

Firms Lobby To Get Levin Tax Haven Measure Sidelined

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Multinational corporations are urging Senate leaders to sideline a bill by Sen. Carl Levin, D-Mich., that aims to crack down on offshore tax dodgers, arguing that they could be unintended collateral damage.

That debate could heat up as the healthcare overhaul effort moves to the Senate floor, as Levin is making noises that he might offer his bill as an amendment. The proposal, backed by unions such as the AFL-CIO, American Federation of State, County and Municipal Employees and Service Employees International Union, could raise \$30 billion to help fill gaps in revenue.

A pot of money like that could be attractive as unions try to blunt the impact of an excise tax on high-cost health insurance plans in Senate Finance Chairman Max Baucus' bill, which would pay for nearly a quarter of the \$829 billion measure.

"The biggest concern is what happens on the Senate floor, because a lot of people do not like the 'Cadillac' plan as a pay-for," said Catherine Schultz, vice president for tax policy at the National Foreign Trade Council. "And our concern is they step out of that realm of paying for health care with health care, and Katy bar the door of what they could put in it."

Industry officials said they have no problem with measures aimed at wealthy tax cheats hiding money in offshore accounts. Their concerns lie mainly with a separate provision, estimated to raise \$5.4 billion, to treat foreign companies as domestic firms for tax purposes if they are managed and controlled in the United States.

That is a shift from current law, which taxes companies based on where they are actually incorporated. Schultz's group represents U.S.-based multinational firms, which would not be directly affected. But she said it could put U.S. firms at risk overseas as it would violate numerous tax treaties, which help keep U.S. companies safe from double-taxation by both the United States and their host countries.

"If you have this process in place, and the U.S. says we're going to start treating some of your companies as U.S.-based companies, it throws that whole negotiation into disarray," Schultz said. "It makes it more difficult for other countries to want to do tax treaties with us because they won't trust us, having Congress step in and override the provision we just agreed to, and it just creates more problems for U.S. companies trying to do business abroad."

Levin says his main goal is to go after businesses that set up shell companies offshore to avoid taxes, but are really making decisions in the United States. An example would be hedge funds incorporated in the Cayman Islands with little more than a post office box to mark their presence, while the main office is actually in, say, Connecticut. The measure would only apply to publicly traded foreign firms, or those with more than \$50 million in assets.

But critics argue the bill has loose guidelines for Treasury to define "management and control." Written broadly, it could simply mean a foreign firm whose senior executives operate out of U.S. offices. That means a foreign multinational would now be taxed in the same manner as U.S.-based multinationals -- on income earned all over the world, not just what they earn in their host country.

On Tuesday the Organization for International Investment, which represents U.S. subsidiaries of foreign firms, fired off a 13-page letter to Senate Finance Committee leaders arguing the Levin proposal would cost jobs, violate tax treaties and lead to international retaliation.

The provision "does not target abusers but would broadly affect ALL foreign corporations with U.S. operations, with repercussions for U.S. employment and the U.S. economy," wrote OFII President and CEO Nancy McLernon. "This proposal contemplates a fundamental shift in U.S. tax policy and should be debated by the Congress, in regular order, before being taken up on the Senate floor."

In an interview, McLernon said if the provision became law, foreign countries could choose to tax U.S. firms in a similar fashion. "International objections will surely be raised because of the unilateral nature of this," she said. Moreover, foreign multinationals would simply pull their management operations out of the United States, she said, leaving little income to actually be taxed.

The proposal is "a pretty draconian solution to something that goes well beyond abusive situations," added McLernon. "We're going to be lobbying this pretty hard."

Levin modeled the measure after a provision enshrined in the U.S.-Netherlands tax treaty approved in 2004, which uses a company's management and control to determine its residency. That treaty language was cited in a 2005 tax-compliance options paper by the Joint Committee on Taxation, which said revising the rules "to test for primary place of management and control would produce a more meaningful test" than in present law.

The bill states that management and control "shall be treated primarily" as within the United States if "substantially all of the executive officers and senior management of the corporation who exercise day-to-day responsibility for making decisions involving strategic, financial and operational policies of the corporation are located primarily within the United States." Based on those guidelines, it would be up to Treasury to determine the actual definition of management and control.

While that would appear to be a high threshold, one international tax attorney who asked not to be named said that the guidelines are fraught with uncertainty. Unlike other countries that have clear rules, such as where a firm's board of directors meets, it could be difficult to determine what the threshold is.

"What does 'substantially all' mean? What does it mean to be 'primarily'? What's included in the concept of 'senior management'? How far down do you go? What is a 'strategic' policy or an 'operational' policy as opposed to a one-time strategic decision or an 'operational' procedure?" asked the attorney, formerly a career Treasury official in both Democratic and GOP administrations. "People are looking at this and not knowing how it would apply in their situation."

Since the provision would not take effect for two years after enactment, companies could use the time to weigh in with Treasury for more favorable treatment. But Schultz, whose group is also sending a letter to senators this week, argues that tax reform, not health care, is the proper forum for debating the measure. "They really need to understand that this is not the time or the place to raise the tax haven issue," she said.

By Peter Cohn