



Policy Resolution Group Reconciliation & Infrastructure Update

September 10, 2021

Please find below the inaugural edition of the Policy Resolution Group's FY2022 Budget Reconciliation Alert. A weekly newsletter designed to help clients navigate the arcane process and politics of the most significant bill in 2021, it will combine links to authoritative documents and brief opinion pieces aimed at highlighting what we think you need to know. None of the information or analysis in these reports is intended, or should be interpreted, as statements from Bracewell LLP or advice on any specific tax or legal issues. However, we have a deep bench of legislative, regulatory, and legal experts available to answer any questions you may have. Please enjoy and feel free to let us know your reaction to this new product.

Included in this newsletter are sections on:

- Setting the Stage
- Liam Donovan's Bottom Line
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Setting the Stage

Timing

Congress faces a series of tight deadlines over the next month as Democratic leadership works to navigate negotiations within the party and between the chambers to pass both bipartisan infrastructure legislation and partisan budget reconciliation legislation. The relevant House and Senate committees aim to put together the full draft of the \$3.5 trillion budget resolution by September 15. The House plans to vote on the bipartisan infrastructure bill, the American Infrastructure Investment and Jobs Act, on September 27; progressives want the House to vote on the final budget reconciliation package on September 27 as well. These timelines have been further complicated by Senator Joe Manchin's (D-WV) and Senator Kyrsten Sinema's (D-AZ) reiteration that they will not support a \$3.5 trillion spending plan, for fear of the economic consequences of an increasing national debt and inflation. Over the next weeks, Democratic leadership in both chambers will need to pursue an agreement that will win the support of both progressives and moderates, with all sides needing to make compromises.

Tracking Progress

As negotiations move ahead, Members of Congress work to pressure leadership to adopt their preferred policy options both through backroom negotiations and public signaling. One of the preferred methods to publicly outline one's policy priorities and generate awareness are letters to leadership. The following letters offer glimpses into the objectives of some key figures and coalitions. This list is non-exhaustive and does not include every letter issued to leadership. Links to each letter are included in the document library.

- On September 1, a coalition of 10 Democratic governors led by Governor Gavin Newsom (D-CA) wrote a letter to Democratic leadership supporting broad swaths of the Build Back Better Agenda.
- On September 2, Senator Joe Manchin (D-WV) rocked negotiations after publishing an opinion piece in the Wall Street Journal expressing his opposition to a \$3.5 trillion budget framework for fear of the economic consequences of inflation.
- On September 2, Sen. Amy Klobuchar (D-MN) led a group of nine Democrats to send a letter to leadership urging them to include support for biofuels in the reconciliation package.
- On September 3, two moderate House Democratic leaders, Rep. Stephanie Murphy (D-FL) and Rep. Henry Cuellar (D-TX), sent a letter, supposedly on behalf of a broader caucus, rejecting deficit spending in the budget reconciliation package except on climate policy. They also requested that the bill be "pre-conferenced" with the Senate and that members be given at least 72 hours to review the legislation before it comes to the House floor.
- On September 3, a coalition of 42 Democrats led by Rep. Jamaal Bowman (D-NY) called for the Polluter Pays Climate Fund Act to be included in the final budget reconciliation bill.
- On September 7, more than 40 House Democrats led by Rep. Lloyd Doggett (D-TX) urged House Ways & Means Committee Chair Richard Neal (D-MA) to pass an array of international tax provisions, including boosting the minimum tax rate on corporate foreign earnings to 21%.

Liam Donovan's Bottom Line

Committee action on the reconciliation package heated up this week, as eight House committees held markups on their respective components, joining a ninth (Oversight and Government Reform) that approved its contribution last week. Perhaps most importantly, the Ways and Means Committee began piecemeal consideration of the elements under its jurisdiction, which encompass half of the Build Back Better plan's \$3.5 trillion proposed cost, in addition to all of its financing. While these committee products should not be seen as in any way final, they likely represent the outer limits of what the ultimate package could look like once negotiated with the upper chamber. And with no such markups planned in the evenly divided Senate, the process also marks the last best chance for rank and file members to have their input considered before deals are hatched in the back rooms of the Capitol.

As both chambers race to meet the soft September 15 deadline for legislative recommendations, the endgame remains opaque. Fundamental questions of substance and procedure remain unanswered, the deciding vote in the Senate has publicly called for a "strategic pause," and Congress is hurtling toward an

end-of-the-month policy cliff related to everything from government funding to surface transportation to the federal debt limit.

Over the course of the next week we will get our first look at the potential components of the reconciliation package, all of which are likely to be written to max out their respective allocations under the instructions. Without a good sense of the demands from influential members like Senators Manchin (D-WV) and Sinema (D-AZ), it is difficult to discern which parts are built to last. We also await key rulings from the Senate parliamentarian whose decisions could reign in the policy scope of the package in any number of ways. Until we begin to solve for these variables, the ultimate size, shape, and speed of this package remains very much in flux.

