons."

Importantly, however, Wyden is on the record for reforming—rather than repealing—the section 199A deduction.

Indeed, in 2021, Wyden introduced the Small Business Tax Fairness Act (text, summary), which he argued would simplify and better target the deduction, while netting billions of dollars of savings in the process.
URL: https://www.finance.senate.gov/imo/media/doc/7.19.21%20Small%20Business%20Tax%20Fairness%20Act.pdf
URL: https://www.finance.senate.gov/download/small-business-tax-fairness-act-one-pager

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Among other changes, Wyden's bill would eliminate the "specified trade or business" concept that partially determines eligibility for the deduction, streamline the formulas and limitations that determine the size of a qualifying taxpayer's deduction and—to help finance these changes and raise additional revenue—phase out the deduction for individuals earning more than $400,000. (Under the proposed phase-out schedule, taxpayers with earnings above $500,000 would be ineligible for any 199A deduction.)

Wyden alluded to a similar legislative construct during this week's hearing.

"[H]igh-earners don't need the [section 199A] break," he said, "but Democrats are going to stand by the pledge to protect those with incomes under $400,000, including small business owners."

Child tax credit

A handful of Democrats at the hearing also spoke out in favor of expanding the child tax credit as part of the negotiations next year when lawmakers address the scheduled expiration of the TCJA's temporary tax relief provisions benefiting individuals, estates, and passthrough entities. Many Democrats—both in the Senate and in the House—see this policy as critical to reducing the number of children living in poverty.

Indeed, the significant, but temporary, expansions made to the child credit in 2021 as part of the American Rescue Plan (P.L. 117-2)—which increased the credit from $2,000 per child to $3,600 per child ($3,000 for children aged 6 through 17), made the credit fully refundable, and allowed taxpayers to elect to receive the benefits as advanceable monthly payments rather than waiting to claim them when filing a tax return in the following year—have been estimated by Chairman Wyden and others to have cut child poverty in half.
URL: https://www.congress.gov/117/plaws/publ2/PLAW-117publ2.pdf

Additionally, pursuant to the TCJA, the maximum per-child credit amount is set to revert from $2,000 to $1,000 (that is, its pre-2018 level) after 2025.

"When I think about the results we saw [under the American Rescue Plan] and the results that we've seen in other countries that have similar child allowances where the work participation rates are actually higher than we have here in the United States of America because people have the money to be able to spend it on child care and stay at work . . . , it just goes to show we can make a real difference," said Finance Committee member Michael Bennet, D-Colo. (Bennet has authored child tax credit legislation mirroring the American Rescue Plan's changes.)

A far more modest set of child credit changes is also included in the Tax Relief for American Families and Workers Act (H.R. 7024), which Finance Committee Chairman Wyden negotiated with House Ways and Means Committee Chairman Jason Smith, R-Mo., and which passed the House by a wide bipartisan margin in January but has since been stalled in the Senate due to opposition from Finance Committee ranking Republican Mike Crapo of Idaho for, among other things, its child tax credit policy.
URL: https://www.congress.gov/118/bills/hr7024/BILLS-118hr7024eh.pdf

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Crapo lauds TCJA, argues for extension

On the other side of the dais, Republicans, including ranking member Mike Crapo—who could find himself in the chairman's seat next year should the GOP wrest control of the Senate from Democrats in the November elections—took issue with Wyden's view of the lack of fairness in the current tax code and instead argued in favor of extending the components of the TCJA which are slated to expire after 2025.

Unless lawmakers act, a slew of temporary changes on the individual side of the tax code put in place by the TCJA—including the law's lower marginal rates, expanded standard deduction, itemized deduction modifications, the section 199A deduction, and estate tax changes—will sunset after 2025, leading to a roughly $4.6 trillion net increase in revenues over the next decade, according to the latest projections by nonpartisan Congressional Budget Office.

"When it comes to 2025 tax policy, . . . those proposing all of these tax increases continue to avoid a fundamental question," Crapo argued. "Will they allow the Tax Cuts and Jobs Act to expire, and inflict multi-trillion dollar tax hikes on the American people?"

Notwithstanding the steep price tag of extending the TCJA, however—a cost that will likely only grow even larger when the 10-year budget window shifts forward early next year—Crapo also argued in separate remarks earlier this week that other TCJA provisions that are currently part of permanent law, such as the 21 percent corporate tax rate, should also be on the table during negotiations next year.

Crapo told reporters on September 9 that he would support cutting the corporate rate to 15 percent, a proposal that former President Donald Trump has also made in his re-election bid, albeit only for domestically made goods, according to Trump's recent statements.

"We are going to be negotiating on a lot of different moving pieces," Crapo told *Politico*.

On the flip side, however, it's worth recalling that House Ways and Means Committee Chairman Jason Smith stated at a legislative seminar sponsored by BakerHostetler in May that there are Republican lawmakers who believe the corporate tax rate cut in 2017 may have been too deep, and who now may be willing to consider *increasing* the rate as a viable revenue-raising option to pay for the cost of extending expiring TCJA tax relief. (For prior coverage, see *Tax News & Views*, Vol. 25, No. 17, May 10, 2024.) Since then, one GOP Senate taxwriter—Thom Tillis of North Carolina—and one member of the ultraconservative House Freedom Caucus—Chip Roy of Texas—have publicly stated that they would be open to a corporate rate increase.
URL: https://dhub.deloitte.com/Newsletters/Tax/2024/TNV/240510_2.html

Helmy joins Finance Committee

In other Finance Committee news, Senate Democratic leaders announced this week that newly minted Sen. George Helmy, D-N.J., who was appointed by New Jersey Gov. Phil Murphy (D) to fill the vacancy in the chamber created by the resignation of former New Jersey Sen. Robert Menendez, has also taken over

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Menendez's Senate committee assignments, which include a spot on the taxwriting panel. (Helmy participated in this week's Finance Committee hearing on tax-avoidance strategies.)

Menendez resigned from the Senate on August 20, a few weeks after being convicted on federal bribery and corruption charges. His former Senate seat is among those that are in play in the 2024 election cycle.

Helmy is not seeking re-election and will leave Capitol Hill once the 118th Congress officially adjourns in early January. Four candidates—including New Jersey Democratic House member Andy Kim—are vying to replace Menendez in the Senate this November.

It is unclear who will take Menendez's seat on the Finance Committee for the long term. The ratio of Democratic and Republican slots on the taxwriting panel is likely to be reset in the 119th Congress based on which party controls the Senate following the upcoming congressional elections.

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