



January 28, 2022

The Honorable Ron Wyden
Chairman
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Neal
Chairman
U.S. House Committee on Ways and Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Michael Crapo
Ranking Member
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Kevin Brady
Ranking Member
U.S. House Committee on Ways and Means
1139 Longworth House Office Building
Washington, DC 20515

RE: Additional Comments Regarding Effective Dates in Build Back Better (BBB) Act

Dear Chairmen Wyden and Neal, and Ranking Members Crapo and Brady:

The American Institute of CPAs (AICPA) is pleased to submit additional comments regarding the potential impact of retroactive effective dates under the proposed tax provisions in H.R. 5376 (“Build Back Better Act” or “BBB”).¹ The AICPA consistently champions good tax policy and effective tax administration.² Two of the AICPA’s guiding principles are pertinent to the planned reconciliation process regarding BBB, specifically, certainty and transparency.³ The AICPA is concerned regarding the possible (and probable) negative effect(s) of retroactive tax consequences pertaining to the effective dates in the current version of the BBB Act.

The AICPA understands that certain circumstances warrant retroactive effective dates; however, Congress should generally reexamine the proposed effective dates in order to minimize negative consequences. Particularly, retroactive tax increases unnecessarily harm taxpayers and belie the certainty those rules are meant to provide.⁴

Retroactive effective dates could cause two concurrent tax systems to materialize as taxpayers must comply with differing sets of rules during the same tax year. Retroactively enacted change(s)

¹ This comment letter further supplements previous comments submitted on October 1, November 10, and December 14, 2021. See AICPA letters, “[Tax Provisions in House Reconciliation Legislation or Being Considered](#)” (Oct. 1, 2021), “[Tax Provisions in House Manager’s Amendment to Rules Committee Reconciliation Legislation or Being Considered](#)” (Nov. 10, 2021), “[Tax Provisions in Senate Finance Committee Reconciliation Legislation Released on December 11, 2021](#)” (Dec. 14, 2021). All bill section references refer to the [House Rules Committee](#) version passed November 19, 2021.

² See generally [AICPA Principles of Good Tax Policy](#) (12 principles providing objective framework to evaluate policy proposals).

³ The principle of transparency is not *per se* related to a “hidden process,” but rather that taxpayers should know that a tax exists and how and when it is imposed upon them and others.

⁴ The AICPA highlights retroactive tax increases. However, even retroactive beneficial effects do not provide a foundation for a well-functioning, stable tax system as taxpayers are unable to properly evaluate their current financial circumstances.

may produce drastically different results without a particular taxpayer's position materially changing during the tax year and further burdens beleaguered taxpayers, practitioners, and the Internal Revenue Service (IRS) by simultaneously imposing two tax systems.

The IRS and the Department of the Treasury ("Treasury") also require time to implement new laws and provide guidance to taxpayers to enable proper taxpayer compliance. Retroactive effective dates may also necessitate taxpayers filing amended returns causing an unnecessary administrative burden for both taxpayers and the IRS.

The below selected proposed tax provisions highlight Congress's potential need to reexamine the effective dates as drafted in the BBB Act due to differing effects that could occur by passing BBB in 2022:

I. General Comments

1. Taxpayer Favorable Provisions

II. Individuals

1. Surcharge and Broader Application of the Net Investment Income Tax

III. Businesses

1. Limitation on Certain Special Rules for Section 1202⁵ Gains
2. Modifications to Limitation on Deduction of Excessive Employee Remuneration
3. Extension of the Deduction for Research Expenditures under Section 174
4. General Concerns Regarding International Tax Changes
5. Application of the Restoration of Former Section 958(b)(4)

IV. IRS Administration

1. Modifications of Procedural Requirements Relating to Penalty Assessment

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The AICPA is the world's largest member association representing the accounting profession, with more than 428,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

⁵ Unless otherwise indicated, all section references are to the Internal Revenue Code of 1986 (IRC or "Code"), as amended, or to the Treasury Regulations promulgated thereunder.

