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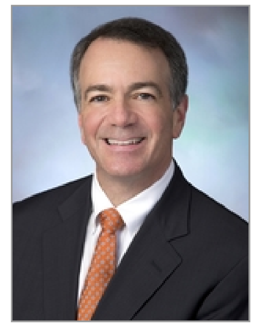
The Senate's Tax Reform Bill Faces A 'Byrd Bath'

By **Darryl Nirenberg**



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For the first time in over three decades, members of Congress are making a serious run at a comprehensive overhaul of the tax code, the success or failure of which will impact every American taxpayer. What will be included in this legislation (and what will not) will be largely determined by members themselves. But they are likely to find their choices constrained by the arcane rules of the reconciliation process.

Reconciliation is a special budget process established in the Congressional Budget Act of 1974. It shields certain legislation impacting the deficit, spending or the debt limit from the threat of filibuster in the Senate. The process was intended to make it easier for Congress to bring revenues, spending and the debt limit into conformity with a budget resolution agreed upon by the House and Senate.

This is the second time this year that congressional leaders have sought to use the reconciliation process to facilitate passage of substantive legislation. Republican lawmakers hit speed bump after speed bump in their effort earlier this year to fulfill a seven-year promise to repeal and replace the Affordable Care Act.

Now they are seeking to make good on another campaign promise — comprehensive tax reform. Congressional Republicans are promising quick passage of tax reform. And that may well come to pass. But, members in both chambers are already struggling over several key issues, both substantive and procedural.

While the strict requirements of the reconciliation process created substantive challenges for health care reform, in the tax reform context reconciliation presents a math problem.

To qualify for the procedural protections of the reconciliation process, the legislation may increase the deficit by no more than $1.5 trillion over the next 10 years. Under the budget rules, no increase is permitted outside of that window.

Despite these limitations, the Congressional Budget Office estimated that the House bill will actually increase the deficit by $1.7 trillion.[1] Some private analyses are more extreme, estimating the legislation would add $155 billion to the deficit in 2028, one year outside the 10-year window[2] or would lose another $2.6 trillion in revenue during the 12 years after the 10-year window[3].

The Senate bill, on the other hand, is a moving target. But as initially proposed by Finance Committee Republicans, it appears poised to exceed the $1.5 trillion limit (with certain predictions estimating between $1.5 trillion and $1.78 trillion)[4] and to increase the deficit outside the 10-year window.

To solve this math problem, Finance Committee Republicans have proposed repealing the individual mandate under the ACA — a move estimated to reduce the federal deficit by about $338 billion over the 2018-2027 period.[5]

These savings are to be accrued by reducing government spending on health care subsidies for an estimated 13 million Americans over the 10-year period. Beyond cleaning up the arithmetic, they eliminate a significant issue related to the so-called “Byrd Rule,” and ensure compliance with the reconciliation instructions.[6]

Repeal of the individual mandate nevertheless risks creating a broader political dilemma for those senators staunchly opposed to intertwining the tax reform effort with health care reform. This could, in turn, force the Senate to find alternative revenue raisers (e.g., sunsetting the tax cuts) that would have their own economic side effects.

The House, on the other hand, does not appear concerned with meeting the fiscal targets established in the reconciliation instructions, purportedly leaving it to the Senate to iron out any kinks and then hoping to address them further at conference.

The Senate's individual mandate fix, however, does not resolve *all* of the Byrd Rule issues attendant to its reconciliation bill. Certain provisions may give rise to content-specific issues.

Outlined below are some of the details of how the reconciliation process operates and how it will likely play out in the coming weeks.

Reconciliation 101

The reconciliation process is a tool to bring revenue and spending in line with a budget resolution agreed to by the House and Senate. The first step is adoption by both chambers of Congress of a budget resolution containing reconciliation instructions. The instructions direct specific committees to report legislation affecting revenue, spending or the debt limit by a specific amount. For example, the reconciliation instructions for the budget resolution for fiscal year 2018 included a directive for the tax-writing committees to increase the deficit by *no more than* $1.5 trillion over the next 10 years.

The process includes several procedural rules intended to speed Senate consideration of reconciliation legislation, chief among them a 20-hour limit on debate, a non-debatable motion to proceed to the bill and a strict germaneness test for amendments. In effect, in a Senate in which neither party has the supermajority (60 votes) necessary to limit debate on traditional legislation, a reconciliation bill can be passed with only a simple majority (51 votes).

This benefit comes with a cost. There are specific content restrictions on what can be included in reconciliation legislation found in the Byrd Rule. To receive expedited consideration, the legislation must concern only revenue, spending or the debt limit. As noted further below, it may not contain any extraneous or non-germane amendments or provisions.

The Byrd Rule's Function and Operation

The Byrd Rule — the brainchild of late Senator Robert C. Byrd, D-W.Va. — ensures the Senate adheres to its mandate of limiting the legislation to budgetary-related provisions by subjecting "extraneous" provisions to parliamentary objections during the Senate's consideration of reconciliation legislation.[7]

The Byrd Rule treats as "extraneous" any provision that:

- Does not produce a change in outlays or revenues
- Produces an outlay increase or revenue decrease when the instructed committee fails to achieve its reconciliation instructions
- Is outside the jurisdiction of the committee that submitted the provision for inclusion in the reconciliation measure
- Produces a change in outlays or revenues, which is merely incidental to the non-budgetary components of the provision
- Would increase the deficit for a fiscal year beyond those covered by the reconciliation measure
- Recommends changes in Social Security

In practice, in advance of sending a reconciliation measure to the floor, the Senate Budget Committee will compile a list of potentially extraneous provisions that may be in violation of the Byrd Rule for the parliamentarian’s consideration and review.

