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GOP Process Designed to Obscure Tax Plan's Effects

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Congress is moving forward with reckless speed on a tax plan that touches most aspects of the federal tax code. Less than two months after the House Ways and Means Committee proposed its first legislative draft, Republican leaders are seeking to send a bill to President Trump's desk before Christmas. Congress sometimes moves quickly because an emergency situation needs to be addressed or because there is broad consensus that action needs to be taken. Neither is the case here. Instead, congressional Republican leaders have shortchanged the normal process of gathering information, holding hearings on various approaches, and carefully reviewing the implications of legislation to hide their bill's full impact from both the public and legislators. If they succeed in this rush to enactment, there are likely to be unintended consequences.

An alternative approach would have been to follow the bipartisan process used to enact the Tax Reform Act of 1986, the last legislation to include broad-based changes to core elements of both individual and corporate tax policy. That approach included robust public hearings about different aspects of tax reform and draft legislation. Such an approach would have been justified in today's case because tax law and policy are complicated. Understanding a bill's full impact requires analysis both by tax lawyers to understand how taxpayers might react to the changes, and economists to understand how it will shape economic activity, the level of revenue, and the financial situations of taxpayers in different circumstances. And a bipartisan process can provide policymakers with the political cover needed to make difficult decisions that — like almost any tax legislation — involve winners and losers.

As we have explained, the legislation passed by the House and under consideration by the Senate does indeed include significant losers — millions of taxpayers who will pay more in the near term, millions more who will be uninsured or pay higher premiums for health insurance as a result of repealing the Affordable Care Act's individual mandate, and people who will be affected by budget cuts that are likely to come in the future to pay for the tax bill's large cost.[1] Without a bipartisan

[1] See Chye-Ching Huang, Guillermo Herrera, and Brendan Duke, "JCT Estimates: Amended Senate Tax Bill Skewed to Top, Hurts Many Low- and Middle- Income Americans," CBPP, November 17, 2017, https://www.cbpp.org/research/federal-tax/jct-estimates-amended-senate-tax-bill-skewed-to-top-hurts-many-low-and-

approach, Republican congressional leaders and the White House have chosen a strategy designed to obscure as much as possible this bill's consequences for those who will bear its costs. That strategy is in evidence by Senate Finance Committee Chairman Orrin Hatch's statement on Monday that changes to the tax bill "probably" would not be public until they are introduced on the Senate floor.[2] And as Congress returns this week, lawmakers may take further steps to use speed — including a possible attempt to quickly pass a bill through the Senate and then the House without a conference committee — to further hide the implications of the legislation they seek to pass.

Rushed Process Has Led to a Lack of Information and Transparency

As congressional Republican leaders have moved forward with their legislation, their approach has avoided steps that would bring more clarity to their bill's impact. A combination of the speed of their process and intentional choices by leadership has meant that information that would be helpful in evaluating the legislation has not been available, for either the public or for legislators considering the bill.

- **A lack of complete information from congressional scorekeepers — including a Joint Committee on Taxation (JCT) estimate of the bill's effects on the economy.** For purposes of determining whether a bill complies with reconciliation requirements — in this case, that it costs no more than $1.5 trillion over a decade and doesn't increase the deficit beyond ten years — JCT and the Congressional Budget Office (CBO) will use conventional scoring methods.[3] While these methods take into account how tax cuts would affect individual and corporate behavior, many congressional Republicans and the Administration have argued they overstate tax cuts' impact on the deficit by failing to account for how greater macroeconomic growth might increase revenues.

  We have argued in the past that, given all of the uncertainties around assessing a major bill's effects on the economy, such estimates should not play a formal role in the budget process.[4] But JCT and CBO produce so-called dynamic analyses that take macroeconomic growth into account, which can be used to supplement the cost estimates and other information available to policymakers as they consider legislation. What is remarkable is that congressional Republicans, who have pushed for broader use of dynamic estimates generally and who have praised this tax bill primarily for the positive effects they claim it will have on the economy, have not waited for those analyses to be released. Rather, the House passed the tax plan before JCT had a chance to produce such an analysis, and there is no indication that the Senate will wait for such an analysis, either.

