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Senate clears bipartisan infrastructure bill, takes up $3.5 trillion budget resolution

The Senate on August 10 approved bipartisan infrastructure legislation and then immediately turned to a fiscal year 2022 budget resolution that would unlock the process for moving an expansive tax-and-spending package that could clear the chamber without Republican support.

Infrastructure Innovation and Jobs Act

The Infrastructure Innovation and Jobs Act, which cleared the chamber by a vote of 69-30, 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 bipartisan group led by Democratic Sen. Kyrsten Sinema of Arizona and Republican Sen. Rob Portman of Ohio that hammered out the framework for the legislation 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 so far has proven 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.

Separately, the Joint Committee on Taxation (JCT) staff released a revenue estimate on August 2 indicating that the assorted tax-related incentives and revenue offsets in the bill 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/

A handful 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.

Cryptocurrency reporting and other tax offsets

As is the case with the proposed outlays, 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 customs user fees and certain fees imposed by government-sponsored enterprises, 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 newly 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 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." Although some lawmakers in both parties contended that the term "broker" as defined in the legislation is overly broad, efforts in recent days to amend the bill with a more limited definition were unsuccessful.

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.

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 would raise nearly $28 billion over 10 years.

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.

Next up: Fiscal 2022 budget resolution

Almost immediately after passage of the infrastructure legislation, Senate Majority Leader Charles Schumer, D-N.Y., moved to begin the upper chamber's consideration of a sweeping, $3.5 trillion fiscal year 2022 budget resolution with reconciliation instructions (text, one-page summary) designed to facilitate the filibuster-proof passage of a larger-scale "human" infrastructure package that would address many of the Biden administration's other policy 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, 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.

URL: https://www.democrats.senate.gov/imo/media/doc/HEN21B52.pdf
URL:
https://www.democrats.senate.gov/imo/media/doc/Topline%20Summary%20of%20FY2022%20Budget%20Resolution.pdf

A procedural motion to begin debate on the budget plan – which required only a simple majority to approve, rather than the three-fifths majority typically required to overcome procedural hurdles in the chamber – cleared the Senate August 10 on a strictly party-line vote of 50-49.

Under the rules governing the budget process, the plan will be afforded as much as 50 hours of debate on the Senate floor, followed by a period – commonly called a "vote-a-rama" – when unlimited amendments may be offered and voted upon without debate. After the vote-a-rama, the Senate would move to adopt the budget resolution (including any approved amendments), which again would require the affirmative vote of only a simple majority of senators.

Senate may act quickly: Importantly, although the budget is afforded 50 hours of debate, it has been rumored that, in the current instance, that timeframe may be significantly truncated with the consent of all 100 senators and that the vote-a-rama could commence as early as August 10, as members in both parties are eager to begin an already-delayed August recess.

High-level overview of budget plan

The budget blueprint – which was released on August 9 – generally tracks closely with what had been telegraphed in recent weeks by the plan's primary author, Senate Budget Committee Chairman Bernie Sanders, I-Vt., as well as other Democrats on the budget-writing panel. Specifically, the resolution includes reconciliation instructions calling on various committees to report – by September 15, 2021 (a nonbinding deadline under parliamentary precedent) – as much as $3.5 trillion in spending and tax cut initiatives that generally hew closely to what President Biden laid out in his American Jobs Plan and American Families Plan (minus the "hard" infrastructure investments, which are being moved on a bipartisan basis in the Senate-passed Infrastructure Investment and Jobs Act).

One wrinkle, however, relates to the reconciliation instructions directed at the Senate Finance Committee and House Ways and Means Committee – panels that oversee not only tax policy, and thus much of the "budget offset" side of the reconciliation equation, but also certain health care programs and other large-scale initiatives (for example, a national paid family and medical leave program and a proposed expansion of Medicare's benefit offerings) that Democrats hope to enact as part of this process.

As a consequence, the budget blueprint actually takes the approach of directing each of these two committees to report legislation that, on net, reduces the deficit by a nominal amount of $1 billion over the next decade – a figure that encompasses what could be, according to an overview of the reconciliation instructions, as much as $1.8 trillion in new spending initiatives and tax cuts aimed at working families (that is, extensions of temporary enhancements to the child tax credit, earned income tax credit, and child and dependent care tax credit enacted earlier this year as part of the COVID relief-focused American Rescue Plan), with offsetting

policies that ensure "the wealthy and large corporations pay their fair share of taxes" and "[h]undreds of billions in additional savings by lowering the price of prescription drugs."
URL: https://www.democrats.senate.gov/imo/media/doc/MEMORANDUM%20for%20Democratic%20Senators%20-%20FY2022%20Budget%20Resolution.pdf

"The [budget resolution] framework includes a mix of policies within the jurisdiction of the Finance Committee that both increase and decrease outlays and increase and decrease revenues," the overview states. "In other words, the Finance Committee's reconciliation product will both provide substantial portions of the investments contemplated by the $3.5 trillion package but also nearly all of the stated offsets."

