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BIPARTISAN GROUP OF SENATORS STRIKES INFRASTRUCTURE DEAL, BUT CHALLENGES FOR SENATE PASSAGE REMAIN

To Our Clients and Friends:

On March 31, 2021, President Biden unveiled the American Jobs Plan ("Jobs Plan"), a sweeping $2.25 trillion proposal designed to create jobs through upgrading public infrastructure, revitalizing manufacturing, prioritizing workforce training, and expanding long-term health care services. The Jobs Plan, one of the most ambitious federal spending proposals in American history, is the first of a two-part package to revive the economy from the COVID-19 recession. The second portion—the American Families Plan ("Families Plan")—which President Biden released on April 28, 2021, is a $1.8 trillion investment to expand health insurance coverage, childcare subsidies, and education access, among other proposals.[1]

The Jobs Plan and Families Plan would be historic investments. The Jobs Plan combines spending and tax credits to modernize the nation's infrastructure, including the construction of roads, bridges, and ports, and also invests in climate change-related and racial equity priorities. The Jobs Plan encompasses four categories of investments: (1) transportation infrastructure; (2) utilities infrastructure; (3) care infrastructure; and (4) investments in manufacturing, innovation and the workforce. The Families Plan (1) adds at least four years of free education to community colleges; (2) provides direct support to children and families; and (3) extends tax cuts for families with children and American workers, restoring the highest income tax bracket to 39 percent and implementing income tax rates on capital gains for high-income earners.

To offset the costs of both proposals, the Biden administration released the Made in America Tax Plan ("Tax Plan") on April 7, 2021. The Tax Plan generally sets forth tax proposals to pay for the infrastructure investments. It would raise the corporate tax rate and global minimum tax, measures that would largely reverse the 2017 Trump administration's tax plan. The Tax Plan increases corporate tax rates from 21 percent to 28 percent and proposes a minimum tax on multinational corporations. The Biden administration projects that the Tax Plan's overhaul of corporate tax policy would generate $2 trillion over the next 15 years.

Passing these Plans through Congress has been a challenge, particularly in an equally divided, Democratically controlled Senate. Republicans opposed the Jobs Plan due to its breadth, cost, and reliance on corporate tax increases. Furthermore, dueling infrastructure proposals exist after Senate Republicans released several counterproposals of their own infrastructure plan, which narrowly focus on physical infrastructure and cost less than the Jobs Plan, all of which were rejected by the Biden White

House.[2] As of this week, it remains unclear which proposal could achieve the 60 votes required to overcome a filibuster in the Senate.

On June 10, 2021, a bipartisan group of Senators reached a compromise on infrastructure, which would spend $1.2 trillion over eight years, a key step towards achieving an infrastructure bill that can pass Congress and be signed into law by the President. The deal still needs to be approved by the White House and Senate Republican Conference and the legislative text must still be approved by all the parties as well. While light exists at the end of the tunnel, challenges remain as the infrastructure deal has received bipartisan criticism—Republicans are concerned about the deal's cost being too large, its tax increases are controversial, and the prospect of a major legislative accomplishment for a Biden administration and Democrats are concerned that the deal's cost is too small, the strategies to pay for it are problematic, and the deal fails to address climate change—and it may not achieve a filibuster-proof supermajority in the Senate.

If the bipartisan deal in the Senate breaks down, Democrats may pass the Jobs Plan on their own, using a legislative process known as reconciliation that permits the passage of certain legislation with only a majority of votes. Alternatively, Democrats may decide to move a physical infrastructure-focused bill with Republican support and use reconciliation to move their broader policy priorities, like climate change, at a later date.

1. Overview of the American Jobs Plan

The Jobs Plan seeks to rejuvenate the American economy by prioritizing investments in green infrastructure while addressing climate change, racial inequities, and employees' rights.

a. Common Themes

Consistent among the various types of investments in the Jobs Plan is a focus on green infrastructure. Indeed, around 56 percent of the Jobs Plan's expenditures can fairly be said to relate to climate change.[3] Of the various provisions in the Jobs Plan, improvements to transportation infrastructure, including a wide-scale investment in electric power, are mostly climate-driven. Tackling both mass transit and electric vehicles, the Jobs Plan allocates $85 billion for public transit and $80 billion for Amtrak in an effort to make public transport options more reliable and accessible, thus encouraging people to transition away from single-occupancy vehicles, which are a major source of greenhouse gas emissions. The Jobs Plan also directs $174 billion to electric vehicles to build up charging infrastructure and provide point-of-sales rebates and tax incentives to customers buying electric vehicles.

Beyond transportation investments, another green infrastructure investment is the $100 billion set aside for electric grid infrastructure and the extension and expansion of renewable energy tax credits. The Jobs Plan creates a "Clean Electricity Standard," a federal mandate requiring that a certain percentage of electricity in the United States be generated by zero-carbon energy sources, such as wind and solar. The Jobs Plan also puts aside $35 billion toward clean-energy technology, new methods for reducing emissions, and other broad-based climate research.

Also embedded throughout the Jobs Plan is an emphasis on closing racial gaps in the economy, which according to administration officials have been created or exacerbated by previous federal spending efforts, such as interstate highway developments that have cleaved communities of color or air pollution that affects a majority of Black and Latino communities near power plants. These inequities have become even more pronounced during the coronavirus pandemic. For example, Black and Latino households are less likely to have access to home broadband Internet than White households. Addressing this disparity, the Jobs Plan prioritizes building broadband infrastructure in unserved and underserved areas to ensure the country reaches comprehensive high-speed broadband coverage. The Jobs Plan's investments in workforce development also seek to advance racial equity, setting aside $100 million in workforce development programs that specifically target support services for communities of color. And, in order to boost minority-owned manufacturing, the Jobs Plan markedly increases support for the Manufacturing Extensions Partnership, which will increase the involvement of minority-owned and rurally located small- and medium-size enterprises.

The Jobs Plan also seeks to strengthen unions and collective bargaining rights for employees, including guaranteeing union and bargaining rights for public service workers.[4] President Biden has signaled his support for the Protecting the Right to Organize (PRO) Act,[5] which would make sweeping changes to federal labor law. Moreover, the Jobs Plan invests $10 billion to strengthen the capacity of labor enforcement agencies, and imposes increased penalties for employers who violate workplace safety and health rules.[6]

b. Transportation Infrastructure

The plurality of the $2 trillion dollar Jobs Plan package, approximately $620 billion, will be dedicated to transportation infrastructure, including:

- $174 billion in grants and other incentives to encourage state and local governments to partner with the private sector to build electric vehicle ("EV") charging infrastructure, incentivize EV purchases, and support the transition away from diesel transit vehicles. The Jobs Plan would electrify 20 percent of the nation's fleet of yellow school buses and would convert the entire U.S. Postal Service fleet to electric;

- $115 billion to revamp 20,000 miles of highways and roads, including improvements to 10 of the most economically important bridges across the country, as well as to thousands of smaller bridges in need of reconstruction;

- $85 billion to modernize and expand bus, rapid transit and rail services in order to reduce congestion and improve equitable access to these modes of transportation;