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Page 3 of 3

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact Kristin Esposito, AICPA Director – Tax Policy & Advocacy, at (202) 434-9241 or kristin.esposito@aicpa-cima.com; or Lauren Pfingstag, Director, AICPA Congressional or Political Affairs, at (407) 257-0607 or lauren.pfingstag@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,



Jan F. Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Members of the Senate Committee on Finance
Members of the House Committee on Ways and Means
Mr. Thomas Barthold, Chief of Staff, Joint Committee on Taxation
The Honorable Janet Yellen, Secretary of the Treasury
The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. Mark Mazur, Deputy Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable William M. Paul, Chief Counsel, Internal Revenue Service

AMERICAN INSTITUTE OF CPAs

Additional Comments Regarding Effective Dates in Build Back Better (BBB) Act

January 28, 2022

I. General Comments

1. Taxpayer Favorable Provisions

The AICPA recommends that any enacted taxpayer-friendly provisions contain similar effective date language as proposed Bill Section 136301 of “property placed in service after December 31, 2021 and amounts paid or incurred after December 31, 2021.” Modifying the effective dates of proposed provisions that provide for a deduction or a credit for the entire tax year (similar to language contained in Bill Section 136301) allows taxpayers applying these new provisions simplicity.

II. Individuals

1. Surcharge and Broader Application of the Net Investment Income Tax

The AICPA recommends proposed Bill Section 138203 and Bill Section 138206 apply to tax years beginning after December 31, 2022. Bill Section 138203 would expand application of the net investment income tax (NIIT) to trade or business income of certain high-income individuals, trusts, and estates. Bill Section 138206 would impose a surcharge on a certain level of income. Modifying the effective date maintains consistency in tax treatment for the entire tax year versus the proposed provision applying to only certain calendar quarter(s).

The AICPA notes that both of these provisions apply to trusts and estates at a very low income amount. If the current effective date of January 1, 2022 is maintained, individuals and trusts subject to the tax may not be aware of the provision before the due dates of their estimated tax payments.⁶ Alternatively, statutorily providing a penalty waiver for any resulting estimated tax underpayments mitigates this issue if the January 1, 2022 effective date is maintained.

III. Businesses

1. Limitation on Certain Special Rules for Section 1202 Gains

The AICPA reiterates⁷ its opposition to the retroactive application of proposed Bill Section 138150, which imposes a limitation on the exclusion of certain gains under section 1202. If Congress enacts the limitation on certain special rules for section 1202 gains, the limitation should

⁶ Later in the year enactment will cause underpayments on additional estimated tax payments. Although the estimated tax safe harbor may alleviate this issue for most individuals and trusts, this bifurcation in applicability serves as a potential trap for the unwary.

⁷ See AICPA letters, “[Tax Provisions in House Reconciliation Legislation or Being Considered](#)” (Oct. 1, 2021), “[Tax Provisions in Senate Finance Committee Reconciliation Legislation Released on December 11, 2021](#)” (Dec. 14, 2021).

be effective after the date of enactment or for the succeeding tax year beginning after the date of enactment. Further, the provision should apply to issuances (rather than sales) of stock after the date of enactment or for the succeeding tax year beginning after the date of enactment. Potentially affected taxpayers have relied on the existing statute to make investment decisions for years. As currently drafted, the proposal obstructs future small-business investment due to the looming threat of continual changes, particularly retroactive tax increases from decreasing the expected capital gain exclusion.

2. Modifications to Limitation on Deduction of Excessive Employee Remuneration

The AICPA recommends that Congress reconsider the effective date related to the changes to section 162(m) in proposed Bill Section 138501. At a minimum, the effective date for this proposal should be no earlier than the tax year beginning after December 31, 2022.

The American Rescue Plan Act (ARPA)⁸ expanded the list of covered employees subject to the section 162(m) limitation to include the next five highest paid employees effective for tax years beginning after December 31, 2026. Proposed Bill Section 138501(b) would accelerate the effective date of the expanded list of covered employees to tax years beginning after December 31, 2021. The acceleration of the effective date to tax years beginning after December 31, 2021 would not allow affected entities time to properly estimate and record any financial statement impact in their 2022 quarterly tax provisions on Form 10-Q.⁹

Additionally, proposed Bill Section 138501(a) expands the number of entities subject to section 162(m). Taxpayers require guidance from the IRS and Treasury to implement the complex changes made to the aggregation rules under section 162(m) by Bill Section 138501(a).

