Build Back Better Act remains stalled as Senate returns from recess

Members of the Senate returned to Capitol Hill from their holiday recess this week and it became apparent as the new legislative session got underway that the obstacles that prevented Majority Leader Charles Schumer, D-N.Y., from getting the Build Back Better Act through his chamber by his self-imposed Christmas deadline may not be overcome quickly.

The roughly $1.75 trillion tax-and-spending package, which was approved in the House on November 19, includes significant tax increases impacting large corporations and high-income individuals to pay for lower- and middle-class tax relief and fund new spending for White House priorities such as expanded access to pre-kindergarten education, child care and elder care, and affordable housing, as well as programs to mitigate climate change.

Because the Build Back Better Act is moving under the budget reconciliation process, 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 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.

Manchin's objections still stand

Just before the Senate began their end-of-year recess, West Virginia Democratic Sen. Joe Manchin upended efforts by Democratic leaders to advance the legislation when he declared in a December 19 interview with Fox News and in a more detailed statement subsequently posted on his Senate website that he is opposed to the measure in its current form.
URL: https://www.manchin.senate.gov/newsroom/press-releases/manchin-statement-on-build-back-better-act

In laying out his position, Manchin argued, among other things, that the legislation would make the nation more vulnerable to threats arising from the COVID-19 pandemic, inflation, and the federal debt. He also reiterated his longstanding concerns that lawmakers' reliance on short-term spending initiatives and tax incentives in the Build Back Better Act serve to "camouflage the real cost of the intent behind this bill" since a future Congress likely would try to further extend these temporary provisions or make them permanent. (For more on Manchin's concerns, plus details on other issues hampering the bill's path forward in the Senate, see *Tax News & Views*, Vol. 22, No. 55, Dec. 17, 2021, and *Tax News & Views*, Vol. 22, No. 56, Dec. 20, 2021.)
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/211217_1.html
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/211220_1.html

Talking to reporters outside of his office on January 4, Manchin stated that his position on the bill has not changed and that he has had "no conversations" on the issue with the White House or Senate Democratic leaders since he released his statement last month.

"I was very clear. I feel as strongly today as I did then," he said.

Expanded child tax credit: On the tax side, Manchin reiterated his objections to the proposed one-year extension of the expanded child tax credit—one of President Biden's key policy priorities—stating that the more generous benefit should be coupled with a work requirement. (In the past he has also called for reducing the phase-out levels for the expanded credit to ensure that benefits do not flow to upper-income individuals.)

Manchin did not appear to view the expiration of the expanded credit at the end of 2021 as a reason to move quickly on the larger Build Back Better package, noting that the base credit of $2,000 remains in place through 2025.

"If people think it's all gone by the wayside, that hasn't happened," he told reporters.
URL: https://www.c-span.org/video/?517023-1/senator-manchin-filibuster-rules-change-heavy-lift

Clean energy and climate change: Manchin also acknowledged, though, that there are "a lot of good things" in the bill, such as tax incentives to promote clean energy and a cleaner environment. (The Build Back Better Act calls for extending and enhancing a number of temporary energy-related tax credits, many of which expired at the end of 2021, as well as creating a number of new ones. See additional discussion about recently expired tax provisions below.)

"We have to have enough energy to run our country and we have to make the transition as . . . we move from fossil dependency to more of a cleaner [energy source] and you do that by using fossils in a cleaner way," he said.

According to Manchin, the climate provisions represent one area that "we could come to an agreement on much easier than anything else."

Schumer's immediate focus shifts

After Manchin announced his opposition to the Build Back Better legislation last month, Majority Leader Schumer vowed in a December 20 letter to his Democratic colleagues that the Senate would "vote on a revised version of the House-passed Build Back Better Act [after the recess] and we will keep voting on it until we get something done." Schumer did not, however, provide a specific schedule for voting on the measure and his plans for bringing Bring Back Better legislation to the floor remain unclear.
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/TNV/211220_1_suppA.pdf

It is worth noting that in a January 3 letter laying out the Senate's agenda for the opening weeks of the new session, Schumer did not mention Build Back Better and instead focused on moving voting rights legislation.
URL: https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2022/TNV/220107_1_suppA.pdf

At the White House, meanwhile, Press Secretary Jen Psaki told reporters during a January 5 briefing that the Senate's shift in focus to voting rights is not at odds with advancing the president's tax-and-spending package.

"We are in touch with a range of senators and their staffs and committee staff about Build Back Better, even as we're working in lockstep with Leader Schumer about getting voting rights done—a huge priority to the president," she said.

Psaki cautioned reporters not to "confuse the legislative calendar with a lack of action or behind-the-scenes discussions about an important priority."

Impasse leaves 2021 extenders in limbo

By failing to send the Build Back Better Act to President Biden's desk by the end of 2021, Congress also brought down the curtain—for the time being, at least—on a number of temporary tax provisions that were scheduled to expire with the start of 2022. In some cases, this resulted in the termination of existing tax benefits while in other cases it meant the imposition of harsher rules that could have a major impact on business taxpayers.

The most recent official list of what are known as "extenders" provisions was produced by the Joint Committee on Taxation (JCT) staff in January of last year. Note, though, that the JCT list does not reflect certain temporary tax provisions that were enacted since it was published. In particular, the American Rescue Plan, which was signed into law last March, included a short-term advanceable expansion of the child tax credit that, as already noted, expired after December 31. Moreover, the Infrastructure Innovation and Jobs Act (the bipartisan infrastructure bill enacted this past November) accelerated the sunset of the employee retention tax credit, subject to a limited exception, that was first enacted in 2020 as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act.
URL: https://www.jct.gov/publications/2021/jcx-1-21/

The slate of now-expired provisions for 2021 includes three areas of special note, given their importance to a wide swath of taxpayers.

