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Health care reform, cont'd…

The Senate's version of legislation to repeal and replace the Affordable Care Act (or "Obamacare") was introduced on June 22nd; it has temporarily stalled. Although Senate Majority Leader Mitch McConnell of Kentucky had hoped to have a vote on the "Better Care Reconciliation Act of 2017" before the week-long July 4th Congressional recess, he was obliged to postpone it, as enough Republican Senators were dissatisfied with the bill's content to block even debating it, let alone voting on it. Sen. McConnell is now working on changes to the bill to garner more support for it; he aims to submit the revised bill to the Congressional Budget Office (CBO) by June 30th for new CBO estimates of the bill's direct spending and revenue effects, so that the Senate can vote on the measure sometime after they return from their July 4th recess.

The CBO's estimates for the current Better Care Act were released on June 26th; they include projections that the Act would 1) reduce the federal deficit by $321 billion over 2017-2026, and 2) relative to current law, increase the number of uninsured individuals by 22 million in 2026. The CBO's May 24th estimates for the House's repeal and replace bill, the "American Health Care Act of 2017" (H.R. 1628, which narrowly passed on May 4th), projected deficit reduction of about $119 billion over that same 10-year period and about 23 million additional uninsureds. Both measures cut back on Obamacare's Medicaid expansion, eliminate the personal mandate requiring individuals to have insurance, but take different approaches to various items, such as tax credits to help subsidize premiums for eligible taxpayers.

The key point for purposes of this brief commentary, however, is that both bills closely resemble each other in terms of their treatment of the Obamacare taxes, which are generally repealed (sometimes as of different dates) or further postponed. Of note is that both bills repeal the 3.8% tax on net investment income (such as dividends and capital gains) retroactive to the beginning of this year; the additional 0.90% (90 basis points) Medicare tax would be repealed as of 2023. (The 3.8% tax can apply if a taxpayer's "modified adjusted gross income" – adjusted gross income plus otherwise excluded foreign income – exceeds the following unindexed (and therefore frozen) amounts: $250,000 (married filing

jointly), $200,000 (single taxpayers) and $125,000 (married filing separately). The additional 0.90% Medicare tax applies to wage income that exceeds these same amounts.)

Should retroactive repeal of the 3.8% tax be enacted, this would be a windfall for taxpayers who have already factored the tax into their 2017 estimated tax payments; it could also encourage taxpayers who might have been waiting to realize capital gains to now do so. And going forward, it could save taxpayers significant dollars (the CBO scored this retroactive repeal at $172.2 billion over 10 years; note that whether the tax will be repealed at all is now under discussion by some Republicans).

What are the legislative prospects for a final health care bill that passes both houses of Congress and moves to President Trump for his signature? First, the Senate must pass some version of the Better Care Act, and second, the House and Senate must then hash out their differences so that they produce ONE bill that passes both chambers. The difficulty, in both the House and the Senate, is that the more their respective bills appeal to conservative Republicans by eliminating as much of Obamacare as possible, the more the bills lose support from more moderate Republicans, many of whose constituents have benefitted from Obamacare's Medicaid expansion…and vice versa. It is a classic "push me, pull you."

How the legislation will play out is anyone's guess. While something could certainly end up on President Trump's desk, the reality is that the legislative calendar is running out: after the July 4th recess, the Senate has 15 legislative days until the five-week August recess, and the House has 13 legislative days until then. And once both chambers are back in session after Labor Day, they also need to deal with the debt-ceiling increase, as well as complete their work on the Fiscal Year 2018 budget.

Stated differently, once Congress reconvenes in early September, the House has 48 legislative days until the end of the year, and the Senate has 61 – contrasted with the 117 calendar days that actually remain until year end. Although Congressional leaders could call members back early from a recess or extend a session, there is still not a lot of time to hammer out details on health care (assuming something doesn't pass before August), tax reform, repatriation of overseas profits, infrastructure, etc., etc. And when 2018 rolls around, Congress will soon be focused on the November mid-term elections.

So – what will happen? Hard to know…and predictions are a dubious business!

Portability relief

"Portability" is shorthand for the surviving spouse's ability to effectively "inherit" the deceased spouse's unused gift and estate tax exclusion – provided that the deceased spouse's executor files a "timely" estate tax return (Form 706), even if the decedent's estate is not large enough to require a return because it is under the "filing threshold" (see below).

Many executors of these smaller estates have missed the filing deadline for the Form 706 (generally, nine months after death) and have therefore blown the portability election (merely filing the return is deemed a portability election); because they have flooded the IRS with private letter ruling requests seeking permission to make a late election, the IRS issued Revenue Procedure 2017-34 on June 9th to stem the tide.

