Schumer sets up weekend vote on bipartisan infrastructure bill

With lawmakers facing the prospect of completing two major legislative priorities before departing for a long summer recess, Senate Majority Leader Charles Schumer, D-N.Y., filed a motion on August 5 to end debate on bipartisan legislation 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.

Debate on the modified bipartisan amendment to the Infrastructure Investment and Jobs Act (text, section-by-section summary) formally began on August 1 and continued through the past week as lawmakers considered 22 potential amendments – almost all on the nontax side. Schumer on August 5 sought to expedite consideration of an additional 16 amendments and move to a vote on final passage that evening but was unable to secure a unanimous consent agreement to do so. Discussion of amendments continued late into the night on August 5, but the chamber planned to recess on August 6 so that members could travel to Wyoming to attend the funeral of retired Finance Committee member Mike Enzi, R-Wyo., who died on July 26.
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210806_1_suppA.pdf
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210806_1_suppB.pdf

Schumer's motion to end debate on the legislation sets the stage for a procedural vote when the Senate reconvenes on August 7, with a vote on final passage coming later that day or slipping into the week of August 8, depending on whether all senators give their consent to an accelerated timeline. Once action on that bill is complete, the Senate is expected to move to consideration of a budget resolution that will set up a $3.5 trillion fall spending bill focused largely on Democratic priorities and paid for with a variety of tax increases (more on that below).

CBO: Deal would increase deficits by $256 billion over 10 years

When they announced their deal on the framework for an infrastructure package late last month, the bipartisan group that hammered out the agreement – led by Democratic Sen. Kyrsten Sinema of Arizona and Republican Sen. Rob Portman of Ohio – purported to have agreed upon budget offsets that would more than cover the $550 billion in additional spending allowed under the five-year span of the underlying transportation reauthorization measure.

But a formal cost estimate released August 5 by the nonpartisan Congressional Budget Office (CBO) indicates the legislation would actually *increase* budget deficits over the 10-year budget window by about $256 billion.
URL: https://www.cbo.gov/system/files/2021-08/hr3684_infrastructure.pdf

That discrepancy may prove to be more of a messaging headache than a true impediment, however – one attributable to the manner in which the CBO is required to account for certain types of spending in the years beyond which that spending is formally authorized. In the current instance, those rules essentially required the agency to assume that the additional outlays authorized in fiscal year 2026 – the final year of the bipartisan deal's term – would be extended for the latter half of the 10-year budget window.

The CBO also did not include any savings from assumed economic growth (so-called "dynamic scoring") attributable to the additional investment – a factor the bipartisan group had earlier suggested would generate $56 billion in savings.

In a joint statement, Sinema and Portman defended their proposal, saying: "The CBO score says that the cost of the bill is $228 billion over five years and $415 billion over 10 years, and the offsets we have identified total $519 billion. The new spending under the bill is offset through a combination of new revenue and savings, some of which is reflected in the formal CBO score and some of which is reflected in other savings and additional revenue identified in estimates, as CBO is limited in what it can include in its formal score." (The statement also includes an itemized list of proposed pay-fors and cites official sources for the group's revenue estimates.)
URL: https://www.portman.senate.gov/newsroom/press-releases/portman-sinema-statement-cbo-score-bipartisan-infrastructure-investment

But at least one Republican senator who blocked Schumer's unanimous consent request to expedite consideration of the bill on August 5 cited the CBO score as the reason.

"While we've heard for weeks that it would be paid for, it's not," said Sen. Bill Hagerty of Tennessee, who is not expected to support the infrastructure bill. "It didn't just come up short, it came up a quarter of a trillion dollars short. The CBO indicated this bill will increase the deficit by at least $256 billion dollars when it was supposed to break even. Despite this news, I was asked to consent to expedite the process and pass it. I could not, in good conscience, allow that to happen…."

JCT weighs in on tax provisions: Separately, the Joint Committee on Taxation (JCT) staff released a revenue estimate on August 2 indicating that the handful of tax-related incentives and revenue offsets in the bill (discussed in more detail below) would, on net, increase federal receipts by roughly $51.1 billion over the 10-year budget window.
URL: https://www.jct.gov/publications/2021/jcx-33-21/

Limited menu of tax incentives

The Senate bill places a particular emphasis on roads and bridges (an increase of $110 billion over the current-law baseline, according to an analysis released by the deal's negotiators), 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 legislation does include some tax incentives that would:

- Treat money or other property received by a public utility providing water or sewerage disposal services as a contribution to capital (and therefore excludable from gross income) if it is a contribution in aid of construction or a contribution by a governmental entity providing for the protection,

preservation, or enhancement of drinking water or sewerage disposal services (JCT estimated 10-year revenue loss: $1.25 billion).
- 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 (estimated revenue loss: $1.2 billion).
- Enhance current-law provisions that extend certain tax-related deadlines for taxpayers affected by federally declared natural disasters, taxpayers serving in a military combat zone, and taxpayers who have been unable to access the Tax Court because of extended closures (due to emergency circumstances such weather, lapses in appropriations, and the COVID-19 pandemic, for example). The JCT staff estimates these provisions would have a negligible effect on revenues.

