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Tax Trends

Tax Provisions in the Senate Infrastructure Bill

By Mark A. Luscombe

On August 10, 2021, the Senate passed the Infrastructure Investment and Jobs bill by a bipartisan vote of 69 to 30. Total cost was over $1 trillion dollars over five years, with $550 billion of that total representing new spending. Federal spending to upgrade infrastructure has long had bipartisan support; however, fights over the total cost of any package and if or how to pay for it have tied it up in Congress for years. The compromise bill for the most part limits infrastructure spending to traditional infrastructure such as roads, bridges, water, power, and mass transit but also funds broadband expansion. For investment in human infrastructure, which the Democrats also sought, the Democrats are working on their own on a separate $3.50 trillion budget reconciliation bill focused on energy efficiency, clean energy, housing, childcare and care for the elderly, climate change, and extended tax breaks for lower- and middle-income taxpayers.

The Democrats had originally hoped to pay for the infrastructure bill with tax increases on the wealthy and corporations. In an effort to achieve bipartisanship, those proposals were moved to the budget reconciliation bill. The bipartisan group working on infrastructure proposed replacing those tax increases with gasoline tax increases, a traditional way to fund infrastructure improvements; however, the Biden Administration objected that proposal would violate President Biden's pledge not to raise taxes on people earning less than $400,000. The Biden Administration proposed raising revenue by funding increased IRS enforcement activities; however, Republicans objected to that proposal. The revenue projected to cover the cost of the Senate-passed infrastructure legislation as passed now comes from use of unused COVID-19 funds as well as a delay in the Medicare Part D rebate rule. Several of the tax-related provisions in the infrastructure bill also provide some revenue for the legislation.

Cryptocurrency Reporting

The infrastructure bill would require brokers to report cryptocurrency transactions to the IRS. The IRS believes that there is extensive tax non-compliance in the cryptocurrency area. The legislation would also expand the definition of who is a broker to include anyone who transfers digital assets on behalf of another person. The Joint Committee on Taxation (JCT) estimates that this provision would raise almost $28 billion over 10 years. Concern was raised in the Senate that the definition of who is a broker would be so broad as to include people who would not have access to the information required to be reported to the IRS. An attempt to amend the provision in the Senate failed; however, it is unclear whether another amendment effort will be undertaken in the House.

The infrastructure legislation has moved to the House of Representatives where its timing is somewhat uncertain.

Employee Retention Credit

The American Rescue Plan Act extended the employee retention credit, first created in the CARES Act, for an additional six months to December 31, 2021. However, the infrastructure bill would terminate the employee retention credit as of September 30, 2021 for employers closed due to COVID. At about the same time in early August that the Senate passed the infrastructure bill, the IRS had come out with guidance implementing the employee retention credit under the American Rescue Plan Act for the last two quarters of 2021. The IRS guidance will have to be revised if the provision in the Senate bill becomes law. This provision was estimated by the JCT to raise $8.20 billion in revenue in 2021.

Superfund Excise Taxes

Superfund excise taxes had been around for many years until 1995 to help pay for the clean-up of toxic sites. Superfund excise taxes had included taxes on certain chemicals. The infrastructure bill would restore those excise taxes. The JCT estimates that this provision would raise $14.40 billion over 10 years.

Interest Rate Stabilization

A provision in the infrastructure bill would extend interest rate stabilization for single-employer retirement plans. The net revenue effect of this provision would be to raise almost $2.90 billion during the period 2026–2031 under JCT projections.

Highways Taxes and Trust Fund Authority

The infrastructure bill would extend expenditure authority for the Highway Trust Fund, the Sport Fish Restoration and Boating Trust Fund, and the Leaking Underground Storage Tax Trust Fund. The legislation would also extend highway-related taxes and authorize a $90 billion transfer from the General Fund to the Highway Trust Fund. The JCT estimates that these provisions would have no significant revenue effect.

Private Activity Bonds

The Tax Code authorizes tax-exempt bonds to be issued by states for a variety of private activities. The infrastructure bill expands the permitted uses of private activity bonds to include qualified broadband projects and carbon dioxide capture facilities. The legislation also increases the limitation amount for qualified highway or surface transportation facilities. The private activity bond changes come with a JCT-estimated 10-year cost of around $1.20 billion.

Water and Sewage Disposal Utilities

The Tax Cuts and Jobs Act of 2017 modified the tax treatment of contributions to the capital of a corporation by removing an exception for water and sewage disposal facilities. The infrastructure bill restores that exception. The JCT estimates the revenue cost of this provision at $1.20 billion.

Disaster Relief

The infrastructure bill would modify the automatic extensions of certain deadlines for taxpayers affected by federally-declared disasters. The definition of what is a major disaster is also modified to include taxpayers impacted by wildfires. The JCT estimates this proposal to have a negligible revenue effect.

Combat Area Tax Filing Deadlines

The infrastructure bill would also modify the automatic extensions of tax deadlines related to service in a combat area.

Prognosis for Legislation

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Speaker of the House Pelosi has stated that the infrastructure bill will only move forward in conjunction with the additional bill moving under budget reconciliation. Some moderate Democrats in the House had insisted on a vote on the infrastructure bill first, while some progressive Democrats are insisting that the two pieces of legislation move together. Speaker Pelosi promised a vote on the infrastructure bill without amendment by September 27, 2021 in order to obtain the votes necessary to pass a $3.5 trillion budget resolution. The various Congressional committees have now commenced work on drafting that budget reconciliation legislation. It is not clear that the second bill, under budget reconciliation, can pass the Senate. Although the budget resolution on the $3.5 trillion number passed the Senate on a party-line vote of 50 to 49, a couple of the Democrats who voted for the budget resolution expressed concern about the overall cost of the legislation and how it would be paid for. By the time that this column is read, some of these issues may be been resolved.

