Senate to take up bipartisan infrastructure plan

The Senate voted 67-32 on July 28 to approve a procedural motion that will lead to beginning debate on a bipartisan plan that would invest roughly $550 billion in new spending over the next five years on so-called "hard" infrastructure projects and includes limited tax-related incentives and revenue offsets.

The vote came just hours after a bipartisan group of Senate negotiators led by Sens. Kyrsten Sinema, D-Ariz., and Rob Portman, R-Ohio, announced that after weeks of talks they had clinched an agreement in principle on a proposal that has the support of the Biden administration. A 60-vote supermajority was required for the motion to be approved. The plan cleared a second procedural hurdle on July 30 by a vote of 66-28.

Limited tax incentives

The agreement places a particular emphasis on roads and bridges (an increase of $110 billion over the current-law baseline), passenger and freight rail (a $66 billion increase), public transit (a $39 billion increase), broadband deployment (a $65 billion increase), water infrastructure (a $55 billion increase), airports (a $25 billion increase), and power grid reliability and resiliency (a $73 billion increase).

Although nearly all of these policy changes would come on the outlay side of the ledger, the deal does include some tax incentives such as an $8 billion expansion of the section 48C tax credit – apparently modeled after bipartisan legislation offered by Democratic Sen. Debbie Stabenow of Michigan and Republican Sen. Steve Daines of Montana – that, according to a summary, would be "available as a 30 percent investment tax credit to manufacturers and other industrial users to retool, expand, or build new facilities that make or recycle energy-related products or to reduce their process-related greenhouse gas emissions." The expanded credit would provide an election to manufacturers for direct pay up to 85 percent of the credit. Under the agreement, $4 billion would be set aside for use in communities affected by the transition away from coal.

The plan also would extend tax-free private activity bond financing options to broadband and carbon capture projects and increase the current-law cap on tax-exempt highway or surface freight facility bonds.

Budget offsets

Notably, the bipartisan group – which also includes key senators such as Mitt Romney, R-Utah, and Joe Manchin, D-W.Va. – also purports to have agreed upon budget offsets that would more than cover the $550 billion in additional spending. Here again, most of these proposed pay-fors do not touch the tax code, instead relying on provisions such as repurposing previously approved COVID relief funds ($205 billion, according to one summary) and recouping certain fraudulently paid or unused unemployment insurance funds ($103 billion), as well as an assortment of perennial favorites in the offset world such as auctioning off spectrum, extending GSE fees and customs user fees, and selling oil from the Strategic Petroleum Reserve. The deal apparently also banks about $56 billion in purported savings from assumed economic growth (so called "dynamic scoring") attributable to the additional investment.

However, a few proposed offsets do have tax implications. These provisions call for:

- Applying “information reporting requirements to digital assets (including cryptocurrency) to ensure they are properly reported to the IRS.” According to the summary that has been circulating, this provision would raise significant revenue ($28 billion) by, among other things, adding digital assets – a new defined term – to the current rule that requires businesses to report cash payments over $10,000.
- Reinstating certain expired Superfund excise taxes on chemical production – but not for oil and gas (estimated to increase receipts by $13 billion).
- Extending interest rate smoothing options for defined benefit plans (so-called “pension smoothing,” which is said to raise about $3 billion by lowering deductible required employer pension contributions).

The Biden administration called for expanded information reporting for cryptocurrency assets and reinstating and expanding certain Superfund taxes in the fiscal year 2022 budget blueprint it released this past May.

Next steps

Although the Senate’s decision to take up the infrastructure plan is significant, many hurdles remain on the path to ultimate enactment. For starters, we still have not seen legislative text from the Senate negotiating team as of press time, nor is there a formal cost estimate from the Congressional Budget Office or the Joint Committee on Taxation. These will likely inform many members’ views of the deal.