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middle and Sharon Parrott, "Senate Tax Bill Has Same Basic Flaws as House Bill," CBPP, updated November 14, 2017, https://www.cbpp.org/research/federal-tax/senate-tax-bill-has-same-basic-flaws-as-house-bill.

2 Alan Rappeport, "You probably won't see them until we get to work on the floor," Twitter, November 27, 2017, https://twitter.com/arappeport/status/935282576280948742.

3 Chye-Ching Huang and Joel Friedman, "Senate Republicans Take Big First Step Towards $1.5 Trillion Revenue-Losing Tax Cut," CBPP, updated October 2, 2017, https://www.cbpp.org/research/federal-tax/senate-republicans-take-big-first-step-towards-15-trillion-revenue-losing-tax.

4 Paul N. Van de Water and Chye-Ching Huang, "Budget and Tax Plans Should Not Rely on 'Dynamic Scoring,'" CBPP, updated November 7, 2014, https://www.cbpp.org/research/budget-and-tax-plans-should-not-rely-on-dynamic-scoring.

One plausible explanation is that such an estimate could undermine congressional Republicans' argument that their tax plan will generate much higher levels of economic growth, which will in turn boost revenues so that the bill does not add significantly to the deficit. Indeed, dynamic analyses produced by the non-partisan Tax Policy Center and the Penn-Wharton Budget Project (led by a former George W. Bush Treasury appointee) have found that the legislation would not produce enough growth to meaningfully reduce the projected deficit impact relative to the $1.5 trillion conventional cost estimate of the bill.[5]

Even the Tax Foundation's extremely rosy dynamic estimates, which show growth impacts far more optimistic than mainstream models because they ignore that increased federal deficits create a drag on national investment and growth, still find substantial revenue losses from both bills.[6] (It would be strange for lawmakers who have expressed concerns about how the national debt affects the economy to rely on a rosy dynamic estimate from a model that ignores those effects.[7]) Notably, the Treasury Department — despite Secretary Steven Mnuchin's claims that the tax plan will reduce the deficit — has declined to produce any public estimates of its own by career staff.

- **A lack of open hearings and legislative language changed shortly before key votes.** Congressional Republicans have repeatedly insisted that their process is "regular order," pointing to, for example, the fact that their bill was marked up in committee.[8] This is true, and in the Senate's case, a departure from the health care repeal bills considered earlier this year. But major, complex provisions of the bill have not been explored in open hearings, either before or after the markup process began.

  The contrast in process can be seen most notably in comparing this to the 1986 tax reform process, which took nearly three years to complete. As that process began, the Treasury Department produced a 262-page report to describe core proposals of the Reagan

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[5] Benjamin Page *et al.*, "Macroeconomic Analysis of the Tax Cuts and Jobs Act as Passed by the House of Representatives," Tax Policy Center, November 20, 2017, http://www.taxpolicycenter.org/publications/macroeconomic-analysis-tax-cuts-and-jobs-act-passed-house-representatives; Penn-Wharton Budget Model, "The House Tax Cuts and Jobs Act, Amended (11/9/17): The Dynamic Effect on the Budget and the Economy," November 13, 2017, http://budgetmodel.wharton.upenn.edu/issues/2017/11/13/the-house-tax-cuts-and-jobs-act-amended-11917-the-dynamic-effect-on-the-budget-and-the-economy; Penn-Wharton Budget Model, "The Senate Tax Cuts and Jobs Act, Amended (11/15/17): The Dynamic Effect on the Budget and the Economy," November 21, 2017, http://budgetmodel.wharton.upenn.edu/issues/2017/11/21/the-senate-tax-cuts-and-jobs-act-amended-111517-dynamic-effects-on-the-budget-and-the-economy.