- $80 billion targeted to address Amtrak's repair backlog and modernize the busy Northeast Corridor, as well as improve and expand existing corridors and enhance passenger and freight rail safety;

- $50 billion in grants and tax incentives to improve infrastructure resilience by safeguarding critical infrastructure and services from extreme weather events;

- $25 billion to upgrade airports and support a new program that aims to renovate terminals, as well as additional funding for the Airport Improvement Program, Federal Aviation Administration assets;
- $20 billion to incentivize new programs increase access and opportunity and work toward racial equity and environmental justice;
- $20 billion to improve road safety for cyclists and pedestrians, including the Safe Streets for All Program, which funds state and local "vision zero" plans to reduce crashes and fatalities; and
- $17 billion to improve inland waterways and shipping ports.c

c. Investment in "How We Live at Home"

The Jobs Plan's second major category of investments focuses on how Americans live at home. Among other things, the President's proposal calls upon Congress to dedicate billions to improve the nation's affordable housing supply, power infrastructure, clean water, broadband access, schools and childcare facilities, and the manufacturing sector.

i. Affordable Housing

With an eye towards addressing the "severe shortage of affordable housing in America,"[7] the Jobs Plan allocates $213 billion to address the nation's affordable housing shortage using primarily a two-pronged approach: (1) building, preserving, and retrofitting more than two million commercial buildings and homes; and (2) eliminating state and local exclusionary zoning laws through a competitive grant program.

<u>Building and Improving Housing Stock</u>

Key to the Jobs Plan's proposed increase in the amount of affordable housing in the nation is to build, renovate, and retrofit part of our current housing and commercial building stock. Specifically, the President's plan calls upon Congress to pass the Neighborhood Home Investment Act ("NHIA"), which would offer $20 billion in tax credits over the next five years towards renovating or building 500,000 homes in distressed areas.

The NHIA is a centerpiece of the President's affordable housing plan and already has bipartisan support. U.S. Senators Ben Cardin (D-Md) and Rob Portman (R-Ohio) have introduced the NHIA in the Senate as S. 98,[8] while Representative Brian Higgins has introduced the accompanying bill in the House of Representatives, H.R. 2143.[9] Under the NHIA proposal, states would establish a Neighborhood Homes Credit Agency which would allocate the tax credits to qualified home builds or renovations.[10] Project sponsors—such as developers—would be responsible for developing or rehabilitating the home, condominium, or qualified cooperative, receiving a tax credit once the home or project has been sold to a qualified buyer.[11] Qualified projects must be certified by a Neighborhood Homes Credit Agency and located in a qualified census tract where certain conditions are met.[12] Specifically, the project must be in a census tract where (1) the median gross income which does not exceed 80 percent of the applicable area median gross income; (2) the poverty rate that is not less than 130 percent of the applicable area poverty rate; and (3) a median value for owner-occupied homes does not exceed the applicable area median value for owner-occupied homes.[13] To receive the tax credit, the project must be sold to a qualified buyer, who are individuals that will use the qualified residence as their principal residence and whose income does not exceed 140 percent of the applicable area median gross income for where the home is located.[14]

The tax credit awarded would cover the gap between development cost and sales price of new homes, but is capped at 35 percent of the cost of construction or 35 percent of 80 percent of the national median sale price for new homes as determined according to the most recent census data, whichever is less.[15] For homes that are rehabilitated, the NHIA tax credit would cover the gap between the rehabilitation cost and the homeowner's contribution, for up to 35% of the rehabilitation cost.[16]

The Jobs Plan uses block grant programs, the Department of Energy's Weatherization Assistance Program,[17] and commercial efficiency tax credits, to renovate additional structures. The proposal also creates a $27 billion Clean Energy and Sustainability Accelerator to mobilize private investment into energy resources, retrofits of residential, commercial and municipal buildings, and clean transportation. The American Jobs Plan also tackles public housing, asking Congress to invest $40 billion to improve public housing in the country.

Eliminating State and Local Exclusionary Zoning Laws

The Jobs Plan also calls upon Congress to enact a new competitive grant program that awards funding to jurisdictions willing to eliminate "exclusionary zoning laws" that have prevented the creation of more homes. The Jobs Plan provides examples of such exclusionary laws, suggesting that "minimum lot sizes [requirements], mandatory parking requirements, and prohibitions on multifamily housing" have "inflated housing and construction costs and locked families out of areas with more opportunities."[18]

ii. Upgrading and Reorienting Power Infrastructure

Modernizing Power Infrastructure

Another key aspect of the proposal is to reenergize America's power infrastructure. As part of this effort, the Jobs Plan calls on Congress to invest $100 billion in investment tax credits to incentivize the buildout of, at minimum, 20 gigawatts of high-voltage capacity power lines and to mobilize private capital into re-energization efforts. The Jobs Plan also establishes the Grid Deployment Authority at the Department of Energy, designed to better utilize existing right-of-ways that can help create additional transmission lines as well as support financing tools for those kinds of projects. Additionally, the Jobs Plan proposes a 10-year extension and phasedown of an expanded direct-pay investment tax credit and production tax credit for clean energy and storage. States and local governments will also have access to clean energy block grants if they prioritize power grid modernization, which can be used to support clean energy, worker empowerment, and environmental justice programs.

Eliminating Hazardous Energy-Related Sites

The proposal also makes key investments in improving energy-related sites throughout the country. For example, the proposal invests $16 billion to plug hundreds of thousands of former orphan oil and gas wells, along with abandoned mines, which pose serious safety hazards and can be a source of environmental harm. The Jobs Plan also calls for a $5 billion investment in the remediation and redevelopment of former industrial and energy sites that contain hazardous substances (known as Brownfield and Superfund sites). The Jobs Plan also calls for further aide to communities around such sites, through investments to the Economic Development Agency's Public Works program, lifting the cap on projects. Additionally, the proposal asks for additional economic development efforts through the Appalachian Regional Commission's Partnerships for Opportunity and Workforce and Economic Revitalization ("POWER") grant program, which aids regions affected by job losses in coal mining, coal power plant operations, and coal-related supply chain industries. The Jobs Plan also invests in the Department of Energy's retooling grants for idle factories through Section 132 of the Energy Independence and Security Act, which has never been funded. Section 132's grant program was designed "to encourage domestic production and sales of efficient hybrid and advanced diesel vehicles" with "priority . . . given to the refurbishment or retooling of manufacturing facilities that have recently ceased operation or will cease operation in the near future."[19]

Energy-Related Goals and Financial Commitments

President Biden's proposal makes significant energy-related commitments. Among them is the creation of the Energy Efficiency and Clean Electricity Standards, aimed at cutting electricity bills and pollution, to move toward "100 percent carbon-pollution free [sic] power by 2035." President Biden has also pledged that the federal government will purchase 24/7 clean power for federal buildings to help support these efforts.

