Procedural stumble for Senate bipartisan infrastructure plan as negotiators work to finalize text

The Senate on July 21 blocked consideration of a physical infrastructure spending bill that a bipartisan group has been crafting for weeks; but the key GOP negotiators who voted against beginning debate on the as-yet unfinished legislation say they are close to finalizing a deal with their Democratic colleagues and should be in a position to support moving forward as early as July 26.

Meanwhile, Democrats on the Senate Budget Committee continued their efforts to drum up support within their caucus for a $3.5 trillion budget resolution for the coming fiscal year that would include reconciliation instructions to accommodate a massive "human" infrastructure package that could advance on the strength of Democratic votes alone.

Forcing action on bipartisan package

Senate Majority Leader Charles Schumer, D-N.Y., forced this week's cloture vote – a procedural motion aimed at teeing up debate on a piece of legislation – in what he said was a necessary move to begin floor consideration of the infrastructure bill. All of the chamber's Republicans objected to the push, however, arguing that they did not want to hold a procedural vote on a bill that had not yet been drafted, and the motion was defeated 49-51. (A 60-vote supermajority was required for approval. Schumer changed his own vote from yes to no at the conclusion of the proceedings to preserve his right to quickly bring the measure up for reconsideration at a later date.)

In the wake of the failed cloture motion, a group of GOP lawmakers is continuing to work with Senate Democrats and the Biden administration to nail down the last of the spending details, refine the offsets, and get revenue estimates from the Congressional Budget Office (CBO).

According to press reports, a group of 11 Republicans led by Sen. Rob Portman of Ohio sent Schumer a letter stating that they will be ready to vote for cloture on July 26. Separately, a group of 22 senators, including 10 Republicans, said in a statement released after the initial cloture vote that they "are close to a final agreement."
URL: https://www.portman.senate.gov/newsroom/press-releases/senators-statement-infrastructure-0

"We will continue working hard to ensure we get this critical legislation right – and are optimistic that we will finalize, and be prepared to advance, this historic bipartisan proposal to strengthen America's infrastructure and create good-paying jobs in the coming days," the group said.

If all 50 Democrats vote in favor of the legislation, at least 10 Republicans will need to join with them to avert a filibuster, so keeping all of the current members of the group on board (or recruiting new GOP supporters) is crucial.

Sticking points on revenue, spending provisions: Since they rolled out the framework of a bipartisan agreement to invest in physical infrastructure on June 24, Portman, Sen. Kyrsten Sinema, D-Ariz., and eight others from both sides of the aisle have been working to flesh out its details. Their plan currently calls for $973 billion in spending over five years – $579 billion of which is designated as new spending – on highways, transit systems, water, broadband, and the power grid, as well as environmental remediation and "resilience."

With Republicans generally eschewing any tax increases as pay-fors, the only tax provision included in the group's initial framework was a proposal to reinstate the Superfund excise tax on chemicals, which expired in 1995. This tax, one of three Superfund excise taxes, was first levied in 1987 to finance environmental cleanup of certain hazardous waste sites and 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. According to the recent Treasury Department Green Book describing revenue proposals in the Biden administration's fiscal year 2022 budget blueprint, the White House has called for reinstating Superfund taxes at double their previous rates, but the parameters of the bipartisan group's proposal are not yet known.

Negotiations on the revenue side of the framework recently hit a speedbump after some Republicans raised objections to a proposal to boost funding for IRS enforcement by $40 billion in an effort to narrow the "tax gap," the difference between the amount of tax owed to the government and the amount actually collected. (Supporters argue the provision would generate revenue through increased collection of taxes legally due; opponents counter that it would run the risk of creating a massive new bureaucracy within the Service.) Press reports have suggested that the proposal was also pulled because Democrats plan to use this provision as a pay-for in their upcoming reconciliation bill. (More on that below.)

After it became clear the provision would cost the bill essential support, the negotiators agreed to drop it and have reportedly agreed to replace the foregone revenue – initially estimated at a net $100 billion – with a repeal or further delay of a Trump-era Medicare proposal that has never gone into effect. The so-called Medicare rebate rule would block rebates that pharmaceutical companies pay to pharmacy drug managers and instead allow rebates to be provided directly to consumers at the pharmacy counter. A 2019 CBO estimate pegged the rule's cost at $177 billion over 10 years. Implementation of the rule has already been delayed once by the Biden administration and is currently set to take effect at the beginning of 2023.

Among the final issues said to be outstanding as of press time are the allocation of unused coronavirus relief funds and the division of funding for various transportation systems. Since the 1980s, transportation spending has operated under a so-called 80-20 split: highways get 80 percent of funds, and transit gets 20 percent. However, Democrats are pushing for more transit funding in this year's bill, while some Republicans are balking at the 80-20 ratio, arguing, among other things, that it would disproportionately benefit a handful of large metropolitan areas.

