Build Back Better bill won't be enacted this year, Biden says

President Biden announced December 16 that the Build Back Better Act, the roughly $1.75 trillion tax-and-spending plan that is currently moving through Congress under budget reconciliation protections, will not be ready for his signature before the end of this year.

The House approved the legislation on November 19, and Senate Majority Leader Charles Schumer, D-N.Y., had hoped to have his chamber vote on its version of a Build Back Better bill by Christmas. But Schumer's schedule—which was already considered ambitious because of the time still needed to resolve some open policy issues such as changes to the current-law cap on the deduction for state and local taxes (SALT) and to satisfy certain procedural requirements for advancing the legislation—was thrown further into doubt this week after Sen. Joe Manchin, D-W.Va., appeared to reach an impasse with the White House over some of the structural underpinnings of the measure.

Biden acknowledged these hurdles in a written statement.

"My team and I are having ongoing discussions with Sen. Manchin; that work will continue next week," he said. "It takes time to finalize these agreements, prepare the legislative changes, and finish all the parliamentary and procedural steps needed to enable a Senate vote. We will advance this work together over the days and weeks ahead; Leader Schumer and I are determined to see the bill successfully on the floor as early as possible."

Manchin's concerns

Because the Build Back Better Act is moving under budget reconciliation rules, it is shielded from a filibuster in the Senate, thus making it possible for Democrats to pass it without Republican support. But Democrats control only 50 seats in the chamber and will need all of those votes—plus the tie-breaking vote of Vice President Kamala Harris—to get it across the finish line, given that all 50 Senate Republicans are expected to remain united in opposition. That dynamic means that Sen. Manchin or any other Democrat in the chamber who withholds support for the legislation can prevent it from advancing.

Manchin has in the past urged his Senate colleagues to take "a strategic pause" on the Build Back Better legislation, arguing that trillions of dollars in new spending could exacerbate the already-rising rate of inflation. (The Labor Department reported December 10 that consumer prices rose 6.8 percent in November of this year compared to the same period in 2020.) The White House has countered that the Build Back Better Act would reduce inflation over the long term by lowering the cost of household budget items such as child care and health care.

Short-term spending, long-term costs: More recently, Manchin has warned against the use of what he describes as "budget gimmicks" in the legislation, such as offering certain popular spending programs and tax incentives on a short-term basis when they are almost certain to be renewed for longer periods and therefore will be more expensive in the long run. (Earlier this fall, as they considered how to pare back the measure in response to objections from Manchin and other moderate Democrats that the $3.5 trillion package originally envisioned by the White House was too expensive, congressional Democratic leaders made a deliberate decision to include a relatively broad array of spending provisions and tax incentives in the legislation but to keep costs down through a combination of reduced funding levels and rapid sunsets.)

The nonpartisan Congressional Budget Office (CBO) added a new element to the debate in a report released December 10 in which it estimated that certain selected temporary provisions in the House-passed reconciliation bill—including, among other things, enhancements to the child tax credit and the earned income tax credit and relief from the current-law cap on the deduction for state and local taxes—would increase the deficit by $3 trillion over the 10 year budget window if they were made permanent. (The CBO prepared the report at the behest of Senate Budget Committee ranking member Lindsey Graham, R-S.C., and House Budget Committee ranking member Jason Smith, R-Mo.)
URL: https://www.cbo.gov/publication/57673

Manchin told reporters December 13 that the CBO's estimate bolsters his position that Democrats should draft the spending and tax provisions in a way that mirrors their long-term intentions.

"If it's whatever plan it will be, pre-K, child care and in-home care, then it should be 10 years, it shouldn't just be one year here, three years here, five years there. And I think it'd be very transparent for the public to see exactly what they'd be getting for what we're spending for 10 years."

White House Press Secretary Jen Psaki, meanwhile, reminded reporters during a December 13 press briefing that the CBO estimate "is not based on the actual bill that anybody is voting on" and that the administration is committed to offsetting the cost of any future extensions of Build Back Better provisions. Lawmakers and the public, she said, should focus instead "on the actual bill everybody is going to vote on and considering in Congress right now."

Revise and extend, but don't overspend: Manchin, however, reportedly told President Biden in a conversation on December 15 that the bill would need to be recast so that any spending programs and tax incentives are provided over the full 10-year budget window, with the overall size of the package capped at the current level of $1.75 trillion.

"We have $1.75 trillion to work within," Manchin explained in a December 15 interview with CNN. "So pick your priorities and let's do it."

Since the CBO estimates that a permanent extension the enhanced child tax credit alone would cost nearly $1.6 trillion over 10 years, reworking the bill to comply with Manchin's proposed constraints would require Democrats to make difficult choices over which provisions to retain and which to eliminate. This approach also would require Democratic leaders in the House to convince their members to accept a Build Back Better bill that is substantially narrower in scope than the measure they approved last month. Persuading progressive House Democrats could be especially challenging since they had been adamant that the legislation should

provide as many benefits as possible, even if they are only available over short horizons. (A detailed discussion of the tax provisions in the House-passed legislation is available from Deloitte Tax LLP.)
URL: https://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-provisions-in-the-build-back-better-act.pdf

Manchin has suggested that Democrats could look for ways to extend the expanded child tax credit—which expires on December 31—on a stand-alone basis. Although such a proposal likely would pass in the House, its prospects in the Senate would be less certain since it would be moving without budget reconciliation protections and would require support from 10 Republicans to overcome a likely filibuster threat. White House Principal Deputy Press Secretary Karine Jean-Pierre acknowledged the lack of Senate votes during a December 16 press briefing, telling reporters that moving a child tax credit extension outside of budget reconciliation "is not an option."