This so-called “Byrd bath” can make the parliamentarian one of the most powerful people in Washington, landing on her shoulders the decision of what constitutes “extraneous” content. When the issues are mathematical, however, as they are here, the parliamentarian’s job is less challenging.

For example, if the House bill as drafted were introduced on the Senate floor, senators could raise points of order against any provisions that add to the debt beyond the 10-year window, a determination that would require little interpretation by the parliamentarian if the numbers comply with the reconciliation instructions (and even if they do not).

Ultimately, if a Byrd Rule point of order against a provision as “extraneous” is sustained, the provision is stricken from the bill (or the amendment fails, as the case may be). Appealing that determination requires an affirmative vote by 60 senators.

The Byrd Rule’s Impact on Conference

House leaders have expressed a desire for the differences between the House and Senate bills to be worked out in a conference (as opposed to being reached in an informal pre-conference agreement substituted before passage by the Senate). Even if the bill were not tied to the reconciliation process, the conference procedure could be challenging given the significant differences between the House and Senate bills. Nonetheless, reconciliation complicates the task since it triggers special procedures in the Senate.

If a reconciliation conference report is returned to the Senate containing extraneous items under the Byrd Rule, a point of order may be raised. Should it be sustained, then the material deemed in violation is stricken. The Senate will then proceed, without intervening action or motion, to consider whether it will recede from its amendment and concur with a further amendment, or concur in the House amendment with a further amendment (whichever is applicable).

Any such motion in the Senate is subject to two hours of debate. The further amendment, in either case, shall consist solely of that portion of the conference report not stricken on a Byrd Rule point of order. If the Senate passes the motion, the conference report goes back to the House, where it is amendable.

Thus, the Byrd Rule can be expected to become a major issue in any reconciliation conference — complicating or prolonging the road to enactment.

Conclusion

The Senate plans to take up its reconciliation bill after Thanksgiving, leaving significant time for last-minute changes and constant evaluation of its fiscal impact. Whether it is the individual mandate or some other revenue raiser, the Senate *will* need to come up with some method to successfully reduce its overall deficit impact below the $1.5 trillion threshold. Failure to do so opens the bill up to certain Byrd Rule violations, making its path to the president’s desk all the more difficult.

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[1] Letter from Keith Hall, Director, Cong. Budget Office, to Richard Neal, Ranking Member, House of Representatives Committee on Ways and Means (Nov. 8, 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr1deficitsanddebt.pdf.

[2] The Tax Cuts and Jobs Act Doesn’t Comply with the Byrd Rule, Comm. for a Responsible Fed.

Budget Blog (Nov. 7, 2017), http://www.crfb.org/blogs/tax-cuts-and-jobs-act-doesnt-comply-byrd-rule.

[3] John Harwood, GOP Tax Plan Would Increase Federal Deficits Beyond the Limit, New Analysis Shows, CNBC (Nov. 6, 2017), https://www.cnbc.com/2017/11/06/gop-tax-plan-overwhelmingly-favors-the-wealthy-and-might-stall-in-senate-new-analyses-show.html.

[4] Joint Committee on Taxation, Estimated Revenue Effects of the Chairman's Mark of the "Tax Cuts and Jobs Act," Scheduled for Markup by the Committee on Finance on November 13, 2017 (Nov. 9, 2017), https://www.jct.gov/publications.html?func=startdown&id=5033; Letter from Keith Hall, Director, Cong. Budget Office, to Ron Wyden, Senator, U.S. Senate (Nov. 13, 2017), https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/chairmansmarkofthetaxcutsandjobsact deficitsanddebt.pdf; Tax Foundation, Preliminary Details and Analysis of the Senate's 2017 Tax Cuts and Jobs Act (Nov. 10, 2017), https://taxfoundation.org/details-analysis-2017-senate-tax-cuts-and-jobs-act/.

[5] Cong. Budget Office, Modeling the Effects of the Individual Mandate on Health Insurance Coverage (Nov. 14, 2017), https://www.cbo.gov/publication/53300.

[6] It warrants noting that including the individual mandate in the tax bill does not result in a substantive Byrd Rule issue. Though a health care topic, the individual mandate falls squarely within the jurisdiction of the tax writing committees and therefore is eligible for inclusion in the tax reform reconciliation bill.

[7] During his more than 50 years serving in the Senate, Senator Byrd took on the role of protector of the institution, its traditions and its unique place in our constitutional government. The inclusion of extraneous provisions in a piece of legislation shielded from filibuster, he felt, threatened the deliberative nature of the Senate. Years later, explaining his reservations about using the reconciliation process for consideration of then-President Clinton's health care bill, he stated "[t]he reconciliation process was never, never, never, intended to be used as a shield for controversial legislation." In particular, he noted that the legislation, "which would affect every man, woman, and child in the United States," was "so complex, so far reaching" that it should be "subject to scrutiny."