[6] Tax Foundation, "Details and Analysis of the 2017 Tax Cuts and Jobs Act," updated November 15, 2017, https://taxfoundation.org/2017-tax-cuts-jobs-act-analysis/; Tax Foundation, "Preliminary Details and Analysis of the Senate's 2017 Tax Cuts and Jobs Act," November 10, 2017, https://taxfoundation.org/details-analysis-2017-senate-tax-cuts-and-jobs-act/.

[7] For more on the Tax Foundation model, see Chad Stone and Chye-Ching Huang, "Trump Campaign's 'Dynamic Scoring' of Revised Tax Plan Should Be Taken With More Than A Grain of Salt," CBPP, September 15, 2016, https://www.cbpp.org/research/federal-tax/trump-campaigns-dynamic-scoring-of-revised-tax-plan-should-be-taken-with-more.

[8] "Regular Order: 23.5 Hours Over Four Days, 350+ Amendments Filed," U.S. Senate Committee on Finance, November 20, 2017, https://www.finance.senate.gov/chairmans-news/regular-order-235-hours-over-four-days-350-amendments-filed.

Administration's tax reform plan.[9] The Ways and Means Committee heard testimony from more than 450 witnesses, while the Senate Finance Committee held 33 days of hearings.[10] As former House Minority Leader Richard Gephardt — a major player in the tax reform discussions — explained, "In 1986, the committees conducted hundreds of hours of hearings, not for grandstanding, but for learning and for getting information in front of everybody."[11]

By contrast, the Administration began the tax debate this year by releasing a one-page outline of principles. Major provisions were discussed and released for the first time in recent weeks, including the specific tax cut for "pass-through" businesses, profound changes to the taxation of multinational corporations, and individual tax deductions that are being limited or repealed. And Republicans have advanced new legislative language several times in recent weeks without providing members and their staffs with sufficient time to evaluate the provisions before votes. The House released four versions of its bill within ten days; the Ways and Means Committee, for example, released a new bill only hours before the committee approved it on party lines, moving it to the floor. Likewise, the Senate Finance Committee added major provisions repealing the individual mandate and sunsetting most of the individual tax components of its bill just 48 hours before the committee advanced the bill.

As a defense of the speed at which they've pursued their legislation, Republican leaders have pointed to the fact that tax reform has been an ongoing process since Republicans reclaimed the House in January 2011 — with Senate Finance Committee Republicans, for example, noting that the committee has held more than 70 hearings on the tax code since 2011. This idea operates under the false assumption that the legislative text or even the broad details of a bill are incidental in considering it. It is certainly true that tax reform has been a topic of consideration for years. But that conversation frequently existed at the level of basic concepts, which could not be fully evaluated for their impacts on families, businesses, the economy, or the nation's fiscal outlook.

Indeed, Republicans' example of former Ways and Means Chairman Dave Camp's outline for tax reform as evidence of an ongoing process undermines their own point. Camp's efforts involved far more transparency and open debate, from discussion drafts of key elements released early in the process to a full release of JCT conventional and a range of dynamic estimates — even though the plan never got close to passage.[12] And the current legislation is such a departure from Camp's plan — which aimed to be revenue neutral over ten years, including paying for the extension of any expiring tax breaks and making all of its provisions

[9] U.S. Treasury Department, "Tax Reform for Fairness, Simplicity, and Economic Growth," November 27, 1984, https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Tax-Reform-v1-1984.pdf.

[10] David Rosenbaum, "The Tax Reform Act of 1986: How the Measure Came Together; A Tax Bill for the Textbooks," *New York Times*, October 23, 1986, http://www.nytimes.com/1986/10/23/business/tax-reform-act-1986-measure-came-together-tax-bill-for-textbooks.html.

