Rough road ahead as deal on bipartisan infrastructure framework emerges

President Biden and a bipartisan group of Senate negotiators announced June 24 that they had reached an agreement on a legislative framework to fund "hard" infrastructure, and after intense wrangling over how – and whether – the package should be paid for, the group released a list of revenue raisers that includes only one direct tax increase: reinstating Superfund excise taxes for chemicals.
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210625_1_suppA.pdf

But the agreement's path forward could be complicated by efforts to link it to a separate package – presumably to be moved under budget reconciliation protections – that would address the "human" infrastructure proposals and tax policy priorities that the president has laid out in the American Jobs Plan, the American Families Plan, and his fiscal year 2022 budget blueprint.

A narrower view of 'infrastructure'

The group of 10 senators who hashed out the deal – spearheaded by Sen. Kyrsten Sinema, D-Ariz., and Sen. Rob Portman, R-Ohio – spent two days this week huddled with White House negotiators before meeting with the president at the White House and then announcing their accord.

"We earned the support of the United States president because there's a recognition that this package meets the needs that our country faces, both from a job creation standpoint, from investing in crumbling infrastructure that has been neglected for multiple decades and critical national security to help us prepare for the challenges we face in the global community," Sinema told the press following the White House meeting.

A previous attempt to reach a compromise, undertaken by a group of GOP senators led by Sen. Shelley Moore Capito of West Virginia, collapsed earlier this month, but the deal announced this week appears to be similar to the last offer Republicans made during those talks. The framework released June 24 includes $973 billion in spending for physical infrastructure over five years – with $559 billion designated as new spending – and is focused on transportation, water, broadband, and the power grid, as well as environmental remediation and "resilience."

This is a fairly traditional and far more narrow definition of infrastructure than President Biden proposed in his American Jobs Plan this spring, reflecting the fact that most Republicans are not willing to negotiate a bill that also includes spending on schools, child care centers, veterans' facilities, energy-efficiency improvements to commercial buildings, and the home health care industry. The GOP has criticized the president's original plan – as well as his American Families Plan to invest in "human infrastructure" – as too expensive and full of "liberal wish list" priorities. The new spending proposed in the American Jobs Plan is about $2.65 trillion over eight years, including tax credits totaling about $400 billion; the price tag on the American Families Plan is about $1.8 trillion over 10 years.

Consensus on offsets

The administration laid out a long list of tax hikes on corporations and the wealthiest individual taxpayers to offset much of the proposed spending in those two legislative packages, including increases in the corporate income rate, the tax on multinationals' overseas profits (global intangible low-taxed income, or GILTI), the top individual income rate, and capital gains. (For additional details on the American Jobs Plan, see *Tax News & Views*, Vol. 22, No. 19, Apr. 9, 2021. For details on the American Families Plan, see *Tax News & Views*, Vol. 22, No. 23, Apr. 30, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210409_1.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210430_1.html

Many of these proposals would roll back tax relief provisions enacted in 2017's Tax Cuts and Jobs Act (TCJA, P.L. 115-97). But congressional Republicans generally have regarded the TCJA as untouchable. On the flip side, the president, who vowed during his 2020 campaign not to raise taxes on individuals earning less than $400,000 a year, rejected GOP proposals such as indexing fuel taxes (which have not been increased since 1993) and imposing user fees on electric vehicles.

The list of revenue raisers in the framework President Biden and the senators released this week includes:

- Reducing the "tax gap" (the difference between the amount of tax owed to the government and the amount actually collected);
- Unemployment insurance program integrity;
- Redirecting unused unemployment insurance relief funds;
- Repurposing unused relief funds from 2020 emergency relief legislation;
- State and local investment in broadband infrastructure;
- Allowing states to sell or purchase unused toll credits for infrastructure;
- Extending expiring customs user fees;
- Reinstating Superfund fees for chemicals;
- 5G spectrum auction proceeds;
- Extending mandatory sequester;
- Strategic petroleum reserve sale;
- Public-private partnerships; private activity bonds; direct pay bonds and asset recycling for infrastructure investment; and
- Macroeconomic impact of infrastructure investment.

