Challenges ahead as Biden pitches massive infrastructure plan to Capitol Hill

President Joe Biden this week unveiled his massive tax-and-spending proposal aimed at overhauling the nation's infrastructure; but despite his stated goal of moving legislation through Congress with bipartisan support, early indications suggest he is likely to encounter resistance from Republicans and could even face challenges in holding together the tight Democratic majorities in the House and Senate.

At a high level, the American Jobs Plan, which the president announced during a March 31 speech in Pittsburgh, calls for new spending to upgrade the nation's roads and bridges, electric grid, broadband capacity, and water systems; encourage domestic manufacturing; promote clean energy; expand affordable housing; and improve home- and community-based care for children, the elderly, and individuals with disabilities.

According to a White House fact sheet released ahead of the president's speech, the roughly $2 trillion in spending would be offset through largely familiar corporate-focused tax increases – such as raising the corporate income tax rate and repealing or limiting certain current-law incentives – that then-candidate Biden proposed during the 2020 presidential campaign.
URL: https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/

The administration thus far has not provided specific details on how these tax proposals would operate or when they would take effect. We could learn more when the president releases his budget blueprint for fiscal year 2022 in the coming weeks. (Treasury Department officials have indicated that the budget release is expected to be accompanied by a "Green Book" with detailed explanations of tax proposals.)

The plan does not include specific proposed tax increases affecting upper-income individuals. Those are likely to come into play later this month when the president is expected to unveil a separate tax-and-spending package – which he has dubbed the "American Families Plan" – that will address economic issues facing low- and middle-income taxpayers.

Corporate tax rate

The American Jobs Plan renews a call from Biden's presidential campaign to increase the corporate income tax rate to 28 percent from the 21 percent rate enacted in 2017's Tax Cuts and Jobs Act (TCJA, P.L. 115-97) – a move the administration contends "will return corporate tax revenue as a share of the economy to around its twenty-first century average from before the 2017 tax law and well below where it stood before the 1980s."

The plan also would impose a 15 percent minimum tax on the "book income" of "the very largest corporations" – a term that is left undefined in the White House fact sheet. (During the campaign, Biden called for the tax to be imposed on corporations that report "book income" greater than $100 million but owe no federal income tax.)

Base erosion and offshoring

The plan includes several campaign proposals to modify or eliminate current-law tax provisions that the administration argues provide incentives for companies to locate investment in foreign jurisdictions and move US-based jobs and production activities offshore.

GILTI: The administration proposes to revamp the global intangible low-taxed income (GILTI) rules enacted in the TCJA by:

- Increasing the effective tax rate on GILTI to 21 percent (from the current rate of 10.5 percent);
- Requiring GILTI to be calculated on a country-by-country basis, which generally would prevent taxpayers from offsetting GILTI amounts between high-tax and low-tax jurisdictions; and
- Changing the formula for calculating GILTI to eliminate the exclusion for a 10 percent return on foreign tangible investment (so-called "qualified business asset investment," or QBAI).

FDII: The plan includes a proposal not previously floated by the Biden team (either during the campaign or since the inauguration) that would eliminate the deduction for foreign-derived intangible income (FDII), another provision enacted in the TCJA. According to the fact sheet, revenue generated by repealing the FDII deduction "will be used to expand more effective R&D investment incentives."

BEAT: Another proposal not featured in the 2020 campaign appears to call for repealing the TCJA's base erosion and anti-abuse tax (BEAT) and replacing it, presumably with a more stringent regime. Although the White House provides no details, the fact sheet states that the plan "replaces an ineffective provision in the 2017 tax law that tried to stop foreign corporations from stripping profits out of the United States."

Offshoring and 'inversions': The administration argues that even with tighter minimum tax rules for US corporations in place, foreign corporations would still be in a position to "strip profits out of the United States, and US corporations [could] potentially escape US taxes by inverting and switching their headquarters to foreign countries." To address that perceived issue, the plan calls for:

- Strengthening rules preventing US companies from becoming foreign-domiciled;
- Denying deductions for expenses associated with moving US jobs offshore; and
- Providing a tax credit for expenses associated with "onshoring" jobs back to the US.

All of these proposals were planks in Biden's tax policy platform during the campaign, although the administration has not provided additional specifics on how they would operate. The plan as released does not include a related campaign proposal that would impose a 10 percent net profits tax (in addition to the increased corporate tax rate) on income derived from the production of goods or delivery of services abroad for sale or use in the US.

Global minimum taxes: The plan proposes to encourage other countries "to adopt strong minimum taxes on corporations…so that foreign corporations aren't advantaged and foreign countries can't try to get a competitive edge by serving as tax havens." Members of the Organisation for Economic Cooperation and Development's so-called "Inclusive Framework" are striving to reach agreement on a global minimum tax (known as Pillar 2) as well as new nexus and profit allocation rules (known as Pillar 1) by this summer.

In an apparent attempt to bolster the OECD initiative on Pillar 2, the president's plan also proposes to "deny deductions to foreign corporations on payments that could allow them to strip profits out of the United States if they are based in a country that does not adopt a strong minimum tax." It is unclear whether this would be part of a revised BEAT regime or a separate set of rules.