Expensing of research and experimentation costs: First, beginning in 2022, companies may no longer immediately expense their costs for research and experimentation. Those costs must instead be amortized over five years for domestically conducted activities and fifteen years for those activities conducted aboard. This provision, which was enacted in 2017's Tax Cuts and Jobs Act (TCJA) and codified in section 174, has spurred intense lobbying by affected companies seeking to repeal it or delay its implementation. Those efforts appeared on the cusp of success given that both the House-passed version of the Build Back Better Act and the tax title for the Senate version of the legislation call for delaying the effective date of the TCJA provision by four years (through 2025). With the Build Back Better Act now stalled, however, amortization requirement has come into effect as scheduled.
URL: https://www.congress.gov/bill/117th-congress/house-bill/5376/text?q=%7B%22search%22%3A%5B%22%5C%22build+back+better%5C%22%22%2C%22%5C%22build%22%2C%22back%22%2C%22better%5C%22%22%5D%7D&r=1&s=1
URL: https://www.finance.senate.gov/imo/media/doc/12.11.21%20Finance%20Text.pdf

Limit on deduction for interest expense: Second, another TCJA provision, codified as section 163(j), limits taxpayers' deductions of business interest expense. Since the provision went into effect, the limit generally was a taxpayer's business interest income plus 30 percent of its adjusted taxable income (ATI), which is taxable income subject to several adjustments.

For tax years beginning before January 1, 2022, ATI is analogous to earnings before interest, taxes, depreciation, and amortization (EBITDA), as one key adjustment is "adding back" a taxpayer's allowable depreciation, amortization, and depletion deductions. However, for tax years beginning on or after January 1, 2022, this "addback" is no longer permitted, and ATI becomes analogous to earnings before interest and taxes (EBIT). As such, depreciation, amortization, and depletion deductions will reduce taxpayers' ATI and thus the amount of business interest that they may deduct. This may be of particular importance to taxpayers with large depreciation or amortization deductions that suddenly may find themselves unable to deduct all their business interest expense.

Unlike the section 174 provision discussed above, the Build Back Better Act as currently drafted does not address the sunset of the addback of depreciation, amortization, and depletion.

Alternative energy and conservation incentives: Third, the end of 2021 brought about the scheduled expiration of an array of temporary tax credits promoting renewable and alternative power sources and energy conservation. While the House-passed version of the Build Back Better Act and the Finance Committee's proposed tax title for the Senate version would extend these provisions and make many of them more generous, the ongoing delay in getting the legislation through Congress and to the White House instead has created uncertainty for affected taxpayers.

These lapsed incentives include, among other things, the:

- Tax credit for alternative fuel vehicle refueling property (section 30C(g));
- Credit for two-wheeled plug-in electric vehicles (section 30D(g)(3)(E)(ii));
- Second-generation biofuel producer credit (section 40(b)(6)(J));
- Beginning-of-construction date for most renewable power facilities eligible to claim the electricity production credit or investment credit in lieu of the production credit (sections 45(d) and 48(a)(5)); and
- Credit for construction of new energy-efficient homes (section 45L(g)).

Outlook for action in Congress

Although the dust is still settling from the recent developments around the Build Back Better Act, it remains possible that Congress will try to reconstitute the legislation in a manner acceptable to Sen. Manchin.

Given Manchin's stated concerns about the way the legislation is currently structured, lawmakers likely would have to rework it so that any spending programs and tax incentives are provided over the full 10-year budget window (rather than expiring after just a few years), with the overall size of the package capped at the current level of $1.75 trillion. Meeting those constraints would require Democrats to make difficult political choices to retain some provisions and eliminate others. It also would require Democratic leaders in the House to convince their members to accept a version of Build Back Better that is substantially narrower in scope than the measure they approved in November. 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.

Although Democratic leaders have not set a deadline for completing work on a revised bill, they might look to the pending expiration (on February 18) of the short-term continuing resolution funding the federal government or President Biden's upcoming State of the Union address (scheduled for March 1) as possible backstops to force decisions and action on the package.

Just how Congress will address the now-expired extenders provisions if some version of the Build Back Better Act is not enacted in the near term remains unclear. Democrats may face increasing pressure to sever the now-lapsed expansion of the child tax credit from the Build Back Better Act and advance it in separate legislation. Unlike the Build Back Better Act, however, a separate child tax credit bill would not be moving under fast-track budget reconciliation procedures and would need bipartisan support to avert potential procedural hurdles in the Senate. In that case, some items that may appeal to Republicans could also make it into such a package, although it is unclear at this time just what sorts of provisions those might be. (The February 18 expiration of the current government funding patch conceivably could provide an opportunity for lawmakers to address expired tax provisions.)

It is also important to keep in mind, though, that Congress has had a long history of renewing expired tax extenders provisions on a retroactive basis. In 2019, for example, lawmakers retroactively extended nearly two dozen provisions, including a number of energy-focused incentives, that had expired over the two previous years. (For details, see *Tax News & Views*, Vol. 20, No. 42, Dec. 19, 2019.) Given this history, and in the absence of other factors creating a sense of urgency for lawmakers, congressional action on expired tax extenders later in 2022 (or beyond) is not out of the question.
URL: http://newsletters.usdbriefs.com/2019/Tax/TNV/191219_1.html

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