Biden releases slimmed-down Build Back Better framework

President Biden on October 28 released a proposed framework for the Build Back Better Act that, among other things, calls for new minimum taxes on "book" income and foreign profits of US corporations, an excise tax on stock buybacks, a new surtax on multimillionaires, expanded application of the net investment income tax, a permanent extension of the excess business loss limitation on noncorporate taxpayers, and increased funding for IRS enforcement efforts to address the "tax gap."
URL: https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/build-back-better-framework/

The revenue provisions would help to offset the cost of expanded tax incentives to promote clean energy and climate change mitigation; expansions of the earned income tax credit, the child tax credit, and Affordable Care Act premium credits; plus spending provisions aimed at expanding access to prekindergarten education and higher education, child care and elder care, Medicare and Medicaid benefits, and affordable housing.

According to the White House, the framework's proposed revenue offsets could increase federal receipts by up to $2 trillion over 10 years—more than enough to pay for the estimated $1.75 trillion in proposed tax incentives and new social spending. But the package as released is significantly narrower in scope than the fiscal year 2022 budget proposal the administration released in May or the tax title for the Build Back Better Act that the House Ways and Means Committee approved in September. (For details on the White House budget proposal, see Tax News & Views, Vol. 22, No. 28, May 29, 2021. For details on the Ways and Means-approved revenue package, see Tax News & Views, Vol. 22, No. 43, Sep. 18, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210529_1.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210917_1.html

The White House and congressional Democrats intend to move the Build Back Better Act through Congress under filibuster-proof budget reconciliation protections.

In announcing the framework, the White House noted that it reflects negotiations with Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona—two moderate Democrats who have voiced specific concerns about the size and scope of the legislation and whose votes are needed to secure passage of the legislation in the evenly divided Senate—as well as with "congressional leadership, and a broad swath of members of Congress."

Updated House bill reflects framework priorities

The administration has indicated that the framework is intended to "guide the drafting of legislative language" in Congress. And, to that end, House Democrats on October 28 released an updated version of the Build Back Better Act (text, section-by-section summary) that incorporates the policy priorities outlined at a very high level in the framework.
URL: https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5376RH-RCP117-17.pdf
URL: https://rules.house.gov/sites/democrats.rules.house.gov/files/Section_by_Section_BBB.pdf

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Here is an overview of how the framework and the revised House bill align on major corporate and individual tax provisions.

Minimum tax on book income: In apparent deference to Sen. Simena's stated opposition to tax rate increases, the framework jettisons a corporate rate hike (to 28 percent) that the administration proposed in its fiscal year 2022 budget blueprint and instead calls for a "15 percent minimum tax on the corporate profits that large corporations—those with over $1 billion in profits—report to shareholders." This is a proposal that then-candidate Joe Biden touted on the campaign trail while running for the presidency and was included in his fiscal year 2022 budget submission to Congress.

The revised House bill likewise drops a provision in the revenue package approved by the Ways and Means Committee last month that called for increasing the corporate rate to 26.5 percent. In its place it includes a proposal that, in general, would impose a 15 percent minimum tax on adjusted financial statement income for certain corporations with adjusted financial statement income greater than $1 billion over a defined applicable period. An applicable corporation's minimum tax would be equal to the amount by which the tentative minimum tax exceeds the corporation's regular tax for the year. Tentative minimum tax would be determined by applying a 15 percent tax rate to the adjusted financial statement income of the corporation for the taxable year (after taking into account any AMT foreign tax credits and financial statement net operating loss carryovers).

The notion of a corporate minimum tax also has support from Democrats across the Rotunda, where Senate Finance Committee Chairman Ron Wyden, D-Ore., and Finance Committee members Elizabeth Warren, D-Mass., and Angus King, I-Maine, this week released a proposal (text, one-page summary) that generally would impose a 15 percent minimum tax on the book income of corporations that, over a three-year period, have average "adjusted financial statement income" in excess of $1 billion, effective for taxable years beginning after 2022.
URL: https://www.warren.senate.gov/imo/media/doc/MCG21C14.pdf
URL: https://www.warren.senate.gov/imo/media/doc/Warren-King-Wyden%20Corporate%20Profits%20Minimum%20Tax%20-%20One%20Pager.pdf

Surcharge on stock buybacks: The framework also would raise revenue through a 1 percent surcharge on corporations that buy back stock from their shareholders. Such a proposal was not included in the administration's fiscal year 2022 budget blueprint, nor was it part the tax title for the Build Back Better Act that the House Ways and Means Committee approved last month.