Fossil fuels and environmental clean-up

The plan generally proposes to eliminate tax provisions that the administration says favor the fossil fuel industry. According to the White House, repealing these provisions is part of President Biden's larger goals of addressing climate change and achieving net-zero emissions in the US by 2050.

The plan also would reinstate "payments from polluters into the Superfund Trust Fund."

On the incentive side, the plan generally calls for expanding current-law credits for solar energy, wind energy, and carbon capture; extending and expanding credits for home and commercial energy efficiency; and providing credits for the purchase of American-made electric vehicles.

Stronger enforcement resources

According to the administration, all of these proposed tax increases would be backstopped by enhanced IRS enforcement resources "to make sure corporations pay their fair share" in taxes. The fact sheet notes that this effort "will be paired with a broader enforcement initiative to be announced in the coming weeks that will address tax evasion among corporations and high-income Americans."

Path forward

Now that the American Jobs Plan has been formally released, the Biden administration is ramping up efforts to sell it on Capitol Hill. Democrats and Republicans have championed the need for a significant infrastructure investment package for several years, but Biden's proposal is by no means winning bipartisan support. The proposed revenue raisers, the broad definition of "infrastructure," and the prioritization of specific transportation projects are all driving deep divides, even as the administration says it wants to hear Republicans' ideas. And there is also a question of whether the president's plan can make it through his own party, with Democrats' majorities so narrow that they can lose only three votes in the House, and have none to spare in the Senate.

Revenue raisers a concern for GOP: Biden's proposals to significantly increase the corporate tax rate and to pare back the key components of the TCJA's international tax changes – which were sold at the time as a tradeoff for the end of deferral and the imposition of a deemed repatriation tax – have been declared non-starters by Republicans, who warn that tax hikes will threaten the US's economic recovery.

"This is the biggest economic blunder of our lifetime," Rep. Kevin Brady of Texas, the top Republican on the House Ways and Means Committee – and one of TCJA's architects – told reporters this week. "As you're trying to rebuild the economy from the biggest hit we've had in 90 years, why would you impose a massive tax hike on the very Americans' businesses you want to rehire workers?"

The Senate Finance Committee's senior Republican, Sen. Mike Crapo of Idaho, likewise argued in a news release that "[h]astily changing the tax system purely for purposes of raising revenue will bring back inversions and foreign takeovers of US companies, cost jobs, shrink domestic investment, and slow down wage growth, ultimately crushing ordinary workers and the middle class."

Senate Republican Leader Mitch McConnell of Kentucky told reporters April 1 that the Biden proposal would not get any support from his members because "the last thing the economy needs right now is a big, whopping tax increase."

"My view of infrastructure is we ought to build that which we can afford, and not either whack the economy with major tax increases or run up the national debt even more," he continued.

A number of business groups have also criticized the administration's proposed tax increases, saying that they support investment in the nation's infrastructure but oppose what they consider a tax code that would make US companies less competitive.

Questions about scope: Republicans have also taken issue with the broad scope of the proposal, arguing that Democrats want to push through "progressive priorities" under the banner of infrastructure and criticizing the inclusion of money for electric vehicle charging stations and what some Democrats have called "social infrastructure," such as affordable housing and community colleges.

"Our nation could use a serious, targeted infrastructure plan. There would be bipartisan support for a smart proposal," McConnell said in a statement March 31. "Unfortunately, the latest liberal wish-list the White House has decided to label 'infrastructure' is a major missed opportunity by this administration."

In early March, at a White House meeting that included the president and Transportation Secretary Pete Buttigieg, Rep. Sam Graves of Missouri, the top Republican on the House Transportation and Infrastructure Committee warned against a proposal like the one rolled out this week, saying that "[a] transportation bill needs to be a transportation bill that primarily focuses on fundamental transportation needs, such as roads and bridges. Republicans won't support another Green New Deal disguising itself as a transportation bill."

Buttigieg on March 29 contended that the administration's focus on climate change is directly connected to its focus on infrastructure.

"You can't separate the climate part from this vision," he said, "because every road we fix, every bridge we build, we can either do it in a way that's better for the climate or worse for the climate. Why wouldn't we want to be creating these jobs in a way that's better for the climate?"

White House Chief of Staff Ron Klain said April 1 that while Biden hopes for GOP support, he's willing to push ahead with Democrats only.

"Let's work together and see if there's a way for us to deliver this," Klain told Politico. "In the end, let me be clear, the president was elected to do a job. And part of that job is to get this country ready to win the future. That's what he's going to do. We intend to deliver."

Some red lines from Democrats: While the congressional timeline is not yet clear, House Speaker Nancy Pelosi, D-Calif., reportedly told her caucus this week that she hopes to pass a bill by July 4 – an ambitious target for such a mammoth piece of legislation which still needs to be drafted and scored. But if Republicans stand united in opposition to the proposal, Pelosi can lose just three votes from her own party and still retain majority support on the House floor, and some Democrats are drawing red lines before the drafting has even begun.