iii. Clean Water

The Jobs Plan also invests $111 billion to replace all of the nation's lead pipes and service lines, to ensure that lead pipes do not deliver drinking water to any home in the country. To accomplish this goal, President Biden's Plan calls on Congress to invest $45 billion in the Environmental Protection Agency's Drinking Water State Revolving Fund and in Water Infrastructure Improvements for the Nation Act ("WIIN") grants. The Jobs Plan also allocates $56 billion to help modernize the country's aging water systems, providing grants and low-cost flexible loans to states. An additional $10 billion is dedicated to monitoring and remediating per- and polyfluoroalkyl substances ("PFAs") in drinking water and to invest in rural small water systems and household well and wastewater systems, including drainage fields.

iv. Expanding Broadband Access

Recognizing the Internet as "the new electricity," the Jobs Plan also pledges $100 billion to expand broadband access to everyone, including to Americans living in areas with no broadband infrastructure with minimal access to the Internet. The money will go towards building high-speed broadband infrastructure and providing temporary, short-term subsidies to cover the costs of overpriced Internet services. However, President Biden also pledges in his proposal to work with Congress to find a permanent solution to reduce Internet prices for everyone and "hold providers accountable."

v. Investment in Repairs of Schools, Community Colleges, Childcare Facilities, Federal Buildings, and the Veteran Hospital System

Improvements in Public Schools and Community Colleges

The Jobs Plan also sets aside $100 billion to upgrade and build new public schools, $50 billion of which will be provided in direct grants and the other $50 billion in bonds. The funding is designed to improve school safety, make technological improvements to schools, and create more energy-efficient school buildings. The Jobs Plan also calls for $12 billion dedicated to expanding the nation's community college infrastructure, giving states the ability to address existing physical and technological infrastructure needs.

Improvements to, and the Creation of, Childcare Facilities

The Jobs Plan dedicates $25 billion to a Child Care Growth and Innovation Fund, which states it will use to upgrade childcare facilities and build additional childcare facilities in high-need areas. The Jobs Plan also expands tax credits to encourage businesses to build childcare facilities. Under the proposal, employers will receive 50 percent of the first $1 million of construction costs per facility to create on-site childcare.

Additionally, the Jobs Plan calls for $18 billion dedicated to the modernization of Veterans Affairs hospitals and clinics. An additional $10 billion will go towards a Federal Capital Revolving Fund to support investment in a major purchase, construction or renovation of federal facilities.

vi. Manufacturing and Strengthening of Supply Chains as Well as Increasing Access to Capital for Domestic Manufacturers

President Biden's Plan also dedicates $300 billion to revitalize American manufacturing and supply chains. Specifically, the proposal calls for $50 billion in semiconductor manufacturing and research dollars; $30 billion in pandemic-ready-related manufacturing and research and development; and $36 billion towards the manufacture of "clean" cars, ports, pumps, along with advanced nuclear reactor sand fuel. Additionally, President Biden proposes that Congress invest more than $52 billion in domestic manufacturers, expanding their access to capital. The Jobs Plan also calls for modernizing supply chains, including the auto sector, through specific programs, such as extending the Advanced Energy Manufacturing Tax Credit Program, also known as the "48C tax credit," which helps promote clean energy projects. The Jobs Plan also contains an additional $31 billion in investments designed to give small business manufacturers access to credit, venture capital, and R&D dollars, to increase their ability "to compete in a system that is so often titled in favor of large corporations and wealthy individuals."

d. Care Infrastructure

The third major category of investments focuses on expanding access to home and community-based services to bolster America's "care economy." The Jobs Plan sets out to address the current "caregiving crisis" by improving access to, and quality of, home care for individuals who qualify under Medicaid, creating additional home care jobs, and supporting home care workers. To do so, the Jobs Plan asks Congress to put $400 billion toward "expanding access to quality, affordable home-or community-based care for aging relatives and people with disabilities." In addition to facilitating access to care, these investments are intended to increase the pay and benefits for those in the caregiving industry and create an opportunity for these workers "to organize or join a union and collectively bargain."

The Jobs Plan sets forth a two-pronged approach to accomplish these objectives: (1) expand access to long-term care services under Medicaid and (2) put in place an infrastructure to create middle-class jobs with the opportunity to participate in collective bargaining. The Jobs Plan will expand access to home- and community-based services ("HCBS") and extend existing Medicaid long-term care programs such as the "Money Follows the Person" program, which is designed to move nursing home residents out of nursing homes and back into their own homes, or the home of family members. The HCBS expansion will be designed to support well-paying caregiving jobs and permit joining a union, in an effort to "improve wages and quality of life for essential homecare workers and yield significant economic benefits for low-income communities and communities of color."[20]

e. Investments in Jobs, Manufacturing, and Innovation

i. Research and Development

The Jobs Plan envisions investment in research and development ("R&D") as serving multiple administration priorities, not the least of which is keeping pace with—and pushing back against—China on advanced and emerging technologies. That strain runs throughout this section of the Jobs Plan, which first notes, "[c]ountries like China are investing aggressively in R&D" before proposing $180 billion in investment to "win the 21st century economy" by "investing in the researchers, laboratories, and universities across our nation." Specific to these emerging technologies, the Jobs Plan proposes $50 billion for the National Science Foundation; $30 billion for generalized innovation and job creation, including in rural areas; and $40 billion to upgrade research infrastructure across various government agencies.

It is clear that the Jobs Plan envisions investment in R&D as a way to advance other aspects of the Biden Agenda. For example, the Jobs Plan calls for "$35 billion in the full range of solutions needed to achieve technology breakthroughs that address the climate crisis and position America as the global leader in clean energy technology and clean energy jobs." This includes launching "APRA-C," a climate-focused counterpart to the Defense Advanced Research Projects Agency ("DARPA"), along with other projects focused on energy storage, carbon capture, hydrogen and nuclear technologies, wind, biofuel, quantum computing and electric vehicles. In addition, the Jobs Plan views R&D as a means by which to confront racial and gender inequities, stating: "Persistent inequities in access to R&D dollars and to careers in innovation industries prevents [sic] the U.S. economy from reaching its full potential." Accordingly, the

Jobs Plan proposes $10 billion in funding for R&D investment at Historically Black Colleges and Universities ("HBCUs") and $15 billion to create research incubators at HBCUs and other minority-serving institutions.

ii. Domestic Production

In seeking an additional $300 billion in funding for domestic manufacturing—"a critical node that helps convert research and innovation into sustained economic growth"—the Jobs Plan attempts to bolster the middle class and reinforce union support while expanding growth to rural areas. Proposed funding under this category likewise reflects the administration's focus on the COVID-19 recovery, supply chain independence, and combating climate change. The Jobs Plan calls for $50 billion to advance semiconductor manufacturing and research along with $30 billion to address job losses caused by the pandemic and to "shore up our nation's strategic national stockpile," including funding for measures designed to address a future pandemic, such as prototype vaccines and therapeutic treatments.