Until the framework is cast in legislative language and is scored by the Joint Committee on Taxation, it is uncertain exactly how much revenue some of these proposals might raise. For example, the amount of revenue that can be gained by shrinking the tax gap has been the subject of some debate this year, especially after IRS Commissioner Charles Rettig told congressional taxwriters that the annual gap is likely much higher than the prior official estimate of $441 billion and could be as high as $1 trillion. To try and recoup more of this foregone money, the administration's FY 2022 budget request called for a 10.4 percent increase in IRS funding over current levels, including $6.7 billion in new discretionary spending for enforcement efforts over the 10-

year budget window, as well as $72.5 billion in mandatory spending for enforcement and compliance. (For previous discussion of the tax gap, see *Tax News & Views*, Vol. 22, No. 25, May 14, 2021, and *Tax News & Views*, Vol. 22, No. 29, June 11, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210514_3.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210611_2.html

Also of note, by including the estimated macroeconomic impact of infrastructure investment, the framework relies on what is known as dynamic scoring – a concept Republicans have long embraced when pushing for tax cuts but that Democrats have often regarded with some skepticism.

Senate Finance Committee member Mark Warner, D-Va., one of negotiators of the bipartisan package, told *Politico* on June 24 that the framework is counting on $100 billion over 10 years from narrowing the tax gap, based on an investment of $40 billion in new spending to expand IRS enforcement and compliance operations. He also indicated that the group is assuming the impact of dynamic scoring to be $58 billion over 10 years.

Further offset assumptions have not been officially released, but a draft document that has been widely circulated in Washington shows that negotiators believe that reinstating the Superfund tax on chemicals, which expired in 1995, would raise $13 billion. (This excise tax, first levied in 1987 and used to finance environmental clean-up of certain hazardous waste sites, applied to the sale or import of specified chemicals by the manufacturer, producer, or importer, at a rate ranging from 22 cents to $4.87 per ton.) The recent Green Book of revenue proposals published by the Biden administration calls for reinstating Superfund taxes at double their previous rates, which was projected to raise $24.8 billion over 10 years. Because the exact parameters of the bipartisan framework's provision are not yet known, the reason for the discrepancy between the bipartisan group's estimate and the administration's estimate is unclear.

A separate reconciliation bill, too?

As the bipartisan infrastructure talks progressed this week, congressional Democrats indicated they were also continuing down the path of writing a fiscal year 2022 budget resolution that, if adopted, would tee up the budget reconciliation process as a way to side-step a likely GOP filibuster against a legislative package focused on Democratic priorities including potential tax increases to finance climate change initiatives and investments in areas such as paid family and medical leave, universal child care, and access to pre-kindergarten education.

By utilizing reconciliation – which first requires the House and Senate to adopt a congressional budget resolution authorizing the process – Democrats could advance subsequent budget-related legislation through the Senate with the support of all 50 Democrats plus the tie-breaking vote of Vice President Kamala Harris rather than the three-fifths supermajority typically required to overcome procedural hurdles in that chamber. This was the procedure Democrats employed to enact the COVID-relief focused American Rescue Plan earlier this year.

Sanders said to be looking at $6 trillion package with SALT cap relief: Reports this week indicated that Senate Budget Committee Chairman Bernie Sanders, I-Vt., is eyeing a budget plan with reconciliation instructions large enough to accommodate $6 trillion worth of fiscal initiatives – including expanding the benefits menu for

Medicare and lowering the program's eligibility age, providing for immigration-related spending, and increasing federal funding for affordable housing. The plan would also reportedly accommodate most of President Biden's American Jobs Plan and American Families Plan (though, presumably, the fiscal value of any bipartisan infrastructure deal struck by the two parties would be subtracted from the spending amount Democrats may pursue later through reconciliation).

Reports this week also indicated that Sen. Sanders's draft plan would allow space for relaxing the $10,000 cap on state and local tax (SALT) deductions put in place by 2017's TCJA, to the tune of about $120 billion. Though that sum likely is not large enough to accommodate a full repeal of the cap (which, under current law, will remain in place through 2025) it would allow for Congress to consider ways to reduce the number of taxpayers that are subject to it – for example, by raising the $10,000 threshold or making it larger for married couples than for single filers.