[11] Senate Finance Committee, "Tax Reform: Lessons from the Tax Reform Act of 1986," September 23, 2010, https://www.finance.senate.gov/imo/media/doc/70694.pdf.

[12] Joint Committee on Taxation, "Technical Explanation, Estimated Revenue Effects, Distribution Analysis, And Macroeconomic Analysis Of The Tax Reform Act Of 2014, A Discussion Draft Of The Chairman Of The House Committee On Ways And Means To Reform The Internal Revenue Code," November 18, 2014, https://www.jct.gov/publications.html?func=startdown&id=4674.

permanent — that the work done around that proposal cannot be described as laying a real groundwork for this bill.

A Rushed, Non-Transparent Process May Create Unintended Consequences

By moving with such reckless speed, congressional Republicans are virtually ensuring that the bill they pass will include provisions that are not fully understood even by the drafters of the legislation — and certainly not by the general public. This likely will result in provisions that are both costlier than estimated and more tilted towards high-income individuals or large corporations with the resources to engage in aggressive tax planning. As Harvard Law professor and former Treasury tax official Stephen E. Shay recently wrote, "Each passing day there are new discoveries of policy anomalies in the legislation. There also will be large and small loopholes in tax legislation adopted without adequate time to review and analyze bill text."[a]

The following are four examples of areas where tax experts have argued that the legislation, as written, could provide opportunities for avoidance or is otherwise deeply flawed:

- **The bills' pass-through provisions.** Both the House and Senate bills create a lower effective tax rate for certain "pass-through" business income. Pass-through income is reported on owners' individual income tax returns and taxed at their individual income tax rates, but the GOP bills would tax much of that income at a special *lower* effective rate than the top rate on wages and salaries. This would create a large avoidance incentive for high-income salary earners to recharacterize their salaries as "business" income in order to get the discounted rate. Tax experts have pointed to many different types of avoidance activities that both bills fail to prevent.[b]

- **The bills' international tax provisions.** The GOP tax bills include a permanent incentive for corporations to shift profits and even investments offshore by setting a far lower effective tax rate on their foreign profits than their domestic profits.[c] Both bills have provisions intended to contain the increased tax avoidance and offshoring this could generate, but tax experts say that they are weak and flawed. The House bill took a novel approach to anti-avoidance measures on multinationals that tax experts struggled to understand when it was released, but an amendment by Ways and Means Chairman Kevin Brady gutted the only anti-avoidance provision with any teeth. Moreover, the Senate and House bills both have anti-avoidance provisions that tax experts say could *increase* incentives to move investment offshore.[c] And one of the Senate bill's key international tax provisions could be subject to challenge by the World Trade Organization, legal experts have said.[d]

- **The bills' provisions around the state and local income tax deduction.** A group of New York University law professors noted that the original House bill appeared to allow pass-through owners to continue to deduct state and local income taxes, while repealing the deduction for other households. This would have created substantial tax avoidance opportunities and revenue losses. Republican tax writers said that this wasn't their intent, but left behind what one expert called "somewhat of a mess in the legislative language."[e] The Senate bill appears to close off this avenue for tax avoidance, but still does not address many other ways taxpayers could rearrange their affairs to effectively continue to benefit from the deduction. These tactics don't appear to be reflected in JCT's estimates, which may substantially overstate the savings from repealing the deduction.

- **The bills' huge opportunities to "game" big rate differences, especially with phase-ins and sunsets.** The bills include both tax cuts and revenue-raising provisions that phase in over time, take effect abruptly, or phase out or sunset. This would create significant opportunities for businesses to game the changes.[f] For example, there would be incentives for corporations to artificially report their income and profits in years in which the rates are lower — and conversely, to report their deductions and losses in those years where the rates are higher and those tax benefits are worth more. Indeed, the Senate bill currently would let businesses immediately deduct the full cost of various investments in 2018, but would cut the corporate rate starting in 2019. This would create an incentive for businesses to report making investments in 2018, when they could be deducted at the current 35 percent corporate rate, but to report profits from those investments in 2019 or later, when they would be taxed at a 20 percent corporate tax rate. The net effect would be a subsidy that could make otherwise unprofitable ventures worthwhile for the tax benefits alone.