Rev. Proc. 2017-34 allows executors of "pure portability" returns to make a late portability election by filing a Form 706 by the later of January 2, 2018 or the second anniversary of the deceased spouse's death, and indicating on the return that it is "FILED PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY

UNDER § 2010(c)(5)(A).” (This “later of” deadline means that if the spouse died more than two years ago, the executor has until January 2, 2018 to take advantage of this simplified procedure.)

Executors who have already filed a private letter ruling request with the IRS for late portability relief should instead comply with Rev. Proc. 2017-34 (the IRS will close the ruling file and refund the user fee). Phew!

…and here’s a quick “refresher” on portability and why it matters. At the end of 2010, Congress retroactively reinstated the estate tax, which had expired at the beginning of that year. Congress also temporarily provided for a $5 million “applicable exclusion amount” against gift and estate tax; as of 2011, that exclusion could be carried over from a deceased spouse to the surviving spouse (what’s known as “portability”). In late 2012, Congress made both the $5 million applicable exclusion amount and portability permanent.

The applicable exclusion amount has two parts: the $5 million “basic exclusion amount” (BEA) and for surviving spouses, if applicable, the “deceased spousal unused exclusion amount,” or DSUE. (If there is no DSUE, the applicable exclusion and basic exclusion amounts are the same.)

The BEA has been indexed for inflation since 2012…and thanks to portability, married couples can protect twice the amount of the BEA without any special planning or trusts – so that if they want to leave each other everything, they can, without worrying about wasting the BEA of the first spouse to die. In other words, thanks to portability, the exclusion is no longer a “use it or lose it” proposition for married couples.

The inflation-indexed BEA is as follows:

	Single	Married Couple
2012	$5.12 million	$10.24 million
2013	$5.25 million	$10.50 million
2014	$5.34 million	$10.68 million
2015	$5.43 million	$10.86 million
2016	$5.45 million	$10.90 million
2017	**$5.49 million**	**$10.98 million**

As these numbers indicate, a married couple can protect a significant amount of property from gift and estate tax. But suppose that Dad dies first, in 2017. He’s never made any taxable gifts and leaves his entire $2 million estate to Mom, who also has a $2 million estate. His heirs might wonder whether it is worth the expense to hire someone to prepare a 706 for his estate so that his $5.49 million BEA carries over to Mom. The answer presumably depends on how much Mom has and is likely to have by the time she dies. After all, Mom’s total estate is now $4 million – or about $1.5 million less than the current BEA. But who’s to say that the following won’t happen: Mom wins the lottery…or Great Aunt Tilly leaves Mom a generous inheritance…or Mom’s real estate significantly appreciates? Mom and her heirs may later regret it if they don’t elect portability for Dad’s leftover exclusion.

Yet to elect portability, Mom (Dad’s executor) must file a “timely” estate tax return for Dad’s estate, even though it is under the “filing threshold.”

Here’s what these terms mean:

— **“Timely”** means that Mom files the return within nine months of Dad’s death (or within 15 months if she requests an extension within those first nine months).

— The **“filing threshold,”** in 2017, is $5.49 million. Because Dad’s “gross estate” plus “adjusted taxable gifts” is under this amount, no estate tax return is required unless Mom elects portability.

  — The **“gross estate”** means everything in which Dad has an “interest” at death (such as bank and brokerage accounts, retirement accounts, life insurance, etc.).

  — **“Adjusted taxable gifts”** means lifetime gifts that used up some of the Dad’s applicable exclusion; these are typically gifts other than: a) annual exclusion gifts ($14,000 per donee, or $28,000 if Mom agrees to split the gift), and b) direct payments of tuition, medical expenses and health insurance premiums.

The bottom line? If Mom wants Dad’s DSUE, she must file a timely estate tax return for his estate (although there is no short-form “706-EZ,” simplified reporting on the 706 is nevertheless available since Dad’s property is all going to her). And if she blows the filing deadline, Rev. Proc. 2017-34 will still give her up to two years after Dad’s death to file a 706 for portability purposes.

July 7520 rate

The July 2017 7520 rate is 2.2%, a 0.20% (20 basis points) drop from the June (and May) rate of 2.4%. The July mid-term applicable federal rates (AFRs) are also down slightly: 1.89% (annual), 1.88% (semiannual and quarterly), and 1.87% (monthly). The June mid-term rates were: 1.96% (annual), 1.95% (semiannual and quarterly), and 1.94% (monthly).

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