Though the issue has become of paramount importance to a number of Democrats hailing from New York, New Jersey, and other "blue" states with high income and property taxes, Sanders historically has not been supportive of efforts to repeal or weaken the cap.

"Do I think billionaires should receive a tax break in that area? I don't," Sanders said June 22.

Still, its inclusion in his draft plan is indicative of the policy tightrope Democrats will have to walk just to get a budget plan in place that unlocks the reconciliation process.

"We're going to have to work hard, and, you know, make some trade-offs, and so forth and so on," Sanders said. "I am more than willing to speak to every member and hear what they have to say."

To that end, it is important to keep in mind that, in order to invoke the reconciliation process, Sen. Sanders and Democratic leaders would also have to secure the support of moderate Democrats – including Sen. Sinema and West Virginia Democratic Sen. Joe Manchin – on the underlying budget resolution. Those two senators in particular have been vocal about their reluctance to adopt procedural tactics to bypass Republicans in lieu of pursuing legislation on a bipartisan basis. They, along with a handful of other members of the Democratic caucus, are also more moderate on fiscal issues and may be reluctant to sign off on a budget plan of the size Sanders is apparently considering.

"We're going to have to make sure that we end up with numbers that 50 members can agree on," Sanders acknowledged.

Across the Capitol, reports suggested that House Budget Committee Chairman Yarmuth is considering drafting a budget resolution that could accommodate a subsequent $4 trillion reconciliation package – though again, that amount may include "hard" infrastructure spending that is also baked into the emerging bipartisan Senate plan and so could later be backed out of the budget resolution.

Can't have one without the other…

One concern consistently raised by many progressive Democrats relates to the sequencing of consideration of any bipartisan infrastructure deal and a budget resolution teeing up Democrats' ability to utilize the filibuster-proof reconciliation process. Many of these members are demanding an assurance that moderate Democrats, especially those who have been party to the bipartisan Senate talks, will also lend their support to pass both a budget resolution and a follow-on reconciliation package.

Senate Budget Committee Chairman Bernie Sanders himself raised the same issue in comments to reporters this week.

"It's going to be either both or nothing," he said. "There will not be a bipartisan bill unless there's a major reconciliation bill."

Similarly, the Senate's top taxwriter, Ron Wyden, D-Ore., said, "I want it understood that as chairman of the Finance Committee, I will not accept throwing those other priorities – climate change, holding down the cost of medicine, ensuring that the very affluent have to pay taxes – I will not support anything that throws those other matters overboard."

Those concerns appear to have registered with Democratic leaders.

"One can't be done without the other. All of us agree to that," Senate Majority Leader Charles Schumer, D-N.Y., said June 23. "We can't get the bipartisan bill done unless we're sure of getting the budget reconciliation bill done. We can't get the budget reconciliation bill done unless we're sure of the bipartisan [bill]. I think our members across the spectrum realize that."

House Speaker Nancy Pelosi, D-Calif., echoed those comments during her weekly press conference on June 24.

"There won't be an infrastructure bill unless there's a reconciliation bill. Plain and simple," she said.

A tricky proposition

Linking the two bills, however, creates new problems for Democratic congressional leaders in their efforts to wrangle enough votes to move both measures through the House and Senate and get them to the White House.

With the Democrats' majority in both chambers razor thin, they will need every single vote from their party in the Senate and can afford to lose just four votes in the House, assuming that no Republicans cross the aisle to support a bill under reconciliation. But this poses a steep challenge as some moderate Democrats have indicated they are not comfortable with the size of the second package being discussed or with some of the more progressive policy priorities likely to be included.

“It doesn’t seem to be fair to me but they’re gonna make those decisions,” West Virginia Democratic Sen. Joe Manchin commented to CNN of his progressive colleagues’ demands. “But we have to see what’s in the other plan before I can say ‘Oh yes, you vote for this and I’ll vote for that. That’s not what I have signed up for.’”

Over in the House, getting the votes for both bills could be an even bigger challenge. Unlike in the Senate, where the bipartisan framework currently appears to have at least a measure of GOP support, Speaker Pelosi may not be able to count on many Republican votes to offset any progressive Democrats who break ranks and vote against that proposal if they are concerned moderates won’t deliver on a more expansive reconciliation package. To avoid that possible outcome, Pelosi this week called on the Senate to move both pieces of legislation first.