The Jobs Plan also sees a role for clean energy manufacturing—"[t]o meet the President's goals of achieving net-zero emissions by 2050, the United States will need more electric vehicles, charging ports, and electric heat pumps for residential heating and commercial buildings." To these and related projects, the Jobs Plan proposes $46 billion. A further $20 billion is proposed under this category for investment in regional innovation hubs to "leverage private investment to fuel technology development, link urban and rural economics, and create new business in regions beyond the current handful of high-growth centers." The Jobs Plan also specifically addresses rural and Tribal communities, proposing $5 billion for a Rural Partnership Program to "build on their unique assets and realize their vision for inclusive community and economic development."

iii. Workforce Development

The Jobs Plan seeks a further $100 billion for a range of workforce development initiatives. This would include next-generation training programs, $40 billion to address sector-based and dislocated worker training and $12 billion in targeted workforce development in underserved communities, $5 billion of which would go toward community violence prevention programs. The Jobs Plan also calls for $48 billion for apprenticeships, career pathway programs in middle and high schools prioritizing STEM careers, and community college partnerships.

f. Strengthening Employee Rights

The Jobs Plan guarantees that public service workers will have collective bargaining rights.[21] Moreover, the Jobs Plan calls upon Congress to pass the Protecting the Right to Organize ("PRO") Act.[22] A version of the PRO Act has already passed the House of Representatives, with five Republicans joining Democrats in favor of it.[23] If enacted, the House version of the PRO Act would make significant changes to federal labor law. Some of these changes include invalidating state right-to-work laws and limiting arbitration agreements between employers and employees.[24] While an increasing number of Senate Democrats have come out in support of the PRO Act, it is unlikely that bill can generate enough support to overcome a filibuster and ultimately pass in the Senate.[25]

II. Made in America Corporate Tax Reform Plan

The Tax Plan overhauls corporate and international taxation.[26] The Tax Plan includes proposals to raise the U.S. federal corporate income tax rate, establish an international agreement on global taxation, dis-incentivize inversions and offshore profit shifting to low-tax countries, incentive domestic spending, and enact minimum corporate taxes.[27] The Tax Plan is expected to raise over $2 trillion over the next 15 years,[28] which would fully fund the American Jobs Plan.[29]

a. Increase Federal Corporate Income Tax Rate to 28 Percent

One of the most noteworthy aspects of the Tax Plan is the increase in the U.S. federal corporate income tax rate. The Tax Plan would raise the corporate income tax rate from 21 percent to 28 percent.[30] This proposal would reverse the reduction in the corporate income tax rate in the 2017 Tax Cuts and Jobs Act ("TCJA"), which lowered the rate from 35 percent to 21 percent.[31] Revenues from the tax increase would help fund investments in infrastructure, clean energy, and research and development.[32]

The Tax Plan's proposed tax hike on corporate income tax is drawing resistance, even from members of President Biden's own political party. Senator Joe Manchin of West Virginia, who holds a key moderate vote in a 50-50 Senate, has come out in opposition of the proposal.[33] A compromised corporate income tax rate increase to 25 percent will likely appease the White House and moderate Democrats.[34]

b. Strengthen the Global Minimum Tax on U.S. Multinational Corporations

The Tax Plan would revise the "global intangible low taxed income" ("GILTI") regime that was enacted as part of the TCJA.[35] The GILTI regime was intended to discourage moving intangible assets and related profits outside the United States.[36] U.S.-controlled foreign corporations are given a tax exemption on the first 10 percent of returns on foreign tangible assets,[37] and GILTI is taxed at approximately half of the corporate tax rate (10.5 percent).[38] Under the current regime, GILTI tax liabilities are currently calculated on a global basis.[39]

President Biden's Tax Plan would revise the GILTI regime in the following manner:

- Eliminate the tax exemption on the first ten percent of returns on foreign tangible assets;[40]
- Increase the GILTI minimum tax on U.S. corporations to 21 percent;[41] and
- Calculate the GILTI minimum tax on a country-to-country basis to prevent corporations from shifting profits to low-tax countries.[42]

c. Negotiating Multilateral Agreement on International Minimum Taxes

The Tax Plan indicates that the United States will lead a multilateral effort to impose a global minimum tax and strengthen anti-inversion provisions.[43] Pursuant to the Organisation for Economic Co-operation and Development/G20 Inclusive Framework on Base Erosion and Profit, the United States and the international community are negotiating a global agreement that would enact minimum tax rules worldwide.[44] This agreement would allow home countries of multinational corporations to apply a minimum tax when offshore affiliates are taxed below an agreed-upon minimum tax rate.[45] Foreign corporations based in countries that do not adopt a strong minimum tax would be denied deductions on payments that could allow them to strip profits out of the United States.[46] These proposals would repeal and replace the Base Erosion and Anti-Abuse Tax ("BEAT"),[47] which was enacted under the TCJA.[48]

The Tax Plan would also strengthen anti-inversion provisions to prevent U.S. corporations from inverting.[49] Corporations that merge while retaining management and operations in the United States would be treated and taxed as a U.S. company.[50] More specific details regarding anti-inversion provisions will likely emerge as negotiations on the proposed legislation continue.

d. Eliminate Deductions for "Offshoring" Jobs and Credit Expenses for "Onboarding" Jobs

The Tax Plan would eliminate deductions for expenses arising from offshoring jobs and provide tax credits for on-shoring jobs.[51] Currently, the Tax Plan does not provide additional details on this proposal.

e. Repeal TCJA's Foreign Derived Intangible Income ("FDII") Deduction

The FDII deduction was introduced as part of the 2017 TCJA.[52] FDII is income that comes from exporting products tied to intangible assets held in the United States.[53] FDII is currently taxed at a reduced rate of 13.125 percent, rather than the regular 21 percent.[54] This reduced rate was meant to encourage U.S. corporations to export more goods and services, and locate more intangible assets in the United States.[55]

The Tax Plan would repeal the FDII regime in its entirety,[56] and use the generated revenues to incentivize research and development directly,[57] which would include providing stronger tax-based incentives to increase research and development in the United States.[58]

f. Corporate Minimum Taxation

The Tax Plan would enact a 15 percent minimum tax on the income corporations use to report to their investors—which the Tax Plan refers to as "book income."[59] Under this proposal, corporations that report high profits would be required to make an additional payment to the IRS for the excess of up to 15 percent on their book income over their regular tax liability.[60] This tax would "apply only to the very largest corporations"[61]—but there is currently no further guidance on which corporations would be subjected to this tax.

III. The American Families Plan

President Biden's Families Plan provides billions of dollars designed to improve childcare opportunities, expand access to early-childhood education and higher education, create a national paid leave program, improve school nutrition, and modernize the unemployment system. The Jobs Plan also makes key revisions to the tax code, restoring the highest income tax bracket to 39 percent and ending capital gains rates for high-income earners, among other things. Specifically, the Jobs Plan calls for $200 billion for free universal preschool for all three- and four-year-olds; $109 billion for two years of free community college; $80 billion towards Pell Grants; $62 billion to strengthen retention rates at community colleges; $46 billion in Historically Black Colleges and Universities ("HBCUs"), Tribal Colleges and Universities ("TCU"), and Minority Serving Institutions ("MSIs"); and $9 billion to train, equip, and diversify teachers.

a. Direct Support to Children and Families

Under President Biden's plan, low- and middle-income families will pay no more than seven percent of their income on high-quality childcare. Specifically, the Jobs Plan invests $225 billion so that low-income families pay nothing for childcare while those families earning 1.5 times their state median income will pay no more than seven percent of their income to childcare. The Jobs Plan also invests in childcare providers to help them cover the costs associated with early childhood care and provide inclusive curriculums. The Jobs Plan also ensures a $15 minimum wage for early childhood staff.