Expanded section 48C credit left out: The legislation as released does not include a proposed $8 billion expansion of the section 48C tax credit that was part of the high-level deal in principle that the bipartisan negotiating team originally announced on July 28.

According to a summary of the July 28 agreement, that provision, which apparently was modeled after bipartisan legislation offered by Democratic Sen. Debbie Stabenow of Michigan and Republican Sen. Steve Daines of Montana, would have been “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 have provided an election to manufacturers for direct pay up to 85 percent of the credit. Under the agreement, $4 billion would have been set aside for use in communities affected by the transition away from coal.

It is unclear why the provision was dropped from the legislation, but Sen. Stabenow said in an interview with *Politico* this week that lawmakers want to include it in the larger “human” infrastructure package that Democrats expect to move through Congress under budget reconciliation protections in the coming months.

Budget Offsets

As is the case with the tax incentive provisions, most of the legislation’s proposed pay-fors do not touch the tax code, instead relying on provisions such as repurposing previously approved COVID relief funds and recouping certain fraudulently paid or unused unemployment insurance funds, as well as an assortment of familiar proposals such as auctioning off spectrum, extending GSE fees and customs user fees, and selling oil from the Strategic Petroleum Reserve.

However, a few proposed offsets do have tax implications.

Information reporting for digital assets: The measure would expand current-law information reporting requirements for financial accounts to apply to “digital assets” – a new defined term that would include “any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary.”

The bill as currently drafted also would update the definition of "broker" to include "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person."

Other provisions would:

- Expand broker-to-broker reporting requirements to include transfers of digital assets and
- Add digital assets to the current rule that requires businesses to report cash payments over $10,000.

It is unclear at press time, however, exactly how – or whether – Senate leaders will address concerns among some lawmakers that the provision defining the term "broker" is overly broad. Senate Finance Committee Chairman Ron Wyden, D-Ore., Finance Committee member Pat Toomey, R-Pa., and Sen. Cynthia Lummis, R-Wyo., offered an amendment on August 4 that, according to a statement from Wyden, would "clarify that 'brokers' mean[s] only those persons who conduct transactions on exchanges where consumers buy, sell, and trade digital assets, and does not require information reporting from persons who engage in mining or staking, selling hardware or software that an individual may use to control a private key, or developing digital assets or their corresponding protocols for use by other persons if such other persons are not customers."
URL: https://www.finance.senate.gov/imo/media/doc/Wyden%20Lummis%20Toomey%20Crypto%20Amendment.pdf

Ohio Sen. Rob Portman, who drafted the original provision, indicated on August 5 that he agreed the language should be clarified and called for a vote on Wyden's amendment. But Portman and Arizona Sen. Kyrsten Sinema subsequently signed on to a narrower competing amendment offered by Finance Committee Democrat Mark Warner of Virginia on August 5 that reportedly has received backing from the White House. As the Senate adjourned on August 5 there had been no decision on whether either amendment would be brought up for a vote. Senate leaders indicated that they would revisit the issue when the chamber is back in session on August 7. Portman has indicated that he wants leaders to allow a side-by-vote on both amendments.

The new requirement would be effective for reports required to be filed after and statements required to be furnished after December 31, 2023. The JCT staff has estimated that the provision as originally drafted would raise nearly $28 billion over 10 years. It is unclear what effect an amendment clarifying the definition of "broker" would have on the revenue score. (Press reports indicate that the JCT staff has told lawmakers that the Wyden amendment would raise only $23 billion but an official estimate has not been posted as of press time.)

Superfund excise taxes: The bill would reinstate and modify certain expired Superfund excise taxes on the production of certain chemicals through December 31, 2031, effective for periods after June 30, 2022. The JCT staff estimates this provision would increase receipts by $14.5 billion over 10 years.

Employee retention tax credit: The bill generally would terminate the employee retention tax credit (ERTC) effective for calendar quarters beginning after September 30, 2021 – three months ahead of its scheduled expiration date. (An exception is provided for recovery start-up businesses, which would be able to claim the credit through the end of this year, as scheduled under current law.)

The ERTC was originally enacted in 2020 as part of the Coronavirus Aid, Relief, and Economic Security Act to encourage certain businesses experiencing financial hardships because of the COVID-19 pandemic to keep their workers on the payroll. It initially applied to wages paid after March 12, 2020, and before January 1, 2021, but was expanded and extended through June 30, 2021, in the Consolidated Appropriations Act, 2021, the omnibus tax-and-spending package that was signed into law late last year. The credit was further modified and extended – through December 31, 2021 – in the American Rescue Plan, which was enacted this past March.