The revised House bill calls for a 1 percent excise tax on publicly traded US corporation for the value of any of its stock that is repurchased by the corporation during the taxable year, although the amount of repurchases subject to the tax would be reduced by the value of any new issuance to the public and stock issued to the employees of the corporation, and exclusions from the excise tax would apply to certain specified repurchases. The provision would be effective for stock repurchases after December 31, 2021.

Tax treatment of multinationals: The framework calls for a 15 percent tax on global intangible low-taxed income (GILTI), which would be imposed on a country-by-country basis—a proposal the administration says is

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consistent with an agreement recently announced by the OECD/G20 group known as the Inclusive Framework (IF) on base erosion and profit shifting and endorsed by G20 finance ministers. (Details on the OECD/G20 agreement are available in an alert from Deloitte Tax LLP.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/211015_2_suppA.pdf

The framework also would preserve the Base Erosion and Anti-Abuse Tax(BEAT), marking a policy shift from the administration's fiscal 2022 budget blueprint, which called for replacing the BEAT regime with a new rule—known as the Stopping Harmful Inversions and Ending Low-Taxed Developments (SHIELD)—that would disallow deductions to domestic corporations or branches by reference to low-taxed income of entities that are members of the same financial reporting group (including a member that is the common foreign parent, in the case of a foreign-parented controlled group).

In addition, the revised House bill carries over many provisions that were originally included in the prior Ways and Means proposal which tighten current-law tax rules that the White House and congressional Democrats have argued provide incentives for companies to locate investment in foreign jurisdictions and move US-based jobs and production activities offshore. One notable change in the House bill calls for imposing the BEAT at higher rates than those the Ways and Means proposal. (The Ways and Means-approved bill called for a gradual increase in the BEAT rate to 15 percent over several years, while the new House bill would see the BEAT rate eventually hit 18 percent.) The revised House measure also would delay by the effective date of provisions in the Ways and Means bill that would modify the GILTI rules. Other provisions in the revised House bill also have deferred effective dates, which should give taxpayers time to adjust to what are very significant and fundamental changes.

Clean energy: The White House framework calls for an allocation of $550 billion for climate change mitigation including, among other things, "expanded tax credits for utility-scale and residential clean energy, transmission and storage, clean passenger and commercial vehicles, and clean energy manufacturing," as well as "targeted incentives to spur new domestic supply chains and technologies, like solar, batteries, and advanced materials. . . ."

Democrats on the House and Senate taxwriting committees have both put forward significant green energy legislation this year but have been at odds over how to reconcile their disparate approaches to providing tax incentives.

The tax title for the Build Back Better Act that was approved by the House Ways and Means Committee in September generally provides for multi-year extensions of and enhancements to an array of current-law production and investment tax credits for renewable and alternative energy property, credits for production of certain alternative fuels, and business- and consumer-focused incentives for energy-efficient vehicles and construction projects. (Additional details are available in an alert from Deloitte Tax LLP.) These provisions generally have been retained—subject to some notable timing and technical modifications—in the revised House bill.
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210917_2_suppA.pdf

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But an alternative approach, which was approved as a free-standing proposal by the Senate Finance Committee in May, would overhaul the energy tax rules by consolidating roughly 40 current-law energy-related provisions into just a handful of "technology-neutral" incentives. (For prior coverage, see Tax News & Views, Vol. 22, No. 27, May 28, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210528_2.html

That debate was resolved this week when House Ways and Means Committee Chairman Richard Neal, D-Mass., and Senate Finance Committee Chairman Wyden announced a compromise that would adopt the Ways and Means approach for five years, with a transition to the technology-neutral approach advocated by the Finance Committee's Democratic majority.

In a statement released October 28, Neal called the agreement "an historic investment in green energy, combating climate change, and creating good jobs." Wyden, for his part, told reporters that he is "pleased that there's been a decision now to set aside this broken down, dilapidated tax code on energy and going forward, in the future, tax savings will be tied to actually reducing carbon emissions."