b. Paid Leave

President Biden's plan calls for the creation of a national paid family and medical leave program, that will build over ten years. By year 10, the program will guarantee twelve weeks of paid parental, family, and personal illness leave. The Jobs Plan also ensures that workers get three days of bereavement leave per year starting in year one. The leave will provide workers with up to $4,000 a month, with a minimum of two-thirds of average weekly wages replaced, rising to 80 percent for the lowest-wage workers. The Jobs Plan is projected to cost $225 billion over a decade.

c. Nutrition

President Biden's plan is also calling upon Congress to invest $45 billion to expand summer EBT Demonstrations. Seventeen billion of this will go towards expanding free meals for children in the highest-poverty districts. Another $1 billion will go towards launching a healthy-foods incentive demonstration to help schools expand healthy food offerings, allowing schools that adopt specified measures that exceed current school meal standards to receive an enhanced reimbursement rate.

d. Unemployment Insurance Reform

President Biden's plan also calls upon the Rescue Plan's $2 billion allocation that was put towards Unemployment Insurance system modernization. The Jobs Plan also calls for investments to ensure equitable access to the unemployment insurance system, along with fraud prevention efforts. President Biden also calls upon Congress to automatically adjust the length and amount of unemployment insurance benefits unemployed workers receive depending on economic conditions.

e. Tax Reforms

i. Expanding Tax Credits

President Biden's plan also makes changes to the current tax code, expanding certain credits and revising tax rates in key areas. Specifically, President Biden's plan would:

- Invest $200 billion in health care premium reductions;
- Extend the Child Tax Credit, allowing for $3,000 per child (6 years old and above), and $3,600 per child for children under 6; make 17-year-olds eligible for the first time; and make the credit fully refundable to be paid on a regular basis;
- Make permanent the temporary Child and Dependent Care Tax Credit ("CDCTC") expansion enacted in the American Rescue Plan. Families will receive a tax credit for as much as half of their spending on qualified childcare for children under age 13, up to a total of $4,000 for one child, or $8,000 for two or more. A 50 percent reimbursement will also be available to families making less than $125,000 a year, with families making between $125,000 and $400,000 receiving a partial credit;
- Make the Earned Income Credit Expansion for childless workers permanent; and
- Give IRS the authority to regulate paid tax preparers.

ii. Tax Code Revisions

In an effort to ensure more oversight over the tax liability of higher earners, President Biden's plan also requires financial institutions to report information on account flows so that earnings from investments and business activity are subject to reporting more like wages. The Jobs Plan also increases investment in the IRS to help ready enforcement "against those with the highest incomes, rather than Americans with actual income less than $400,000." The Jobs Plan is projected to raise $700 billion over 10 years.

In a key change, President Biden's plan also returns the top income tax rate to 39.6 percent from the current 37 percent rate. With respect to capital income, households making over $1 million will pay the 39.6 percent rate on all their income, equalizing the rate paid on investment returns and wages. Additionally, the Jobs Plan ends the ability of accumulated gains to be passed down across generations untaxed, ending the practice of "stepping-up" the basis for gains in excess of $1 million. Additionally, hedge fund partners will be required to pay ordinary income rates on their income. Finally, the Jobs Plan ends the special real estate tax break that allows real estate investors to defer taxation when they exchange property.

IV. Political Landscape

Infrastructure has long been a bipartisan issue in Washington, but the parties differ over the scope of what should be included in an infrastructure package and how to pay for it. President Biden's Jobs Plan represents a sprawling, ambitious proposal to overhaul the country's infrastructure, from how electricity is generated to the quality of the country's drinking water, to the breadth and speed of Internet connectivity. The Families Plan is also a massive package that extends or makes permanent federal investments in education, childcare and paid family leave. While the Jobs Plan includes major physical infrastructure improvements that both major political parties have long supported, it is far from certain the Jobs Plan will be signed into law.

As detailed below, a bipartisan deal has been struck in principle that may allow for an infrastructure bill to move in Congress, at least on physical infrastructure. But if that deal breaks down for any reason, which remains a real possibility given the bipartisan concerns about the compromise, then President Biden will need to overcome a host of challenges in order to achieve a legislative win on infrastructure this year.

First, the President will have to navigate the challenges of moving legislation via the budget process of reconciliation, which would allow him to pass a bill through Congress by a majority vote and avoid Republican support. But adopting that path requires navigating complex, and time-consuming procedural rules that make reconciliation a difficult option to choose.

Second, the President will have to negotiate a deal that allows him to keep his caucus together and pursue a one-party bill that may be difficult to achieve given the intra-party ideological concerns from his own party and from industry. Or the President will have to pursue a bipartisan option that may cause him to lose support from his own party.

Third, given the reality of a 50-50 Senate and bipartisan concerns over the Senate deal, moving the infrastructure plan through reconciliation may be a realistic option for Democrats to achieve a major legislative victory on infrastructure.

a. Reconciliation Challenges

President Biden has stated a desire for the Jobs Plan to garner bipartisan support. While the President campaigned on restoring bipartisanship to Washington, D.C., garnering Republican support would also obviate the need for Democrats to use budget reconciliation to pass the infrastructure package. Most legislation requires 60 votes to advance in the Senate, which is a substantial hurdle. Reconciliation is a procedural maneuver that allows Congress to fast-track, via a simple majority vote, revenue and spending measures to align with the annual budget resolution. In practice, this means Congress can pass legislation on taxes, spending, and the debt limit with only a majority (51 votes, or 50 votes if Vice President Harris breaks a tie) in the Senate, avoiding a filibuster, which would require 60 votes to overcome.[62]

Democrats now control the political branches—the Executive Branch and both chambers of Congress by a slim majority—which unlocks the reconciliation tool as a potential vehicle to pass legislation along partisan lines. Hence, Democrats could use reconciliation to push through the infrastructure package, which is a major part of President Biden's Build back Better agenda, thus it is not surprising Congressional Democrats are eyeing the budget process once again to pass major legislation.

Even so, in order to pass the infrastructure package via reconciliation, Democrats would need to revise portions of the bill to ensure it complies with the complex reconciliation procedures. The Byrd Rule limits legislation that can be passed under reconciliation. The "Byrd Rule," named after then-Senator Robert C. Byrd (D-WV), was intended to prevent majority parties from abusing the reconciliation process by ramming through non-budgetary legislation that could not otherwise pass under regular order and prevent major policy changes from being undertaken through the use of this filibuster-circumventing maneuver. Specially, the Byrd Rule prohibits a reconciliation bill from containing proposals that are "extraneous" to the budget.[63]

The Byrd Rule's ban on extraneous policy language outlines six possible violations, including having no budgetary impact, having a "merely incidental" budget impact, or being outside the reporting committees' jurisdiction.[64] Policy proposals in the infrastructure plan that may be considered extraneous—and thus be unable to pass through reconciliation procedures—include the PRO Act and strengthening collective bargaining rights for employees, since these proposals are not budgetary in nature.