[a] Stephen Shay, "Tax Reform – Process Failures, Loopholes, and Wealth Windfalls," Harvard Law School, November 21, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076151.

[b] Daniel Shaviro, "Yet Another Problem with the House's (and Senate's?) Special Tax Rate for Passthroughs," November 11, 2017, http://danshaviro.blogspot.com/2017/11/yet-another-problem-with-houses-and.html, Richard Rubin, "Critics Hit GOP Tax Plan for Small Businesses, Partnerships, Developers," *Wall Street Journal,* November 14, 2017, https://www.wsj.com/articles/critics-hit-gop-tax-plan-for-small-businesses-partnerships-developers-1510683829; David Miller, "Tax Planning Under the Tax Cuts and Jobs Act: Flow-Throughs Are the Answer to Everything," November 13, 2017, https://ssrn.com/abstract=3070662.

[c] Shay; Kimberly Clausing, "Commentary: How the GOP's Tax Plan Puts Other Countries Before America," *Fortune*, November 20, 2017, http://fortune.com/2017/11/20/gop-tax-plan-donald-trump-america-first/; Rebecca Kysar, "The G.O.P.'s 20th-Century Tax Plan," *New York Times,* November 15, 2017, https://www.nytimes.com/2017/11/15/opinion/republican-tax-plan-economy.html.

[d] Rebecca Kysar, "The Senate Tax Plan Has a WTO Problem," November 12, 2017, https://medium.com/whatever-source-derived/the-senate-tax-plan-has-a-wto-problem-guest-post-by-rebecca-kysar-31deee86eb99.

[e] David Kamin, "State and Local Income Tax Deduction: Some Answers, More Questions," November 15, 2017, https://medium.com/whatever-source-derived/state-and-local-income-tax-deduction-some-answers-more-questions-6a7737498921.

[f] Daniel Shaviro, "The Tax Arbitrage Act of 2018?," November 13, 2017, http://danshaviro.blogspot.com/2017/11/the-tax-arbitrage-act-of-2018.html.

Republican Leaders Chose a Fully Partisan Process — With Policy Implications for Families

Congressional Republican leaders chose to pursue a tax bill that required only Republican votes, using the so-called "reconciliation" process, which requires only a simple majority in the Senate. There was no requirement that Republicans use this process: bipartisan tax reform has long been an idea supported in broad concept by members of both parties. But Republicans have not sought to engage in a process or pursue policies that could achieve bipartisan support. Indeed, ideas like an expanded Earned Income Tax Credit for childless workers — embraced by both the Obama Administration and House Speaker Paul Ryan in the past — have not even been on the table.[13]

In both the House Ways and Means and Senate Finance committees, Democrats were given an opportunity to offer amendments — but virtually all of these amendments were rejected on a

[13] Chuck Marr *et al.*, "Strengthening the EITC for Childless Workers Would Promote Work and Reduce Poverty," CBPP, April 11, 2016, https://www.cbpp.org/research/federal-tax/strengthening-the-eitc-for-childless-workers-would-promote-work-and-reduce.

straight party-line basis; meanwhile, as noted above, revised legislative text with major changes was offered repeatedly as amendments from the chairmen of both committees, with Democratic members having just hours to review it before key votes.