Surtax for millionaires: In the wake of Sen. Sinema's recent announcement that she would not support an increase in the top individual tax rate from 37 percent to 39.6 percent—something that had been viewed as low-hanging fruit for Democrats since the enactment of 2017's Tax Cuts and Jobs Act—the White House has called for a 5 percent surtax on income over $10 million, and an additional 3 percent surtax on income above $25 million.

While the Ways and Means-approved tax title for the Build Back Better Act proposed a 3 percent surtax on modified adjusted gross income (MAGI) greater than $5 million in addition to raising the top marginal rate from 37 percent to 39.6 percent, the revised House bill leaves the 37 percent rate in place and instead proposes a 5 percent surcharge on MAGI greater than $10 million, plus an additional 3 percent on MAGI greater than $25 million.

Neither the framework nor the revised House bill includes a revenue offset (text, one-page summary, section-by-section summary) recently proposed by Finance Committee Chairman Wyden that would require certain ultra-wealthy taxpayers to pay tax at long-term capital gains rates on unrealized gains on certain tradable and nontradable assets. That proposal drew criticism from Ways and Means Chairman Neal and other House taxwriters, who indicated they prefer a plan based on more conventional rate increases with tax imposed on realized income and contended that an untested new system would be more complex and difficult to implement, as well as from Sen. Manchin, who declared the it "convoluted" and "divisive."
URL: https://www.finance.senate.gov/imo/media/doc/Billionaires%20Income%20Tax.pdf
URL: https://www.finance.senate.gov/download/billionaires-income-tax-one-pager
URL: https://www.finance.senate.gov/download/billionaires-income-tax-section-by-section

Expanded application of net investment income tax: Echoing a provision in the administration's fiscal year 2022 budget blueprint, the framework calls for expanding the application of the 3.8 net investment income tax to include trade or business income for "taxpayers making over $400,000."

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The revised House bill carries over a provision from the Ways and Means package that would expand the tax to cover trade or business income for taxpayers with more than $500,000 in taxable income for joint filers or more than $400,000 for unmarried taxpayers.

Limitation on excess business losses: Under current law, section 461(l) limits the extent to which passthrough business losses may be used to offset other income. In particular, for taxable years beginning after December 31, 2020, and before January 1, 2027, noncorporate taxpayers may not deduct an "excess business loss" from taxable income. Instead, these losses are carried forward to subsequent taxable years as net operating losses.

The administration's framework proposes to "continue the limitation on excess business losses."

The revised House bill, like the Ways and Means-approved revenue title, would permanently disallow excess business losses for noncorporate taxpayers, with those losses carried forward indefinitely as a deduction subject to the excess business loss rules (rather than a one-year suspension to net operating loss under current law).

'Tax gap' provisions: The framework includes a general call to beef up the IRS's enforcement budget in an effort to close the "tax gap"—the difference between the amount of tax legally owed to the government and the amount paid on a timely basis. The increased funds would be directed to priorities such as modernizing outdated technology and hiring additional revenue agents who have experience in dealing with sophisticated tax-avoidance transactions.

The revised House bill proposes a similar budget bump for the IRS as well as compliance provisions to tighten the rules related to backup withholding and third-party network transactions.

It is worth noting, though, that neither the framework nor the House bill includes a provision from the administration's fiscal year 2022 budget blueprint that would require banks and other institutions to report annually to the IRS on the gross inflows and outflows from certain financial accounts that exceed a *de minimis* threshold.

That provision, as proposed in the White House budget, would have applied to inflows and outflows greater than $600. In response to concerns that the original proposal would be too onerous and potentially intrude on taxpayer privacy, Finance Committee Chairman Ron Wyden and Sen. Elizabeth Warren recently released a scaled-back version that would increase the threshold for triggering the reporting requirement to $10,000 and exempt certain incoming and outgoing amounts from the calculation for the reporting threshold. (The proposal had drawn criticism from West Virginia Democratic Sen. Joe Manchin, who reportedly voiced his objections to President Biden at a White House meeting earlier this week, as well as from a group of 21 House Democrats who raised their concerns in a recent letter to House Speaker Nancy Pelosi, D-Calif.)
URL: https://axne.house.gov/sites/axne.house.gov/files/Axne%20IRS%20Letter.pdf

No SALT (No deal?): Not included in the White House framework or the bill text released in the House is any language providing relief from the $10,000 cap on the deduction for state and local taxes (SALT) that has been

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in effect since 2018. A bloc of House Democrats from New Jersey, New York, and California have insisted all year that repeal of the cap is necessary—though it is unclear how many of them would vote against the bill without it—and at press time they were still confident that the final version of the legislation will address the issue.