Even if Senate Democrats resign themselves to using the reconciliation procedures, there reconciliation is by no means a quick process. While the Senate floor consideration of an infrastructure bill under reconciliation can be expedited with debate limited to 20 hours on the bill and 10 hours on the conference report, actually getting legislation to the floor is a multi-stage process that can take months. First, Congress must pass a budget resolution that instructs specific committees to produce legislation that either increases or reduces the deficit. Second, committees then markup their reconciliation text in business meetings and report it to the Budget Committee. Third, the Budget Committee compiles the committee approved bills and reports the combined legislation to the chamber floor. Fourth, the House and Senate debate and pass their respective reconciliation bills. Fifth, the chambers convene a conference committee to reach agreement on legislative text. Sixth, the House and Senate must pass identical versions of the resulting conference report. And lastly, the measure is sent to the President for signature. This is a time-consuming, complex process that can drag on for months and cause delay.[65]

Furthermore, a recent decision by the Senate Parliamentarian has added an additional barrier that may make it difficult for Democrats to pass an infrastructure bill through reconciliation and without the support of Senate Republicans. Generally, Congress can only use reconciliation twice in a two-year Congress, one for each fiscal year.[66] Senate Democrats already used one reconciliation vehicle associated with one fiscal year to pass the $1.9 trillion COVID relief package earlier this year. So Congress could use only the second reconciliation for the upcoming fiscal year for infrastructure. But passing a budget resolution this year in an equally divided Senate is not an easy task.

Senate Democrats came up with an unprecedented solution. Because the plain text of Section 304 of the Budget Act, which governs reconciliation, says that Congress "may" include reconciliation directives, such as "revises" the budget "concurrent resolution for the fiscal year already agreed to,"[67] Senate Democrats asked the Senate Parliamentarian if they could use the same reconciliation vehicle that passed earlier this year on multiple occasions to trigger the fast-track reconciliation process rather than deal with a new reconciliation package for infrastructure. No prior Congress has ever tried to use a reconciliation measure twice in one year.

On April 5, 2021, the Senate Parliamentarian reportedly advised Senate Democrats that the Budget Act could be used to create multiple reconciliation bills within one fiscal year,[68] which would allow Senate Democrats multiple bites at the apple to pass legislation, like infrastructure, through the Senate on a majority vote.

On May 28, 2021, the Senate Parliamentarian made a second decision that could effectively thwart Senate Democrats from using reconciliation to achieve its infrastructure goals. The Senate Parliamentarian reportedly advised that a revised budget reconciliation measure must pass through "regular order," meaning it must go through committee and have floor amendment votes during a "vote-a-rama."[69] A "vote-a-rama" is a lengthy process that forces Senators to take challenging partisan votes on a wide variety of issues.

The effect of both rulings by the Senate Parliamentarian mean that, even though Senate Democrats may revamp the old reconciliation vehicle used for the coronavirus relief package, the process will be just as onerous for two reasons.

First, by the Senate Parliamentarian ruling that a revised budget resolution must go through committee (as opposed to being automatically discharged from committee) that means Senate Democrats would need at least one Republican on the evenly divided, 11-11, Senate Budget Committee to vote with them, which is not an easy task.

Second, by the Senate Parliamentarian signaling that Senate Democrats must go through a "vote-a-rama" that means potentially exposing moderate Democrats who are up for re-election next year to tough votes on politically charged amendments, which is a major consideration given the balance of power in the Senate for a Democratic majority hangs by a single vote (50-50 Senate, with the Vice President breaking the tie). Third, it means that Senate Democrats can only use one more reconciliation vehicle to pass Biden's key legislative priorities this year, so they will not be able to divide up the Jobs and Families Plans as they had originally intended.

Another implication of the Senate Parliamentarian's ruling poses an equally challenging barrier for the infrastructure Plans to move in Congress. Reportedly, the Senate Parliamentarian ruled that reasons beyond "political expediency" must be present to trigger the majority vote threshold of reconciliation, such as an economic downturn.[70] It is unclear how the Senate Parliamentarian would determine the meaning of "political expediency," but this decision poses an obstacle for using reconciliation to pass an infrastructure bill.

b. Ideological Challenges

Another challenge for Senate Democrats is that even if they choose to use reconciliation, no guarantee exists that they will successfully keep their caucus together on a historically expensive and expansive proposal. Moderate Democrats like Senator Joe Manchin (D-WV) have raised their concerns with the proposed hike of the corporate tax rate. Indeed, Senator Manchin went so far as to say that increasing the corporate tax rate to 28 percent is a nonstarter and that "this whole thing here has to change."[71] Senator Manchin has also expressed his preference for a bill that targets physical infrastructure, rather than the "soft infrastructure" spending currently in the President's infrastructure proposals.[72]

Furthermore, it is unclear if Senate Democratic Moderates will want to break with a party-only bill that defies the Senate's traditional process of "regular order," the idea that a bill should move through a hearing, a committee vote, and a floor vote with the possibility of a filibuster proof 60-vote threshold.[73] Rather than use the fast-track, one-party rule vehicle of reconciliation, Senator Manchin, for example, has expressed his preference for a bipartisan bill that moves through regular order, saying "If the place works . . . let it work."[74] Given the 50-50 Senate, the loss of even one Democratic Senator's vote will bar reconciliation as an option. Thus, although Leader Schumer seeks to move the infrastructure package in July, that timeline may depend upon whether moderate Democratic Senators, like Senator Manchin, will agree that a bipartisan approach is no longer viable.

Progressive Democrats, on the other hand, are concerned the Jobs Plan doesn't go far enough, citing President Biden's campaign promise to spend $2 trillion over four years on infrastructure. Progressive Democrats worry that "bipartisanship" may be a cloak for cutting a deal on moving the Jobs Plan, legislation on physical infrastructure only, rather than the Families Plan, a human infrastructure proposal, that progressives view as a once in a generation opportunity to secure legislative victories for families by expanding family leave and child tax credits and for climate change by investing in green energy. Indeed, House Progressives like Rep. Ruben Gallego (D-AZ) have questioned whether Republicans are being "even players" and noted that now is the time to "just move on without them."[75]

To achieve the votes needed to pass the Jobs Plan in both chambers of Congress, Democrats will rely on the votes of Progressives who are requiring human infrastructure as the price for their support, which makes a deal with Republicans who oppose human infrastructure politically tricky. As a result, Progressives will have leverage in shaping what infrastructure plan passes in Congress as Democratic Leadership will count on votes from Progressives in order to pass infrastructure legislation, via a majority vote in the House and Senate (via reconciliation), if a bipartisan deal is not reached. Indeed, in the strongest sign yet that Progressives are willing to use their leverage, House Progressives sent a letter to Speaker Pelosi and Majority Leader Schumer, noting that Democrats should pursue a multi-billion dollar omnibus bill combining the Jobs and Families Plans together because now is the time for "a single ambitious package combing physical and social investments [to go] hand in hand."[76]

Republicans, however, believe President Biden's infrastructure Plan goes too far. Republicans have already criticized the Jobs Plan's cost and the Tax Plan's proposal to raise corporate taxes to cover the cost as non-starters. Republicans have also emphasized that any bipartisan deal can only focus on physical infrastructure, like roads and bridges, similar to bills that usually make up a surface transportation reauthorization bill. Republicans have significant leverage in the negotiations due to the narrow Democratic majority in the House and the 50-50 Senate, which, when combined with rifts in the Democratic caucus, make it harder for Democrats to have the votes to move forward with their own unilateral approach like they did last March with enacting into law the trillion dollar coronavirus relief bill. Also, even if Democrats lose a couple of Senate Democrats they can still achieve a win on infrastructure if they pick up enough Republican votes, which is why the White House has engaged in negotiations with Senate Republicans in the hopes of achieving a compromise.

c. Road to Achieving a Compromise

The path to achieving a bipartisan deal in Congress has been long and, while there is now light at the end of the tunnel, challenges still remain and the deal "in principle" must still be agreed to by various political actors leaving the final status of infrastructure legislation possible, but still not fully guaranteed.

