



HB 2839: Supporting the CARES Act disconnect

Testimony for House Revenue Committee – Bennett Minton – 2.11.2021

Madam Chair and members of the Committee on Revenue:

Tax Fairness Oregon is a network of volunteers who advocate for a rational and equitable tax code. We strongly support the bill.

We became alarmed about these three CARES Act provisions last spring, when their harm to the General Fund and their distributional effects came into focus. Days after CARES became law, members of Congress alerted their colleagues about these buried provisions. The Joint Committee on Taxation [produced a distributional analysis](#) of the suspension of the of the business loss limitation provision: 82% of the benefits will go to individuals reporting 2020 income greater than \$1 million; those 43,000 taxpayers will receive an average benefit of \$1.6 million.

As you know, LRO has reduced its estimate of the cost of these three provisions since May, thanks to Oregon's sunnier revenue outlook. But our concerns remain: The provisions are a misallocation of limited resources created in Washington, not Salem, and they threaten the General Fund.

I spent three decades in D.C. as a reporter and policy analyst, mostly in tax, and many hours in the Senate Finance Committee, where committee leaders struck deals like this one. The business-lobby witnesses in Oregon's Senate Finance Committee last week contended that the CARES Act was bipartisan. But as you know, legislation comes from compromise, and unlike Oregon, the federal government doesn't balance its budget. Ranking Democrat Wyden championed greater unemployment benefits. In exchange, Republicans insisted on the suspension, for 2018 through 2020, of these limits imposed on business-tax cuts enacted in 2017. My brief summary:

- In 2017, Congress eliminated the net operating loss carryback and extended the carryforward indefinitely. (That is, the periods went from 2/20 years to \emptyset/∞ .) As LRO notes, CARES temporarily extended the carryback five years, allowing taxpayers to use NOLs from these years to offset taxable income as far back as 2013. In academic circles, it's just a shift in when businesses pay tax. But in the real world, some of that revenue leaks—the business never pays because circumstances change or Congress amends the law, as it did here.
- The 2017 business loss limitation—the subject of the JCT analysis—applied to pass-throughs. Its purpose is to stop taxpayers from using business losses to offset **amounts greater than a half-million dollars** in non-business income and end up with no tax liability. For example, if in 2018 my spouse and I had non-business income of \$2 million and our businesses lost \$2 million, we could use only \$500,000 of the business loss to offset the non-business income. As a result, we

We read the bills and follow the money

would still pay tax on \$1.5 million. The rest of the loss would carry forward as an NOL. Under the CARES suspension, we can amend our return and get a refund. Ours is an exclusive club: 43,000 taxpayers among 143 million.

- Third is the interest expense limitation, a provision I lobbied against during the Obama administration. Section 163(j) is intended to prevent companies from using interest deductions to make money elsewhere, a practice known as “earnings stripping.” Years ago, Congress addressed earnings stripping in part by disallowing certain corporate interest expenses that exceeded 50% of the corporation’s “adjusted taxable income,” a complicated formula. In 2017, Congress applied that limitation to all taxpayers—with exceptions—and lowered the limit to 30%. Interest expense not allowed as a deduction may be carried forward. It’s a timing shift.

What are the exceptions? In the 2017 law, the expansion of 163(j) did not apply to businesses with gross receipts of less than \$25 million. Nor did it apply to dealers of motor vehicles, boats or farm machinery. It also left out, at the taxpayer’s election, two other sectors: real estate and farming. Why these exceptions? Congress was carving out industries for which leverage transactions are essential, leaving in those using debt to make money.

Why did Congress suspend these provisions? Officially, to enhance “liquidity” during a sharp contraction. This makes little sense, because tax benefits—especially these—have little or no immediate effect. A taxpayer who filed an amended return for 2018 or 2019 would wait weeks or months for refund. (Recent reports are that the IRS is still processing 2019 returns, and amended returns are a lower priority.) For 2020, the taxpayer may have counted on a tax reduction over the course of the year, assuming the taxpayer projected any liability. But for most businesses losing money in the COVID contraction and therefore without liability, NOLs don’t result in cash. A beneficiary of these provisions is by definition not a “struggling business.” And for most, the “liquidity” of a tax refund isn’t worth their accountants’ time to amend.

My explanation for these provisions is born of experience: The lobbyists who won massive business tax cuts in 2017 remained at the doors of the Finance Committee, looking to be relieved of these limits. (For example, JCT estimated that the 2017 tax cut for pass-throughs would cost \$415 billion and the corresponding pass-through limit, suspended by CARES, would raise \$150 billion.) Like other lawmakers, Finance Committee members like giving away money, but their method is the abstract tax code. Those who pay a lot of tax hire lobbyists (like I was) to hang around their doors.

About half of states with an income tax share Oregon’s rolling conformity to the federal code. Of those with rolling conformity, five—New York, North Carolina, Georgia, Colorado and Hawaii—have disconnected from CARES Act provisions. New York’s disconnection applies through 2021, to protect its tax base from similar moves. Like the PPP double-dip, which we urge the committee to examine.

In sum, these provisions are useless for struggling businesses in Oregon. Since Congress acted last March, we have witnessed a recovery that has shifted income upwards but left millions of Americans, and many thousands of Oregonians, hanging by a thread. One out of seven of our fellow citizens is hungry right now. Remaining connected in the face of urgent needs strikes Tax Fairness Oregon as irresponsible.