"We'll get SALT," said Josh Gottheimer, D-N.J., one of the lead advocates on the issue, told reporters October 28.

Reporting from Bloomberg Tax October 28 indicated that one option leadership is looking at is an "extremely high" SALT cap for a number of years—beyond 2025, when the cap is currently due to sunset—as a revenue-neutral fix. Under this scenario, middle-income and potentially some wealthy households would likely be able to deduct the full amount of SALT they pay, but the highest-income taxpayers would still not get the full benefit of the deduction. An alternative version being considered is a two-year suspension of the cap, which would then be imposed again in 2024-2027.

"SALT will be in the endgame, yes," Ways and Means Chairman Neal told reporters after a House Democratic caucus meeting with President Biden at the Capitol October 28.

Other provisions left out: Other notable tax provisions omitted from the framework and the revised House proposal—in addition to those already mentioned—include changes to capital gains rates, changes to the section 199A deduction, changes to tax treatment of carried interest, changes to estate and gift tax rules and the grantor trust rules, changes to the tobacco tax, significant changes to the partnership tax rules (such as those proposed in a recent discussion draft from Finance Committee Chairman Ron Wyden), changes intended to curb the accumulation of outsized balances in tax-preferred retirement accounts (so-called "mega-IRAs"), and imposition of a carbon tax.
URL: https://www.finance.senate.gov/imo/media/doc/Pass-through%20Changes%20Discussion%20Draft%20Legislative%20Text.pdf

Next steps

The administration has stopped short of characterizing framework as a final deal, but has stated that the president is "confident" that it "can pass both houses of Congress, and he looks forward to signing it into law."

Speaker Pelosi indicated at her weekly press conference on October 28 that the revised House legislation conceivably could change in the coming days as lawmakers seek to delete or add provisions.

"[T]he text is out there if . . . any senator, any House member has some suggestions about where their comfort level is or their dismay might be, then we welcome that. . . ," she said. "There's some things that aren't in [that] I frankly have not given up on."

Pelosi also noted that negotiations with Senate Democratic leaders are continuing and that "we won't have anything, regardless of whatever input we have in the bill, unless it is agreed to by the Senate."

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Finance Committee Chairman Ron Wyden echoed that assessment, telling reporters October 28 that "this is not done."

Logjam over physical infrastructure bill unbroken (so far)

Speaker Pelosi had hoped that release of the framework and revised statutory text would assure her colleagues that the Build Back Better plan was on a clear path to being signed into law and would therefore clear the way for House passage of the Infrastructure Investment and Jobs Act, a separate bipartisan bill focusing on physical infrastructure that was approved by the Senate in early August. (For details, see Tax News & Views, Vol. 22, No. 37, Aug. 10, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/210810_1.html

Progressive Democrats in the House, who have been refusing to advance the infrastructure package without assurances that the Build Back Better Act would clear the Senate, appear unswayed, however. They remain concerned if the physical infrastructure package is signed into law on its own, Sens. Manchin and Sinema might be tempted to walk away from the Build Back Better legislation. Those concerns were magnified when neither senator was willing to say outright they would vote for legislation that adheres to the announced framework.

Rep. Pramila Jayapal, D-Wash., who chairs the nearly 100-member Congressional Progressive Caucus, reiterated to reporters October 28 that the two bills must move through the House in tandem.

"We do need to have the legislative text and we will vote [on] both bills together," she said.

Delayed action on the infrastructure bill presents a practical dilemma for Democratic leaders. The Infrastructure Investment and Jobs Act includes a five-year reauthorization of surface transportation spending authority. The most recent long-term extension of federal surface transportation program spending authority expired on September 30, and a short-term patch that was subsequently signed into law is set to expire October 31. The House and Senate pivoted late on October 28 and quickly approved an extension of those programs through December 3, the same day that current government funding expires, setting up an increasingly massive fiscal cliff, potentially including the federal debt limit, that will need to be addressed in the coming weeks and that could serve as action-forcing events for items like Build Back Better.

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