How did this we get here? Taking advantage of their leverage, Senate Republicans, through their main negotiator Senator Shelley Moore Capito (R-WV), released their first counteroffer to President Biden's infrastructure Plans. On April 22, Senator Capito issued a $568 billion infrastructure proposal, which costs only about a quarter of President Biden's $2 trillion package costs.[77] Consistent with Republican criticism of the Jobs Plan's broad interpretation of what is considered infrastructure, this proposal did not address policies such as care for elderly and disabled people or funding for affordable housing. Instead, the Republican framework focuses on roads and bridges, public transit systems, rail, water infrastructure, airports, and broadband infrastructure. The Republican proposal also diverged from the Jobs Plan in its approach to funding, prioritizing joint spending from state and local governments and encouraging private-sector investments and financing. Republicans also called for funding offsets to cover the cost of the programs and did not propose any corporate or international tax increases. The proposal also leaves in place the 2017 tax cuts passed under President Trump.

On May 21, 2021, President Biden issued a counter-offer to the Republican proposal, cutting his original proposal by $550 billion down to $1.7 trillion. To add pressure on Republicans, President Biden insisted that if a bipartisan deal cannot be reached, Democrats were prepared to move forward on a one-party legislative solution. Indeed, White House senior advisor Cedric Richmond noted that President Biden "wants a deal . . . But again, he will not let inaction be the answer. And when he gets to the point where it looks like that is inevitable, you'll see him change course."[78]

On May 27, 2021 Senate Republicans, through Senator Capito, released a second counteroffer, totaling $928 billion. The second Republican counteroffer included $604 billion for physical infrastructure, including roads, bridges, transit systems, rail, water infrastructure, airports and broadband, an increase in funding of almost $40 billion more in funding than the $568 billion for physical infrastructure in Senate Republicans' first counteroffer.[79] An agreement was still not reached.

On June 4, 2021, President Biden rejected the third counteroffer from Senate Republicans, proposed by Senator Capito, to add about $50 billion to the Senate Republicans' $928 billion infrastructure plan. White House Press Secretary Jen Psaki said that Senate Republicans' third counteroffer "did not meet [President Biden's] objectives to grow the economy, tackle the climate crisis, and create new jobs," but that the President would continue negotiations with bipartisan Senators on a "more substantial package."[80] One challenge for President Biden, who cut the size of his infrastructure package to $1.7 trillion during the negotiations, was that he requested at least $1 trillion in new spending over current levels, but Senator Capito's third proposal increased new investments by only $150 billion.

On June 8, 2021, President Biden ended his infrastructure negotiations with Senator Capito,[81] and started new negotiations with a separate bipartisan group of Senators who drafting their own infrastructure proposal ("Group of Ten").[82] Members of the Group of Ten include Senators Rob

Portman (R-Ohio) Kyrsten Sinema (D-AZ), the leaders of the group, which also includes Senators Bill Cassidy (R-LA), Lisa Murkowski (R-AK), Susan Collins (R-ME), Mitt Romney (R-UT) on the Republican side and Senators Jon Tester (D-MT), Joe Manchin (D-WV), Jeanne Shaheen (D-NH), and Mark Warner (D-VA) on the Democratic side.[83] The Group of Ten had been drafting an $880 billion infrastructure bill, which would be circulated to a broader group of about 20-centrist Senators for their support.[84] Senator Manchin, a moderate and key Senate swing vote, has said he is "very confident" a bipartisan compromise on infrastructure can still be worked out.[85]

While the first three Republican counteroffers signal that Senate Republicans remain interested in pursuing a bipartisan path forward with the White House and Senate Democrats, but significant challenges remained in achieving a deal, even with the new Group of Ten negotiations. First, the third Republican counteroffer of $978 billion and the bipartisan bill of $880 billion are both significantly less than the President Biden's $1.7 trillion initial proposal, so Senate Republicans remain far apart from the White House on how much to spend on physical. Second, the third Republican counteroffer did not deliver on the key priorities that Progressives seek, most prominently, it failed to include human infrastructure and it is doubtful the bipartisan group's proposal will include human infrastructure too. Third, the Republican counteroffers were silent on how to pay for an infrastructure bill, which will be key for reaching a deal.

In sum, both parties are about $700 billion apart on a deal, they lack a common definition of infrastructure, and an open question remains on how to pay for an infrastructure bill.[86] And finally, even with the Group of Ten discussions ongoing it may be difficult for 10 or more Senate Republicans—the threshold needed to overcome a filibuster—to support and vote for an infrastructure bill that goes too far beyond Senator Capito's negotiations with the White House.

On June 10, 2021, the Group of Ten announced a bipartisan deal on a "compromise framework" to invest $1.2 trillion in physical infrastructure over the next eight years, including $974 billion over five years invested in physical infrastructure.[87] Importantly, the deal reportedly would not increase taxes even though it does include an option to index the gas tax to inflation.[88] Additionally, the deal includes a new energy section, which President Biden called for Congress to include in an infrastructure deal.[89] Furthermore, the deal would provide $579 billion in new funding, meaning funding over what would otherwise be spent without any new legislation. [90]Hence, the deal would be fully paid for without any tax increases, which is makes the deal likely to be able in theory to pass both chambers of Congress.

However, the deal must still be signed off on by the Biden White House and the Senate Republican Conference in order to guarantee its safe passage, none of which are guarantees. And the option to index the gas tax for inflation may be a tough sale for the broader Senate Democratic Caucus. And the $1.2 trillion spending figure may also raise cost concerns, at least insofar as finding broad agreement in the Senate on how to pay for that spending, but the $1.2 trillion figure is similar to the $1.25 trillion in infrastructure spending proposed by the bipartisan House Problem Solvers Caucus, which could help smooth the path. And of course the devil may be in the details, so the actual legislative text would need to be acceptable to the White House and both parties in Congress as well. So the bipartisan agreement among the Group of 10 is a significant step, but far from a guarantee that the deal will pass in a divided

Senate, even though it creates more optimism that an infrastructure legislative victory is possible. The next step is to sale the deal to the White House and the broader Senate Republican and Democratic caucuses.