Another cloture vote ahead: Sen. Mitt Romney, R-Utah, one of the core 10 negotiators for the bipartisan package, told reporters July 22, "I think most of the agreements have been reached. A few things that are still being worked on. And they largely relate to transit [versus] highway and that split. …But yeah, I think it'll be there on Monday. If not, it'll be a day or two after, but I think it'll be on Monday."

Another cloture vote is expected once such an agreement is in place.

Sanders continues sales job on $3.5 trillion budget resolution

In related developments this week, Senate Budget Committee Chairman Bernie Sanders, I-Vt., and the Democrats on his budget-writing panel continued efforts to get their colleagues on board with a fiscal year 2022 budget resolution with reconciliation instructions designed to unlock a $3.5 trillion human infrastructure package that could move later this year with only Democratic support. (Budget Committee Democrats announced an agreement on the topline spending number on July 13. For prior coverage, see *Tax News & Views*, Vol. 22, No. 33, July 16, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210716_1.html

A missed deadline: Majority Leader Schumer had set a soft deadline of July 21 for the full Democratic caucus to agree on the broad contours of the budget plan, which generally is expected to accommodate White House priorities such as mitigating climate change and expanding access to pre-kindergarten education, affordable housing, child care, and paid family and medical leave. That deadline came and went without a deal in place, however – an outcome likely stemming in large part from the concurrent fluidity of the Senate's bipartisan infrastructure talks, the resolution of which will surely influence the ultimate shape of any budget blueprint, including the size and design of its reconciliation instructions.

Sanders indicated July 21 that he hoped a budget resolution could be drafted and ready for floor consideration "by early August."

By utilizing budget 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 Senate Democrats plus the tie-breaking vote of Vice President Kamala Harris, rather than the three-fifths supermajority typically required to overcome procedural hurdles in the chamber. This was the procedure Democrats employed to enact the American Rescue Plan (P.L. 117-2), the COVID-relief legislation that was signed into law earlier this year.

But rounding up the support of all 50 Democrats on a budget plan to shepherd through what could be sweeping changes to tax and spending policy – even on a partisan basis – may prove challenging.

"We are talking every day. We are talking to different members," Sen. Sanders said. "[There are] 50 different members and 50 different sets of priorities."

For his part, moderate Democratic Sen. Joe Manchin of West Virginia – who is also a linchpin in the bipartisan infrastructure discussions – noted July 21 that he had not yet spoken to Chairman Sanders about the budget plan, but that he plans to do so.

"We haven't gotten there yet," Manchin said.

Manchin has previously expressed some unease with the size of his more progressive colleagues' spending ambitions, including the effect additional federal outlays could have on consumer prices. He has also indicated that any reconciliation bill should be fully paid for with other changes to tax and spending policy.

Passthrough changes, 'border carbon adjustment' eyed as potential pay-fors: To that end, and as part of Democrats' efforts to begin fleshing out the details of a potential reconciliation bill, a pair of prominent senators this week rolled out separate proposals that they argued could be part of a slate of tax-increase provisions targeting large corporations and upper-income individuals to help offset the cost of any human infrastructure package the chamber may consider later this year. (Some reports indicated that Senate Democrats may be eyeing around $2.2 trillion in tax offsets to a potential $3.5 trillion spending package, with the remainder potentially coming from health care measures and savings associated with enhanced economic growth. It is also worth noting that any final decisions about changes to tax law in an eventual reconciliation bill would rest with the two congressional taxwriting committees.)

On July 20, Senate Finance Committee Chairman Ron Wyden, D-Ore., introduced the Small Business Tax Fairness Act (text, one-page summary), legislation that he argued would simplify and better target the 20 percent deduction under tax code section 199A, which was enacted in 2017's Tax Cuts and Jobs Act (TCJA, P.L. 115-97) and applies to the qualified business income of certain passthrough businesses.
URL: https://www.finance.senate.gov/download/small-business-tax-fairness-act
URL: https://www.finance.senate.gov/download/small-business-tax-fairness-act-one-pager

Among other changes, Wyden's bill would eliminate the "specified trade or business" concept that partially determines eligibility for the deduction, simplify the limitations (including denying the benefit to estates and trusts), and begin to phase out the deduction for individuals with income over $400,000. The deduction would be eliminated for individuals with income above a $500,000 threshold.

"Half the benefit of the passthrough deduction goes to millionaires, and because the benefit is so skewed toward the top, many Main Street business owners are excluded…," Wyden said in a statement announcing his proposal. "This bill is a win-win. It's going to make the policy more fair and less complex for middle-class business owners, while also raising billions for priorities like child care, education and health care," he added.