Accelerating the scheduled expiration of the ERTC would save the government an estimated $8.2 billion, according to the JCT staff.

Pension smoothing: The bill would further extend interest rate smoothing options for defined benefit plans (so-called “pension smoothing”) through 2034, effective for plan years beginning after December 31, 2021. The JCT staff estimates this provision would raise nearly $2.9 billion by lowering deductible required employer pension contributions.

Budget resolution remains on Senate’s pre-recess punch list

Once the Senate has dispatched with the bipartisan infrastructure proposal, Democratic lawmakers will need to complete work on a second key agenda item before the chamber adjourns for the August recess: 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, as well as addressing climate change. As currently envisioned by Senate Budget Committee Democrats, that package could approach $3.5 trillion on the spending side and is expected to be offset – in whole or in part – with tax increases primarily targeting corporations and high-income individuals, plus additional revenue from economic growth and health care savings.

Press reports have indicated that the resolution could come directly to the Senate floor, bypassing a mark-up in the Budget Committee. Senate Budget Committee Chairman Bernie Sanders, I-Vt., has not yet released a draft of the proposal, telling reporters on August 4 that it is “still a work in progress.”

Although Democrats are expected to be able to advance the resolution along party lines, the vote on final passage will be preceded by what could be a lengthy “vote-a-rama” – a process that unfolds after a budget’s set 50-hour debate time has lapsed and allows lawmakers to offer an unlimited number of amendments with little or no debate, constrained only by the fatigue of the senators induced by round-the-clock voting and their desire to recess for the remainder of the month of August.

Wyden floats possible reconciliation bill offsets: Perhaps signaling some of his preferred reconciliation bill pay-fors, Finance Committee Chairman Wyden this week re-upped previously introduced bills that would modify the tax treatment of carried interest income and derivative contracts.

The Ending Carried Interests Loophole Act (text, detailed summary), which Wyden introduced with Finance Committee Democrat Sheldon Whitehouse of Rhode Island, generally would require fund managers to recognize income from carried interests as deemed compensation that would be taxed at ordinary income rates and subject to self-employment taxes. According to a press release from Wyden, the JCT staff has estimated that the proposal would increase federal receipts by $63 billion over 10 years. Wyden introduced a similar proposal in 2019.
URL: https://www.finance.senate.gov/imo/media/doc/Ending%20the%20Carried%20Interest%20Loophole%20Act%20117th%20-%20Legislative%20Text.pdf
URL: https://www.finance.senate.gov/download/ending-carried-interest-loophole-act-detailed-summary
URL: https://www.finance.senate.gov/chairmans-news/wyden-whitehouse-bill-ensures-private-equity-moguls-pay-fair-share-in-taxes

The Modernization of Derivatives Act (text, detailed summary, JCT technical explanation) generally would, among other things, require annual mark-to-market treatment of derivatives and ordinary tax treatment of the resulting gains and losses and apply a single tax regime to all derivative contracts. Wyden noted in a press release that the JCT estimated that a similar version of the legislation he introduced in 2016 would raise $16.5 billion over 10 years.
URL: https://www.finance.senate.gov/imo/media/doc/Modernization%20of%20Derivatives%20Tax%20Act1.pdf
URL: https://www.finance.senate.gov/download/modernization-of-derivatives-tax-act-section-by-section
URL: https://www.jct.gov/publications/2021/jcx-34-21/
URL: https://www.finance.senate.gov/chairmans-news/wyden-bill-ensures-wealthy-investors-pay-fair-share-in-taxes

What about the House?

Lingering questions around how the bipartisan infrastructure package and the budget resolution process will advance on the other side of the Rotunda remain unresolved at press time. The House is currently in recess and is not scheduled to be back in session until September 20, although there has been speculation that lawmakers could cut their recess short for several reasons.

Speaker Nancy Pelosi, D-Calif., has said she will not bring the bipartisan infrastructure legislation to the House floor until the Senate *also* has approved the larger "human" infrastructure reconciliation package and to date there has been no indication that her position has changed. That position aligns with the progressive members of the Democratic Caucus, who worry enactment of the bipartisan infrastructure bill will sap momentum for the reconciliation bill. Moderates in the House, however, are expected to try to pressure the speaker to bring the infrastructure bill up for a vote quickly and not let it be held hostage to reconciliation.

Another key issue that bears watching is whether the legislation even 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.

Also unclear is whether the House Budget Committee intends to develop its own version of a budget 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.

— Alex Brosseau, Michael DeHoff, and Storme Sixeas
Tax Policy Group
Deloitte Tax LLP