3. Extension of the Deduction for Research Expenditures under Section 174

The AICPA recommends changing the effective date of proposed Bill Section 138516 delaying the effective date for the capitalization of research and experimental expenditures to retroactively apply to tax years beginning on or after January 1, 2022 in lieu of the currently drafted “date of enactment.” The current “date of enactment” imposes a dual-tax system on taxpayers and in this case, a retroactive effective date ensures that there is no interim period of time where taxpayers are required to capitalize research and experimental costs.

4. General Concerns Regarding International Tax Changes

The AICPA recommends deferring the effective dates of the below highlighted proposals to either tax years beginning after December 31, 2022, or tax years beginning after the date of enactment. For the following proposals, the current effective date of tax years beginning after December 31, 2021 does not leave sufficient time for taxpayers to properly adjust to the new laws or allow certainty for periods beginning prior to enactment but after the effective date.

⁸ P.L. 117-2.

⁹ Form 10-Q is filed with the Securities and Exchange Commission (SEC).

Proposals with an effective date of tax years beginning after December 31, 2021 include:

- Bill Sec. 138123 – Modifications of foreign tax credit rules applicable to certain taxpayers receiving specific economic benefits.
- Bill Sec. 138124 – Modifications to foreign tax credit limitations; Changes to elections of claims or deductions; Changes to the special limitations period.
- Bill Sec. 138125 – Foreign oil and gas extraction income and foreign oil related income to include oil shale and tar sands.
- Bill Sec. 138129 – Limitation on foreign base company sales and services income.
- Bill Sec. 138131 – Modifications to Base Erosion and Anti-Abuse Tax (BEAT).

5. Application of the Restoration of Former Section 958(b)(4)

The AICPA recommends that proposed Bill Section 138128 providing for the restoration of former section 958(b)(4) should be treated as a technical correction, and such correction should apply retroactively. The AICPA appreciates the government’s concerns of additional burdens to certain taxpayers if the restoration is applied retroactively. Therefore, in addition to the retroactive application, the AICPA also recommends statutorily providing a new election for taxpayers to elect out of the application of former section 958(b)(4). This proposed election would apply for tax years of foreign corporations beginning on or after January 1, 2018, but before the date of the enactment of this Act, and tax years of United States persons in which or with which such tax years of foreign corporations end. These proposed modifications are summarized below:

Bill Section 138128(b) – Modifications Related to Determination of Status as a Controlled Foreign Corporation

Current proposed effective date¹⁰

“The amendments made by subsection (b) shall apply to taxable years of foreign corporations beginning after the date of the enactment of this Act, and taxable years of United States persons in which or with which such taxable years of foreign corporations end.”

New AICPA proposed effective date

“The amendments made by subsection (b) shall apply to—
(A) the last taxable year of foreign corporations beginning before January 1, 2018, and each subsequent taxable year of such foreign corporations, and
(B) taxable years of United States persons in which or with which such taxable years of foreign corporations end.”

Additionally, provide a new election to opt out of the retroactive application of the subsection (b) for tax years of foreign corporations beginning on or after January 1, 2018 but before the date of the enactment of this Act, and tax years of United States persons in which or with which such tax years of foreign corporations end.

¹⁰ The pertinent effective date is contained in Bill Section 138128(d)(2).

IV. IRS Administration

1. Modifications of Procedural Requirements Relating to Penalty Assessment

The AICPA opposes proposed Bill Section 138404 relating to the modification of procedural requirements for the assessment of penalties. The check and balance of current section 6751(b)¹¹ is necessary to protect taxpayers and provide a fair and just tax system. Section 6751(b) also requires at least one level of review of the IRS's most punitive tool. The procedural protection in the current law also ensures that penalties are never used as bargaining chips or to induce a taxpayer into settling a case. Bill Section 138404 would repeal the requirement of prior supervisory approval of assertion of penalties, retroactively effective to 1998. Efforts should be focused not on eroding taxpayer protections regarding penalty assertion, but rather, in preserving and expanding taxpayer protections.

Furthermore, penalty abatement determinations will be more efficient if the IRS expands abatement authority to telephone customer service personnel, which would eliminate the need for many taxpayers to correspond with the IRS on a notice, thus bolstering taxpayer service and reducing the IRS paper workload.

¹¹ Under section 6751(b), "No penalty... shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate." One exception includes penalties "automatically calculated through electronic means." This provision requires, for example, first-level managerial approval before a revenue agent may determine or propose a penalty against a taxpayer during an exam.