Policy and Regulation Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Inflation Reduction Act Update

August 10, 2022

The following alert provides a high level update to the August 4 Akin Gump comprehensive section-by-section report, which was published before the Senate vote-a-rama and final Senate passage. This update is being published after final Senate passage but prior to the expected House passage of the bill, which could happen as early as the end of this week. If there are changes made before final enactment of the Inflation Reduction Act, we will publish another alert.

On Sunday afternoon, the U.S. Senate passed the Inflation Reduction Act of 2022 (IRA)—congressional Democrats' plan to battle the climate crisis, pay down the nation's debt, reduce prescription drug prices, extend health insurance subsidies and increase taxes on profitable corporations, the wealthy and those who commit tax fraud. The bill passed on party lines and reflects numerous changes made in recent days, namely those negotiated by Sen. Kyrsten Sinema (D-AZ) (although the base text was crafted by Sen. Joe Manchin III (D-WV) and Senate Majority Leader Chuck Schumer (D-NY)). The house plans to take up the bill Friday, August 12.

On August 4, Sen. Sinema announced that she had agreed to "move forward" with her support of the bill as long as the carried interest tax provision was removed. In addition, she negotiated changes to the new 15-percent corporate alternative minimum tax (AMT) on book income that would "protect advanced manufacturing" by preserving the ability of corporations to reduce their effective tax rate through the use of accelerated depreciation deductions (which, in certain cases, can be used by businesses, including manufacturers, to expense the cost of equipment and machinery they purchase), and allowing for the purchase of spectrum to be amortized for AMT purposes (whereas under normal book principles spectrum is nondeductible). She was also able to secure $4 billion in new drought funding.

The changes caused revenue shortfalls from the base text; tightening the carried interest tax rules would have brought in about $13 billion over 10 years and the AMT modifications to allow for accelerated depreciation and spectrum would cost some $55 billion. To make up the revenue shortfall, Democrats, including Sen. Sinema, agreed to add a new tax to the IRA—a one-percent excise tax on corporate share repurchases. This proposed excise tax on stock buybacks (paid by the corporation, not the shareholders) is not a new policy change: it was in the House-passed Build Back Better Act and in the Senate Finance Committee version released December 11,

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2021. Only one substantive change has been made to the proposal since the Senate Finance Committee version—the effective date has been pushed back a year (it applies to stock repurchases after December 31, 2022). The excise tax more than made up for the revenue shortfall raising about $74 billion.

Even with the agreement reached among Senate Democrats leading up to the vote, there were a few last-minute complications raised during the so-called vote-a-rama process that began late August 6 and lasted more than 15 hours. Nearly 550 amendments to the bill were introduced (a smaller number were actually voted on).

The first change to the bill that occurred Sunday involved an attempt by Democrats to cap the copayment amount for covered insulin products at $35 for 2023, 2024 and 2025. The Senate parliamentarian reportedly ruled against the cap to the extent it applies to individuals with private insurance (and not Medicare), but Democrats decided to leave it in and that set the stage for Republicans to publicly ask for it to be removed. Republicans asserted the point of order and Democrats' motion to waive it (which needed 60 votes but only received 57) failed.

Note that the Senate Parliamentarian objected to another feature of the bill that Democrats decided to scrap before the vote-a-rama, part of a rebate that would have required pharmaceutical companies to pay reimbursements if they raise drug prices more than an inflation-adjusted amount. Thus, the provision will only be applicable to Medicare. As part of the "Byrd Bath" review of the bill, the Parliamentarian found no issue with any of the tax provisions.

The second change to the bill that occurred Sunday was to strip out language in the base text that modified how the 15-percent corporate AMT provision applies the single employer aggregation rule (for determining whether or not you exceed the $1 billion threshold). The modified language was not in the Senate Finance Committee version of the proposal, but incorporates a newly defined concept of "component member" that—according to Americans for Tax Reform—would have the effect of defining "any company with private equity in its capital structure [as] a subsidiary of that private equity firm for purposes of the tax."

Senate Minority Whip John Thune (R-SD) joined forces with Sen. Sinema, introducing an amendment to strip the modified language from the bill so that, in his view, small businesses owned by private equity would not be subject to the new tax. The amendment paid for the change with a one-year extension of the $10,000 cap on the ability to deduct state and local taxes (SALT) (under current law, the cap is scheduled to go away in 2026). The amendment passed by a vote of 57 to 43. However, Democrats did not like the pay-for (particularly those in SALT-sensitive states), so a subsequent amendment introduced by Sen. Mark Warner (D-VA) (which passed with 51 votes) replaced the SALT offset by extending existing limits on how certain businesses can write off their losses for another two years.

In total, the Senate voted on 37 different amendments or motions during vote-a-rama prior to final passage. The Thune and Warner amendments were the only two of those amendments to be adopted. We expect the IRA legislation to pass the House by the end of the week on a similar party-line vote and to be signed into law by President Biden shortly thereafter. Please let us know if we can be helpful in analyzing any portion of the IRA.

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