The remaining roughly $1.7 trillion of reconciliation directives would be structured as "deficit increase" instructions spread among 11 other Senate committees, with the largest instruction – about $726 billion – going to the Health, Education, Labor, and Pensions (HELP) Committee, which oversees policies and programs related to Democratic ambitions in the areas of universal pre-K, tuition-free community college, and workforce development and training.

Although this $1.7 trillion component (which, again, represents a maximum deficit increase) of any future reconciliation legislation may also be partially (or fully) offset – for example, through tax increases, savings generated by higher levels of anticipated economic growth, or enhanced tax enforcement efforts – that would ultimately be a political determination among congressional Democrats.

According to the reconciliation overview: "It should be noted that the $3.5 trillion framework agreement total represents the level of new investments, but does not represent the net budgetary impact of the expected reconciliation bill because the reconciliation bill will also include substantial offsets."

Importantly, it is also still unclear whether there will be a formal mark-up process in each of the 12 "reconciled" committees or whether, instead, conforming legislation will simply be brought straight to the Senate floor. (The latter approach was employed when Democrats enacted the American Rescue Plan earlier this year). Regardless, from a parliamentary perspective, Democrats would have to ensure that the budget impact of any package – broken down by each committee's policy jurisdiction – conforms with the reconciliation instructions in an adopted budget.

Wyden eyes prior tax proposals to fill-in the gaps

Shortly after the budget resolution was made public, Senate Finance Committee Chairman Ron Wyden, D-Ore., released a statement suggesting that he intends to lean heavily on already unveiled proposals – such as the international tax framework he released with fellow Democratic taxwriters Sherrod Brown of Ohio and Mark Warner of Virginia, his Clean Energy for America Act which aims to consolidate roughly 40 current-law energy-related provisions into just a handful of "technology-neutral" incentives, and his Small Business Tax Fairness Act that Wyden argues would simplify and better target the 20 percent deduction under tax code section 199A while saving billions of dollars in the process – as part of any reconciliation package he contributes to. (For details on Wyden's international tax framework, see *Tax News & Views*, Vol. 22, No. 17, Apr. 5, 2021; for

details on the Clean Energy for America Act, see *Tax News & Views*, Vol. 22, No. 27, May 28, 2021; for details on the Small Business Tax Fairness Act, see *Tax News & Views*, Vol. 22, No. 34, July 23, 2021.)
URL: https://www.finance.senate.gov/chairmans-news/wyden-statement-on-budget-resolution
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210405_1.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210528_2.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210723_1.html

"To restore fairness to our tax code and pay for these once-in-a-generation investments, the Finance Committee has been working on a menu of options for the caucus to consider," Wyden said. ". . . Many of these proposals have been laid out – the Wyden-Brown-Warner international tax framework to ensure mega-corporations pay their fair share, legislation to expand the passthrough deduction while dedicating it to Main Street small businesses, legislation to close the carried interest loophole for private equity moguls and legislation to ensure wealthy investors pay tax on investments underlying derivatives contracts, just to name a few."

Plans in the House remain unclear

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 (*i.e.*, not the budget resolution under consideration in the Senate this week but the actual implementing legislation) 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 urging the speaker to bring the infrastructure bill up for a vote quickly and not let it be held hostage to reconciliation. Indeed, a group of six moderate Democrats – members of the Problem Solvers Caucus – made that case in an August 9 letter to Pelosi.

"As soon as the Senate completes its work, we must bring this bipartisan bill to the House floor for a standalone vote. This once-in-a-century investment deserves its own consideration, without regard to other legislation," the letter said.

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.

On the budget front, it is noteworthy that some moderate House Democrats have expressed unease with the scope of Senate Democrats' reconciliation ambitions and may demand changes to the budget resolution – or changes to the size of any follow-on reconciliation package – as a condition of their support.

Moreover, the timing of the House's consideration of the Senate budget plan, should that plan pass – or whether it may move its own budget resolution – still remains unclear. In order to unlock budget reconciliation, both chambers would have to adopt identical budget resolutions authorizing the process.

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