This week, four Democrats – Rep. Tom Suozzi of New York and Reps. Josh Gottheimer, Bill Pascrell, and Mikie Sherrill of New Jersey – all said that they would oppose any changes to the tax code that did not include a full repeal of the $10,000 cap on the deduction of state and local taxes (SALT), which was passed as part of the TCJA. Additional Democrats are reportedly in discussions to publicly join the four, while others in the party view repealing the cap as a tax cut for the wealthy.

The president has not taken a clear position on repealing or limiting the cap, but White House Press Secretary Jen Psaki told reporters April 1 that if Democrats "want to propose a way to pay for it, and they want to put that forward, we are happy to hear their ideas."

On the other side of the party's "big tent," progressive members would like the bill to make the newly expanded child tax credit made permanent, and the chair of the Congressional Progressive Caucus, Rep. Pramila Jayapal, D-Wash., said the bill needs to be "substantially larger in size and scope." However, all of these demands come with hefty price tags and would add to the challenge of raising revenue.

Pelosi said April 1 that she hopes to include the SALT cap repeal in the package, but she also asked Democrats not to offer any ultimatums, saying, "I would withhold any comment about whether you're going to vote for a bill or not until you see what the bill is."

In the Senate, where Democrats hold the majority in the 50-50 chamber only with the tiebreaking vote of Vice President Kamala Harris, all eyes are on a handful of Democratic members viewed as key to success, including Sens. Joe Manchin of West Virginia, Kyrsten Sinema of Arizona, and Jon Tester of Montana. The senators so far are holding their cards close to the vest. Manchin recently told reporters that the corporate tax rate should be raised to at least 25 percent, but he has not weighed in on the 28 percent proposal. It also remains to be seen how Democrats who represent coal-heavy states, such as Manchin, Tester, and Sen. Bob Casey of Pennsylvania, will respond to tax increases targeting the fossil fuel industry.

Taxwriting chairmen weigh in: House Ways and Means Committee Chairman Richard Neal, D-Mass., told reporters April 1 that his panel will begin holding hearings soon and added that he has “some ideas” on changes to the administration’s proposed offsets, although he declined to go into detail. He also expressed an interest in including tax incentives for economic development – for example, reinstating the now-expired Build America Bonds program and expanding the new markets tax credit.

For his part, Senate Finance Committee Chairman Ron Wyden, D-Ore., announced this week that he will unveil his own international tax reform framework on April 5 (along with Democratic taxwriters Sherrod Brown of Ohio and Mark Warner of Virginia). Wyden told reporters on March 31 that his plan would be “distinct” from the administration’s proposals but noted that they “share the same goals.”

Budget matters

According to the administration’s fact sheet, the eight-year, $2 trillion cost of the White House’s infrastructure initiatives would be fully offset over a 15-year span by the proposed business tax changes. After 15 years, the changes would begin to permanently reduce projected budget deficits according to the White House.

It is difficult to know, however, whether those broad budget parameters will hold as the drafting process is taken up in Congress. As a threshold matter, given the strong likelihood that Republicans will not support a tax-and-infrastructure package resembling Biden’s American Jobs Plan, congressional Democrats would again – as they did with the just-enacted American Rescue Plan – have to leverage the budget reconciliation process in order to avoid a near-certain GOP filibuster in the Senate. Even then, as already noted, there are differences of opinion that would have to be bridged between moderate and progressive Democrats as to the size, scope, and details of any legislation.

Among the so-called “Byrd rules” – named after the late Sen. Robert Byrd, D-W.Va. – that govern the budget reconciliation process is a statutory requirement that reconciliation legislation not increase the deficit in any fiscal year beyond the budget window. It is not clear whether by proposing to fully finance eight years’ worth of costs over 15 years, the Biden administration is envisioning that Congress abandon the typical 10-year budget window in favor of one that projects spending and revenue over 15 years, or whether it is instead envisioning that Congress utilize a traditional 10-year budget with reconciliation instructions that authorize a net deficit increase within the 10-year window, as was the case with the American Rescue Plan. These are among the many substantive and procedural details that will need to be ironed out as the process moves forward.

Relatedly, there were reports this week that the office of Senate Majority Leader Charles Schumer, D-N.Y., has been in contact with the Senate parliamentarian in order to understand whether congressional Democrats could leverage a little-known provision within the Congressional Budget Act of 1974 to “revise” the fiscal year 2021 budget resolution – that is, the budget plan that Democrats used to tee up the filibuster-proof reconciliation process for consideration of the American Rescue Plan – in a way that authorizes another round of reconciliation legislation pursuant to that same budget. Although the tactic has never been tried before, and it remains unclear whether the parliamentarian will agree with Schumer's apparent reading of the law, this approach in theory raises the specter of two additional reconciliation bills this year when considering the ability of Democrats to also adopt a budget resolution for fiscal year 2022, which is set to begin this coming October 1.

If the parliamentarian advises that amendment of a budget resolution does not allow for a new set of reconciliation instructions, then the American Jobs Plan is likely to be merged, legislatively, with the forthcoming American Family Plan, which is expected to address a variety of health care and other "human infrastructure" issues and be paid for with changes to tax rules and rates affecting higher-income individuals.

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