Senate concerns: Despite the successful procedural votes this week, it remains unclear whether the eventual bill will win approval in the closely divided Senate. After negotiators announced that they had reached an agreement in principle on the plan, Senate Minority Leader Mitch McConnell, R-Ky, indicated that he would vote in favor of moving toward debate, which likely encouraged more Republicans to align in the “yes” column. However, final passage of the bill may take days as some members may demand votes on amendments which, in theory, could change its contours; moreover, it is not certain that every senator who voted to begin debate will support the final product.

House concerns: Should the bill pass the Senate, we’ll then need to see when it will be taken up in the House, which is currently scheduled to depart for its August recess after this week and not return until September 20 (though there is extensive speculation that the House recess may be cut short for several reasons). The timing issue could be complicated by the fact that Speaker Nancy Pelosi, D-Calif., has said she will not bring the bipartisan legislation to the House floor unless the Senate *also* has approved a significantly larger “human infrastructure” package that would be moved under budget reconciliation protections. (More on the reconciliation bill below.)

Another key issue that bears watching is whether the plan has sufficient support in the House to be approved. The plan has come under fire from some House committee chairs, including Transportation and Infrastructure Chairman Peter DeFazio, D-Ore., who felt they were excluded from its drafting, and from progressives, such as Rep. Alexandria Ocasio-Cortez, D-N.Y., who publicly expressed concerns that the bipartisan bill does not go far enough on the spending side or do enough to address their policy priorities such as mitigating climate change.

It is worth remembering that Democrats hold a narrow majority in the House and can afford few defections within their own ranks. Support for the plan among House Republicans is currently unclear.

Reconciliation bill considerations: Inextricably linked, as well, is Democrats' follow-on effort to pass a budget resolution with reconciliation instructions designed to facilitate the filibuster-proof passage of a larger-scale "human" infrastructure package that would address many of the administration's other priorities, such as expanding access to pre-kindergarten education, affordable housing, child care, and paid family and medical leave, and is expected to be offset – in whole or in part – with tax increases primarily targeting corporations and high-income individuals, plus revenue from economic growth and health care savings. As currently envisioned by Senate Budget Committee Democrats, that package could approach $3.5 trillion on the spending side.

Senate Budget Committee Chairman Bernie Sanders, I-Vt., has said that his panel's budget resolution will be ready for floor action "in early August."

Some observers have argued that passage of the bipartisan "hard" infrastructure deal would give moderate Democrats in both chambers political cover to vote "yes" again on a more liberal-leaning tax-and-spending bill passed under budget reconciliation protections. Others have suggested that this would instead make the Democrats' challenge greater, since it can be difficult to get the momentum to pass two major bills back to back. To that point, Sen. Sinema, on the heels of announcing the bipartisan deal on "hard" infrastructure, also cautioned that she may not, in fact, support a reconciliation package as large as $3.5 trillion.

"I have also made clear that while I will support beginning this process, I do not support a bill that costs $3.5 trillion – and in the coming months, I will work in good faith to develop this legislation with my colleagues and the administration to strengthen Arizona's economy and help Arizona's everyday families get ahead," she said in a written statement.

Montana Democratic Sen. Jon Tester likewise told reporters this week that his support for the budget resolution would not necessarily be a guarantee of his support for the eventual reconciliation package.

Sen. Sanders, when asked by reporters about possible opposition among some Democrats to a $3.5 trillion reconciliation bill, offered this comment: "All I will say is we're moving on a two-track process. Next week, we're going to have 50 votes to pass a budget resolution. And at the end of the day, I believe we will have a reconciliation package that will provide enormous support for working families in this country at three-and-a-half trillion dollars."

Majority Leader Schumer, for his part, said in remarks on the Senate floor July 29 that Democrats "are on track" to approve a budget resolution.

Importantly, it is also worth noting that the reconciliation process cannot be set in motion until the House and Senate adopt a unified budget resolution with reconciliation instructions to the appropriate authorizing committees. It is currently unclear whether the House Budget Committee intends to develop its own resolution – which would have to be approved by the entire House and reconciled with a Senate version – or whether House Democratic leaders will instead bypass committee consideration and bring a Senate-passed budget resolution straight to the floor.

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