Exactly how much Sen. Wyden's bill could raise to finance other Democratic priorities is unclear, although a previous analysis by the Joint Committee on Taxation suggested that, in 2024 alone, taxpayers making more than $500,000 a year would receive almost $40 billion in tax benefits from the deduction (out of a combined $60.3 billion in benefits for taxpayers across all income levels).
URL: https://www.jct.gov/publications/2018/jcx-32r-18/

A second potential offset was rolled out by Sen. Chris Coons, D-Del., and Rep. Scott Peters, D-Calif., on July 19. The FAIR Transition and Competition Act of 2021 (text, one-page summary) would levy a "border carbon adjustment" in the form of tariffs on certain carbon-intensive imported goods. According to the lawmakers, revenue from the tariffs could be used to finance climate change mitigation policies in areas such as infrastructure resilience and emissions-reduction technologies.
URL: https://www.coons.senate.gov/download/text_-fair-transition-and-competition-act-117

URL: https://www.coons.senate.gov/download/one-pager_fair-transition-and-competition-act---117

IRS enforcement in the revenue mix?: Democrats also are considering ways to fold a proposal for beefed-up IRS enforcement funding to address the tax gap – which was scrapped in negotiations for the bipartisan physical infrastructure package – into a reconciliation bill instead.

This approach could prove to be problematic, however, as current budget scoring guidelines preclude the Congressional Budget Office from counting the revenue effects of enhanced tax enforcement in its official budgetary estimates. Thus, it is not clear that the Senate parliamentarian (the arbiter of the arcane budget reconciliation rules in the upper chamber) would allow such revenues to be considered in determining compliance with any reconciliation instructions.

This may require Senate Democrats to attempt to change those scoring guidelines as part of the fiscal 2022 budget resolution.

At a more basic level, because appropriations legislation generally cannot be moved under budget reconciliation, Democrats may have to consider classifying any new IRS enforcement money as so-called "mandatory spending" – an approach that could raise the ire of members of the House and Senate Appropriations committees who are often reluctant to relinquish their authority over annual spending determinations made through appropriations bills.

CBO: Debt limit lift could be needed by October

Finally, in a development that could impact the timing of future budget reconciliation legislation, the CBO suggested in a report released July 21 that the federal debt limit may need to be raised (or further suspended) by the fourth quarter of 2021.
URL: https://www.cbo.gov/publication/57152

Under current law, the most recent suspension of the debt limit – enacted as part of the Bipartisan Budget Act of 2019 – is scheduled to end after July 31, 2021. At that time, the Treasury Department may utilize certain "extraordinary measures" – as it has on several occasions in recent years – to stave off default. But at least in the current instance, those extraordinary measures may prove to have a short shelf-life.

"…[I]f the debt limit remained unchanged, the ability to borrow using those measures would ultimately be exhausted, and the Treasury would probably run out of cash sometime in the first quarter of the next fiscal year (which begins on October 1, 2021), most likely in October or November," the report states.

In that event, "the government would be unable to pay its obligations fully, and it would delay making payments for its activities, default on its debt obligations, or both," the CBO adds.

Ultimately, it is the Treasury Department, not the CBO, that will determine specifically when the debt limit needs to be addressed to prevent default. Though Treasury Secretary Janet Yellen has urged Congress to act expeditiously, the agency has not yet publicly rendered an opinion on the potential duration of any

extraordinary measures. (Yellen has said that making such a determination is complicated by uncertainty around federal payment flows resulting from the pandemic-induced economic slowdown and the substantial federal assistance programs put in place in response. For prior coverage, see *Tax News & Views*, Vol. 22, No. 31, June 25, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210625_1.html

Although certain policy to address the debt limit can be moved under the filibuster-proof budget reconciliation process, it is presently unclear whether Democrats will be able to adopt a budget resolution in time to subsequently move debt limit legislation prior to any default date. And even if they do, it is unclear whether they would be willing to bear that political weight alone.

In theory, a further suspension of the debt limit could also be attached to appropriations legislation that will be due prior to October 1 in order to keep the government's doors open into the new fiscal year, an approach that would require three-fifths majority support in the Senate to avoid a potential filibuster.

But, for his part at least, Senate Minority Leader Mitch McConnell, R-Ky., cast doubt on whether Democrats can expect any GOP votes for such a pairing.

"I can't imagine there will be a single Republican voting to raise the debt ceiling after what we've been experiencing," McConnell said July 20.

Those remarks the drew a sharp retort from Senate Majority Leader Schumer.

"This debt is [President Trump's] debt. It's COVID debt," Schumer said. "And the bottom line is that Leader McConnell should not be playing political games with the full faith and credit of the United States. Americans pay their debts."

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