

Dorsey Infrastructure Alert No. 1

by Joseph Lynyak, Troy M. Keller, Claire H. Topp, and Marcus A. Mollison

Introduction

This is the first of several Alerts that will address the two pending infrastructure bills currently being considered by Congress. While there remain several procedural steps for either initiative to become law, we believe there is now significant momentum that warrants close attention due to the potentially broad economic impacts. Accordingly, this series of Alerts will focus on the opportunities and disadvantages created by these twin legislative efforts for our clients' business plans and on-going operations.

While the traditional notion of infrastructure suggests major construction projects across our nation, the possibility of spending approximately \$4.5 trillion over the next several years has created the so-called "Christmas Tree" effect for legislators to hang a wide variety of provisions into the legislative initiatives that are hidden in an estimated 5000 pages of statutory language. Moreover, the Biden Administration has expanded the notion of infrastructure to include "human" infrastructure—meaning the creation of expanded social programs that may rival the New Deal programs adopted by the Roosevelt Administration. Finally, many facets of the proposals involve a modernizing of infrastructure to be more responsive to challenges of climate change and demographic shifts, including rural areas. Altogether, the spending could result in significant programmatic changes that businesses will need to prepare for and react to going forward.

By agreement on a bi-partisan basis in the Senate, most social programs will be included in a second bill being drafted by the Senate Democrats—which is subject to the Senate's reconciliation budgetary rules that permit adoption by a majority of Senators and avoiding the filibuster cloture requirement of 60 votes.

Accordingly, what follows is: (a) an initial summary of the new construction and related programs included in the first infrastructure bill that was adopted by the Senate on Tuesday, August 10, 2021 (titled the "Infrastructure Investment and Jobs Act," and

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referred to herein as “Infrastructure-1”); (b) a description of the arcane procedural steps that are taking place under the reconciliation rules of the Senate; and (c) a discussion of the tasks before the Senate as it drafts the wide-ranging social infrastructure provisions of the second infrastructure bill (“Infrastructure-2”).

Discussion

Infrastructure-1

As passed by the Senate, Infrastructure-1 is comprised of 10 “Divisions,” each of which are subdivided into numerous “titles” that address (in a somewhat loosely related fashion) topics and authorizations that fall under the divisional headings.

The Divisions are as follows:

- Division A—Surface Transportation
- Division B—Surface Transportation Investment
- Division C—Public Transportation
- Division D—Energy
- Division E—Water
- Division F—Broadband and Internet
- Division G—Miscellaneous Authorizations
- Division H—Revenue and Taxation
- Division I—Other Matters
- Division J—Appropriations

Although touted as a \$1 trillion spending bill, total new spending by Infrastructure-1 is \$550 billion of new appropriations. To pay for the increased spending and avoid increasing the federal deficit, \$210 billion of unused COVID-19 funds will be applied. In a compromise between Senate Republicans and Democrats, minimal increased taxes were agreed upon, but some increased revenues were included, such as sales of broadband spectrum sales, increased fees and similar revenue-generating sources.¹

In regard to new construction projects, the allocation for projects divided into industry segments is as follows:

- Roads and Bridges—\$110 billion
- Passenger and Freight Rail—\$66 billion
- Power Infrastructure—\$65 billion
- Broadband—\$65 billion
- Clean Drinking Water—\$55 billion
- Public Transit—\$39 billion
- Airports, Ports and Waterways—\$42 Billion
- Environmental Cleanup—\$21 billion
- Highway and Pedestrian Safety—\$11 billion
- Resilience Western Water Infrastructure—\$50 billion
- Electric Vehicle Infrastructure—\$7.5 billion

- Electric School buses—\$7.5 billion
- Reconnecting Communities—\$1 billion²

It should be noted that it will be impossible to commence actual construction for the vast number of projects contemplated by Infrastructure-1 by the end of 2021 (much less 2022). That is because federal and state governmental entities will first be required to create project plans, complete environmental assessments, engage in competitive contracting and similar project management functions. Further, both federal and state regulatory agencies (particularly the Department of Transportation) must commence significant rulemaking to create a wide array of oversight functions.

Importantly, many of the programs in Infrastructure-1 will be new programs that are opened to states, communities and non-profit organizations. We expect that the newness of the programs and their extensive reach into states and communities will cause them to be relevant to businesses at all levels.

While nothing is ever final in legislation, the sensitivity of the agreement by Republicans to vote in favor of Infrastructure-1 likely means that few modifications will be made to this bill as it moves over to the House for consideration.

Infrastructure-2 and the Reconciliation Process

In order to appreciate how Infrastructure-2 eventually may be adopted—along with its proposed \$3.4 billion price tag—it is useful to understand how the reconciliation process works in the Senate, which permits a budget bill for certain programs to be adopted by a majority of the Senate (because the filibuster rules do not apply to reconciliation legislation).