The final advance monthly installment payment under the expanded credit, which was enacted as part of this year's American Rescue Plan, was distributed on December 15. The IRS has told lawmakers that an extension of the current-law provision would have to be enacted by December 28 to avoid a lapse in those payments.

Other open issues

Manchin's objections came as Senate Democratic leaders were attempting to resolve several open issues with the legislation that were already threatening to hamper its progress and cause lawmakers to miss Majority Leader Schumer's self-imposed Christmas deadline for passage.

Wyden releases Finance Committee tax title—without SALT provision: Senate Finance Committee Chairman Ron Wyden, D-Ore., released text of the tax title for the Senate's version of the reconciliation measure on December 11 that largely tracks with the House-passed measure but does include some important changes. However, that otherwise promising development was overshadowed to some extent by the fact that the Finance Committee release does *not* include a proposal to relax the cap on the deduction for state and local taxes that was enacted in the Tax Cuts and Jobs Act. (A placeholder in the text indicates that such a provision will be added at a later date.)
URL: https://www.finance.senate.gov/imo/media/doc/12.11.21%20Finance%20Text.pdf

The House version of the Build Back Better Act would temporarily increase the SALT cap from $10,000 to $80,000 for individuals—a provision included at the insistence of a coalition of members from high-tax states such as New Jersey, New York, and California. But a number of Democrats have balked at relaxing the cap, arguing that the resulting tax cut would accrue largely to households earning more than $1 million. Sens. Bernie Sanders, I-Vt., and Robert Menendez, D-N.J., have been working for several weeks to develop an alternative that reins in the benefit for the wealthiest households but have reached an impasse on income limits. (Sanders wants to eliminate the cap permanently for individuals earning less than $400,000, while Menendez said he wants a revenue neutral threshold, which, according to estimates, would be $550,000 for individuals and about double that for married couples. In both cases, the cap on the deduction would be extended—albeit at a higher level—beyond its currently scheduled 2025 expiration date.)

Wyden has said he is working to broker a deal on SALT and remains confident one can be reached, although he has said nothing about when it would be announced or what a possible compromise provision might look like. Negotiators are also reportedly working with key members in the House to ensure that any agreement also has the support needed to pass the House if the Build Back Better Act returns to that chamber for a final vote.

Addressing the Finance Committee's proposed revisions to the tax provisions in the House-bill, Wyden noted in a news release that Senate taxwriters made "both technical and policy changes, as well as modifications to ensure compliance with Senate budget rules."

Among the proposed changes in the Finance Committee package are provisions that would:

- Modify the proposed 15 percent corporate alternative minimum tax (AMT) to (1) disregard book-tax differences related to certain defined benefit pension plans, (2) provide that adjusted financial statement income for tax-exempt entities takes into account *only* unrelated business taxable income or unrelated debt-financed income, and (3) make changes to the AMT foreign tax credit for foreign-parented corporations;
- Make taxpayer-friendly changes to the proposed new limitation on interest expense (section 163(n)) to provide an election (which may not be revoked for five years if taken) to determine the limitation based on the "adjusted basis of assets" instead of EBITDA;
- Expand the anti-inversion rules (section 7874) to lower the threshold for treating an inverted corporation as a domestic corporation (from 80 percent to 65 percent) and lower the current-law inversion gain regime threshold (from 60 percent to 50 percent);
- Modify the base erosion and anti-abuse tax provisions with respect to the 3 percent safe harbor and cost of goods sold; and
- Make targeted revisions to certain renewable energy tax incentives.

The Finance Committee tax title also deletes a proposed excise tax on nicotine used in smokeless tobacco products that had been estimated to increase federal receipts by $8.6 billion over 10 years.

Parliamentarian's review: Procedurally, Senate leaders are reluctant to bring up the measure for floor votes until the parliamentarian has determined that all of its provisions comply with the "Byrd Rule," which imposes extensive restrictions on what can be included in budget reconciliation legislation. (Any provision deemed out of compliance by the Senate parliamentarian will likely have to be dropped from the bill.)

But the formal review process—known colloquially as the "Byrd Bath"—has not yet concluded and could prove to be time-consuming; moreover, two of the twelve committees responsible for drafting sections of the legislation have not yet released the text of the provisions under their jurisdiction, meaning the parliamentarian's review of those sections has not even begun.

New timeline not set

A new deadline for moving the Build Back Better legislation has not been announced, although there has been talk informally that congressional leaders are eyeing the president's State of the Union message in late January as a potential target date. Others have indicated that the pending expiration—on February 18—of the short-term continuing resolution funding government operations could be the next action-forcing event.

As the prospects for Senate action by Christmas appeared to dim in the last few days, Senate Budget Committee Chairman Bernie Sanders told reporters that lawmakers could take advantage of a delay to sell the legislation to their constituents over the upcoming holiday recess. (The Senate could adjourn as early as December 17 and is scheduled to be back in session on January 3. The House is already in recess and is scheduled to resume work on January 10.)

"If there is a silver lining here, it gives us more time to explain to the American people what is in this bill and who is opposed to this bill and why they are opposed to this bill," Sanders said.

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