A bipartisan process might have provided legislators with the ability to make difficult decisions that would improve the tax code, close loopholes for the wealthy and corporations, and improve the revenue outlook for the future. Instead, congressional Republicans and President Trump committed to a bill that featured large and permanent corporate tax cuts without offsetting base broadening provisions, coupled with other regressive changes — such as repeal of the estate tax — that could not get broad-based support. Once those features were set, a Republican-only reconciliation bill was their only path forward and the decision to use the reconciliation process, in turn, led Republicans to make other unpopular decisions in their bill.[14]

While White House Office of Management and Budget Director Mick Mulvaney has blamed Republican leaders' decision to make individual tax cuts expire on the "absurd rules of the Senate," this is highly misleading.[15] The Senate rules did not force this decision: it is a result of the policies Republicans are seeking to pass. The reconciliation process has certain requirements, including that a bill cannot add to the deficit beyond the first decade — rules that are in place because the reconciliation process was initially established as a mechanism to make it easier for Congress to pass *deficit-reduction* legislation, even though it was "repurposed" to pass deficit-increasing tax cuts in 2001.[16] The rules *rightly* do not permit a fast-track legislative process to create large increases in deficits for decades to come as a result of unpaid-for tax cuts. Once Republican leaders committed to passing a bill through the reconciliation process that included large, permanent corporate tax cuts, they had little choice but to finance them through provisions that would hurt a broad set of families, such as the broad-based individual tax increases and health care cuts — which will result in 13 million more uninsured — included in the Senate bill.

The Process May Be Further Shortchanged in Coming Weeks

Congressional Republicans have taken an approach explicitly designed to move as quickly as possible — and they may even accelerate the process further going forward. As noted above, Senator Hatch has indicated that further changes in the Senate may not be made public until the bill is on the floor later this week. While the House and the Senate must pass the same bill to send it to the President's desk for his signature, that does not necessarily require a "conference committee" to finalize details. Instead, it is plausible that the Senate could make changes to its bill based on informal negotiations with House Republicans in an attempt to pass a bill that the House could approve without further adjustments. Those changes could be unveiled on the Senate floor in a so-called "manager's amendment" from Majority Leader Mitch McConnell only hours before senators

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[14] Chuck Marr, "Senate GOP Tax Plan Raises Taxes on Middle and Lower Income, Adds Millions to Uninsured, to Pay for Corporate Tax Cut," CBPP, November 20, 2017, https://www.cbpp.org/blog/senate-gop-tax-plan-raises-taxes-on-middle-and-lower-income-adds-millions-to-uninsured-to-pay.

[15] CNN, State of the Union transcript, aired November 19, 2017, http://www.cnn.com/TRANSCRIPTS/1711/19/sotu.01.html.

[16] David Reich and Richard Kogan, "Introduction to Budget 'Reconciliation,'" CBPP, updated November 9, 2016, https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation.

vote. That would entail major changes being offered to the legislation with no real opportunity for members of either chamber to scrutinize them or make amendments before it moves to final passage. (This is similar to the approach the two chambers took on the budget resolution that began the tax process, with the Senate making last-minute changes to its version of the resolution that enabled the House to pass it without a conference.)

Moreover, whether the House and Senate take that approach or pursue a traditional conference committee, even the limited information available about the current legislation might be absent from a final bill. For the House bill, JCT provided not only estimates of the cost of the legislation and the distribution of changes across income groups, but also information about how many people at different income levels would receive a tax cut or a tax increase as a result of the legislation. No such "winners and losers" analysis is available for the Senate bill yet, and it is not clear that JCT will produce it before a Senate vote. As the Senate seeks additional changes on the floor, it is plausible that very limited or even no information about the distributional impact of the final legislation will be available before senators are asked to vote. With the only requirement that enough information be available to determine that the bill meets the necessary fiscal requirements, members could vote without fully understanding who wins and who loses under the bill — let alone how the official congressional estimators conclude the bill will affect the economy.

That is by design. Congressional Republican leaders have taken an approach meant to obscure their legislation's impact, by moving it forward before its effects can be fully analyzed and before public input, by both experts and constituents, can be provided. If the bill becomes law, it will occur through an approach designed to ensure that its implications are not fully understood.