The purpose of the reconciliation process—which was somewhat grudgingly agreed to by then President Nixon³ -- allows Congress to use an expedited procedure when considering legislation that would bring existing spending, revenue, and debt limit laws into compliance with changing fiscal and policy priorities established in the annual Congressional budget. Stated another way, for stated fiscal and policy goals to be achieved, Congress is authorized to alter current revenue, direct spending, or debt limit laws (and to reconcile existing law with its current priorities).⁴

Budget reconciliation is an optional, expedited legislative process that consists of several different stages, which begins with the adoption of a comprehensive budget resolution, which also must include reconciliation “directives” to affected Senate committees. These directives trigger the second stage of the process by instructing individual committees to develop and report legislation that would change laws within their respective jurisdictions related to modified direct spending, revenue or debt limits. Once a specified committee develops legislation, the reconciliation directive may further direct it to report the legislation for consideration in their respective chamber or submit it to the Budget Committee to be included in an omnibus reconciliation measure.⁵

On August 11, 2021, the Senate followed these reconciliation rules by adopting a budget

resolution (the “Resolution”) drafted by the Senate Budget Committee (chaired by Senator Sanders). The Resolution takes two steps in increasing federal spending and programs: First, it significantly increases federal appropriations; second, instructs specified Senate committees to draft implementing legislation that includes levels of spending included in the Resolution.

Two matters should be noted. First, reconciliation limits the inclusion and amendment of laws that are direct obligations of the federal government, such as Social Security, Medicare, Medicaid, unemployment insurance, and military and federal civilian pensions. While the determination whether a specific statute is germane and can be included in reconciliation is the province of the House and Senate Parliamentarians, the desire by Democrats to create and/or increase entitlement (*i.e.*, social welfare) programs would arguably allow many of new programs and entitlements to be included in a reconciliation bill strongly being advocated for by the liberal wing of the Democratic Party.

As noted above, the Resolution directs the following Senate committees to draft legislation to address the new spending authorizations:

- Committee On Agriculture, Nutrition, And Forestry
- Committee On Banking, Housing, And Urban Affairs
- Committee On Commerce, Science, And Transportation
- Committee On Energy And Natural Resources
- Committee On Environment And Public Works
- Committee On Finance
- Committee On Health, Education, Labor, And Pensions
- Committee On Homeland Security And Governmental Affairs
- Committee On Indian Affairs
- Committee On The Judiciary
- Committee On Small Business And Entrepreneurship
- Committee On Veterans’ Affairs

Second, reconciliation contemplates what is termed in the Senate to be “normal order,” which means that the designated Senate committees referenced above must draft required legislation. In that regard, the scope of \$4.3 billion in new benefits, entitlements and programs by the federal government is so remarkably broad, that significant lobbying by all constituencies directed toward the responsible Senate committees has already begun. Whether or not the end product for a draft Infrastructure-2 bill will satisfy the Senate’s 50% plus 1 requirement to adopt a reconciliation bill will not be determined until later this year or early in 2022.⁷

Though beyond the scope of this Alert, Senator Sanders expanded upon the instructions provided in the Resolution by identifying numerous legislative initiatives and programs to be undertaken by the above-referenced committees, including:

- Expanded Child Care Tax Credits
- Universal Pre-Kindergarten
- Universal Paid Family and Medical Leave

- Medicare Negotiation Authority for Prescription Drugs
- Expanded Medicare Coverage
- Expanded Affordable Housing
- Climate Change
- Renewable Energy
- Immigration Reform

Future Infrastructure Alerts

Because of the impact that literally hundreds of statutory provisions—currently in Infrastructure-1 and soon to be drafted Infrastructure-2 will have across the entire economy—Dorsey will be closely monitoring each bill and providing analysis to our clients regarding our views regarding both opportunities and possible detrimental effects those bills, if enacted, will have over the next decade in regard to governmental expenditures and expanded social obligations.

As the impact of these two bills emerge and are analyzed, Dorsey has organized a team of attorneys available to assist our clients and friends with current analysis and advice for planning and determining appropriate business responses.

¹ Despite bi-partisan statements that the deficit will not be increased, the Congressional Budget Office scored Infrastructure-1 as increasing the federal deficit by \$256 billion during the 2012-2031 time period.

² UPDATED FACT SHEET: Bipartisan Infrastructure Investment and Jobs Act | The White House.

³ Section 310 of the Congressional Budget Act of 1974 as amended (P.L. 93-344).

⁴ Since its first use in 1980, these expedited procedures have been used to pass 25 reconciliation bills.

⁵ Reported reconciliation legislation may be considered under expedited procedures in both the House and Senate, but the significant factor that affects the Senate is that a reconciliation bill only requires a majority of Senators to adopt the same (the House does not have a comparable super-majority requirement to pass legislation). If there are differences between a House and Senate version of a reconciliation bill, a conference committee must meet to resolve any differences before the combined bills can be sent for approval by the President.

⁶ HEN21B67 (senate.gov).

⁷ MEMORANDUM for Democratic Senators - FY2022 Budget Resolution.pdf (senate.gov).