The final remaining question is whether the White House would pursue a bipartisan compromise strategy that would require at least 10 Republican votes to overcome a filibuster or if it will decide on a reconciliation strategy to pass a Democratic-only bill that may satisfy the Democratic base, but lose Republican support. Given the push from Progressives for the Families Plan in addition to the Jobs Plan to be included in any deal to retain their support, the Biden administration has a thin-line to walk. The consequences of which path it chooses could risk alienating either Republicans or Progressive Democrats.

The other key interest to watch that may shape how Washington's negotiations on infrastructure turn out is the business community, which both moderate Democrats and Republicans court. The business community has generally supported the infrastructure spending promised by the Jobs Plan, but has criticized the Tax Plan intended to cover its costs. Some companies may be able to tolerate an increase of the corporate tax rate from 21 percent to up to 25 percent, which Democrats support. But most companies, including small businesses, may prefer the alternative financing plans proposed by Republicans, such as user fees and the creation of a federal infrastructure bank, as more palatable. Indeed, business trade associations have noted that raising the corporate tax rate may harm the business community because it will simply reduce the amount of private investment into infrastructure.

In response, the Biden administration has reportedly had conversations with business leaders to pitch the President's infrastructure Plans as beneficial to companies, emphasizing the importance of the "soft infrastructure" such as job-training programs, as well as physical infrastructure like better roads.[91] But the question of whether the business community will support the Tax Plan needed to pay for the infrastructure package, and how that will impact what infrastructure legislation will come out of Washington, will be a key issue to watch closely.

d. Path Forward

The easiest path forward now would be for the Group of 10 to persuade the White House and Senate Democratic Caucus, and at least enough Republicans to achieve 60 votes in the Senate for a physical infrastructure bill. If that is achieved, then the Senate will likely move this bill through the committees of jurisdiction and vote on the Senate floor with enough votes to overcome a filibuster. The Group of 10 would also need the House Democrats to pass a mirror image of the Senate bill in order to for legislation to arrive on the President's desk for him to sign, which of course the White House would have to support.

If the deal breaks down, Senate Democrats have a way forward by using reconciliation to push the President's infrastructure Plans through Congress, significant political and procedural challenges remain if Democrats attempt a one-party solution. A partisan infrastructure bill is still possible, but these conditions are making it much harder to actually do it.

Democrats can navigate this political landscape and pass President Biden's infrastructure Plans by choosing one of three alternate paths. First, Democrats can pass the entire package through budget reconciliation. This path requires that Democrats garner 50 votes in the evenly-divided Senate, with Vice President Kamala Harris casting the tie-breaking vote in favor of the plan. Second, Democrats can attempt to break up the infrastructure plan and pass three separate reconciliation bills. However, as stated above, it is now unlikely that Senate Democrats will be permitted to pass three reconciliation bills in a single fiscal year. If Democrats pursue this path, Senate Majority Leader Chuck Schumer will have to persuade the Senate Parliamentarian to allow the Democrats to amend the 2021 fiscal year resolution to include instructions for an additional reconciliation bill,[92] which given the latest ruling of the Senate Parliamentarian, seems unlikely. Third, Democrats can pass a bipartisan bill with Republican support on portions of the infrastructure plan that has bipartisan support, and then use the reconciliation process to pass other elements of the infrastructure plan. If the Group of Ten can achieve broader Republican support for the infrastructure deal, which as stated above may be difficult to achieve, then this may be the best path forward for Democrats to pass the President's infrastructure Plans.

Congress must still introduce legislative text to track the Jobs, Families, and Tax Plans' broad contours. The extent to which that legislative text will mirror the Biden administration's policy goals will undoubtedly be shaped by the political reality on Capitol Hill, especially if the bipartisan Group of Ten's compromise breaks down. If Senate Democrats pursue reconciliation, they will need to receive at least 50 votes in the evenly-divided Senate—as opposed to 60 votes to defeat a filibuster—with Vice President Kamala Harris casting the tie-breaking vote in the Democrats' favor. The infrastructure bill would then have to pass in House of Representatives, where the Democrats hold a slight majority (218 Democrats and 212 Republicans). The infrastructure bill would only become law after it passes both chambers of Congress and is signed by President Biden. Currently, Senate Majority Leader Schumer (D-NY) has proposed an infrastructure vote in July[93] and House Speaker Pelosi (D-CA) has set the Fourth of July as a deadline for a House floor vote on infrastructure.[94]

As detailed above, if Democrats and Republicans in Congress pass the compromise on infrastructure, then a bill will likely arrive on the President's desk before the August recess. Otherwise, if a deal breaks down, Senate Democrats will need to go back to the drawing board and likely move a one-party bill through a Democratic Congress. Facing opposition from Republicans, the Biden White House has already attempted to redefine the meaning of "bipartisanship" as a concept that does not require support of Congressional Republicans.[95] Even if an infrastructure bill ultimately passes without a single Republican vote in Congress, the Biden White House is expected to herald it as "bipartisan" legislation with broad support from the American public.[96] But passing a one-party bill is not easy, and the political and procedural conditions have made it harder to do, but if the bipartisan compromise breaks down, it may be the best option for Democrats to move the infrastructure Plans this year through a 50-50 Senate.

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[7] FACT SHEET: The American Jobs Plan, THE WHITE HOUSE (Mar. 31, 2021) [hereinafter JOBS PLAN FACT SHEET].

[8] S. 98, 117th Cong. (2021).

[9] H.R. 2143, 117th Cong. (2020).

[10] S. 98, 117th Cong. § 42A (2021).

[11] *Id.*

[12] *Id.*

[13] *Id.* Qualified census tracts also include projects located in a city with: (1) a population of more than 50,000; (2) a poverty rate not less than 150 percent of the applicable poverty rate; (3) a median gross income that does not exceed the applicable area median gross income; and (4) a median value for owner-occupied homes that does not exceed 80 percent of the applicable area median value for owner-occupied homes. Qualified projects may also be located in a nonmetropolitan county which has a median gross income that does not exceed the applicable area median gross income, and has been designated by a neighborhood comes credit agency as such.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] The Department of Energy's Weatherization Assistance Program is designed "to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential energy expenditures, and improve their health and safety, especially low-income persons who are particularly vulnerable, such as the elderly, the disabled, and children." Department of Energy, About the Weatherization Assistance Program, https://www.energy.gov/eere/wap/about-weatherization-assistance-program (last accessed Apr. 21, 2021).

[18] JOBS FACT SHEET, *supra* note 7.

[19] Energy Independence and Security Act of 2007, 121 Stat. 1511 (2007) (codified and amended at 42 U.S.C. § 16062).

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[31] *Id.*

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[33] Thomas Franck, *Biden says higher corporate tax won't hurt economy; Manchin opposes 28% rate*, CNBC (Apr. 5, 2021), https://www.cnbc.com/2021/04/05/biden-higher-corporate-tax-would-not-hurt-economy-manchin-opposes-28-percent-rate.html.

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[38] *Id.*

[39] TAX PLAN, *supra* note 26.

[40] *Id.* at 11.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 12.

[44] *Id.*

[45] *Id.*

[46] *Id.*

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[49] *Id.*

[50] *Id.*; JOBS PLAN FACT SHEET, *supra* note 7.

[51] JOBS PLAN FACT SHEET, *supra* note 7.

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