“We will not take up a bill in the House until the Senate passes a bipartisan bill and a reconciliation bill,” Pelosi told reporters June 24. “If there is no bipartisan bill, then we’ll just go when the Senate passes a reconciliation bill.”

Critically, President Biden on June 24 backed those Democrats who insisted the bills need to travel as a pair, telling reporters “if this [bipartisan deal] is the only thing that comes to me, I’m not signing it.”

With an unknown number of left-leaning Democrats potentially voting “no” on the framework laid out this week, the view of Senate Minority Leader Mitch McConnell, R-Ky., will be a key indicator of whether the bipartisan deal can garner enough GOP votes to pass the Senate.

McConnell has not yet committed to supporting it, saying that Democrats’ insistence on pairing the bill with one that will unwind Republicans’ 2017 tax cuts violates a “red line” for the GOP.

“It puts us in a very, very challenging position,” he told CNN June 24.

Later in the day, McConnell cast doubt on the prospects for the bipartisan proposal in the wake of President Biden’s promise not to sign that measure if it is not accompanied by a robust reconciliation package.

“I think we have gone from optimism to pessimism as a result of the president’s second press conference,” McConnell told Fox News.

Several Republican senators who were involved in the bipartisan negotiations – including Ohio’s Rob Portman, Maine’s Susan Collins, South Carolina’s Lindsey Graham, and Utah’s Mitt Romney – have also expressed disappointment over Biden’s pronouncement, saying that the all-or-nothing stance was not something that was addressed in the group’s talks with the White House.

Next steps

Implementing this proposed two-pronged legislative strategy will require some heavy lifting from lawmakers over the next several weeks. The bipartisan framework needs to be cast into legislative language, and the two chambers will likely move separate versions and then resolve differences between the two. The House and Senate also will need to reach an agreement on a budget resolution for fiscal year 2022 that includes reconciliation instructions for the relevant congressional committees and then develop legislation based on the budget parameters outlined in those instructions.

Based on recent statements by Senate Majority Leader Schumer, Senate Budget Committee Chairman Sanders, and House Budget Committee Chairman John Yarmuth, Democrats in both chambers hope to move a budget resolution through Congress during July. With the Independence Day recess looming, however, it is possible that this timeline could slip. (The Senate is adjourned from June 26 until July 12. The House is scheduled to be in session through July 1 and then will adjourn until July 12.)

Yellen urges action on debt ceiling

The task of advancing a potential bipartisan infrastructure agreement and a possible follow-on reconciliation package come as lawmakers are also staring down a deadline to increase or further suspend the federal debt ceiling. Congress last suspended the debt ceiling as part of the Bipartisan Budget Act of 2019, but that suspension expires after July 31, 2021.

Treasury Secretary Janet Yellen, speaking at a June 23 Senate Appropriations Financial Services and General Government Subcommittee hearing, urged Congress to address the debt ceiling "as soon as possible."

In an exchange with subcommittee Chairman Chris Van Hollen, D-Md., Yellen said that taking no action on the debt ceiling and allowing the federal government to default on its payment obligations should be regarded as "unthinkable" and would have "catastrophic" economic consequences. She emphasized that raising or further suspending the debt ceiling would allow the government to continue pay its current bills and would not authorize new spending.

Yellen also noted that due to uncertainty around federal payment flows – a consequence of the pandemic-induced economic slowdown and the substantial federal assistance programs put in place in response – it is difficult to determine whether Treasury could forestall default for any significant length of time by resorting to so-called "extraordinary measures" as it has often done in the past. She cautioned that the debt ceiling could be breached sometime in August, while Congress is scheduled to be in a weeks-long recess. (See separate coverage in this issue for additional details on the subcommittee hearing and the IRS budget.)

The parliamentary rules governing the budget reconciliation process allow for policy adjusting the statutory debt limit. However, it appears unlikely that any reconciliation legislation will be ready in time for Democrats to act to lift the limit on their own. In any case, whether they would be willing to bear the full political brunt of raising the debt limit is an open question.

That raises the specter of the two parties having to come together – perhaps sooner than previously expected – to stave off default.

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