Follow Liam on Twitter: [@LPDonovan](https://twitter.com/LPDonovan)

An Interview with PRG Senior Principal Yasmin Nelson, Former Senior Policy Advisor to Then-Senator Kamala Harris

Q: Yasmin, what is your perspective on this year's budget reconciliation exercise?

A: The FY2022 budget reconciliation process is absolutely central to the Biden-Harris and congressional Democratic agenda. It's true that there are very significant political and procedural challenges ahead. But, now that they have started this process, it is imperative that Democrats walk away with a legislative win to demonstrate that they can effectively handle power and manage multiple factions within their party.

Q: Can you comment on the political challenges the President is encountering?

A: Well, on the one hand, House and Senate moderates are making sure that leadership knows that their votes are essential. Some of their demands strike at the heart of the policy prescriptions in the bill, others hamstringing the party's ability to raise revenue to offset the bill. On the other hand, progressives, who see themselves as the guardians of the party's principles, are anxious that their votes not be taken for granted. Their goal is to resist the moderates and push the needle on policy, especially as it pertains to tax fairness and environmental issues. As the leaders work to delicately balance these two forces, it is unclear yet just how far the pendulum will swing.

Q: How do you think the President sees the role of the administration in this process?

A: As you know, the President has already enunciated a bold path forward on tax issues, especially climate and energy tax policy in his budget's Treasury Green book. Now, with so much at stake, and the legislation not being fully written, the President must ensure that everyone in the party works well together towards the common goal. He is having difficult conversations with moderates and congressional leadership, leveraging his decades of personal experience on the Hill, and his well-known ability as a dealmaker.

Q: Given all this - what does this mean for the eventual content of the reconciliation package?

A: While the Biden-Harris administration has postured itself on a big, bold legislative agenda, they may have to compromise to get the votes. Once we have seen the outcome of the House debate on their reconciliation package we will have a better idea of what the parameters of a final bill

are. At this point, we just don't know how far folks will go to dig their heels in - or if in the end any of these players would really contemplate withholding their vote for the budget reconciliation bill with so much at stake.

Q: There has been a lot of discussion among congressional leaders about an expedited process for reconciliation, what do you think?

A: With so much of the process still ahead, and the inevitably intense subsequent negotiations between House and Senate, I am anticipating we may be wearing our winter coats as the process concludes.

Follow Yasmin on Twitter: [@YasminRNelson](https://twitter.com/YasminRNelson)

Key Policies Being Considered in the Reconciliation Process

Major Issues

Outside of general tax policy are a host of significant energy/environment and health care provisions in the hopper that will require significant involvement from the House Energy and Commerce, Senate Energy and Natural Resources, Senate Environment and Public Works, and Senate Health, Education, Labor and Pensions Committees. After Senator Manchin's Wall Street Journal Op-Ed last week, it is clear Democratic leaders in both the House and Senate will need to negotiate from \$3.5 trillion downward, with the idea of shoring up moderate support. The question remains of what will be on the chopping block to bring down the top-line.

Much of this debate on Capitol Hill is currently surrounding health care programs. House and Senate Democrats do not currently have agreement on whether the focus should be to permanently authorize funding for the Affordable Care Act, or instead expand Medicare and Medicaid programs to include dental, vision, and hearing. Senate Democrats – with the backing of Majority Leader Schumer – are pushing for these Medicare improvements, which could cost upwards of \$400 billion. House Democrats, meanwhile, are more wary of the price tag and instead see expansions to Medicaid and permanent reauthorization of Obamacare funding as a way to cross the finish line without a \$400 billion hit.

Energy and Environment

Overview:

On the energy/environment side of the ledger, Senate Majority Leader Schumer (D-NY) has suggested in a [dear colleague letter](#) that climate provisions in the infrastructure bill and reconciliation package would put the US on track to reduce emissions 45% by 2030 compared to 2005 – nearly all of President Biden's 50% by 2030 target.

- The climate investments in the Build Back Better Act were endorsed in an open [letter](#) from 20 environmental groups including the Sierra Club and Natural Resources Defense Council that asks for programs totaling \$746 billion that would cut US emissions in half by 2030 relative to 2005 items.
- Key to these reductions would be the clean electricity payment program led by Senator Tina Smith (D-MN), that would push utilities to speed up clean power deployment. This would essentially

operate as a carrot to those who operate over “Business As Usual” combined with a stick for those utilities that do not meet the clean energy requirements and would face alternative compliance payments, as well as a methane fee that would serve to both reduce emissions and raise revenue.

- These measures are further bolstered by the upcoming House Energy and Commerce markup, led by Committee Chair Frank Pallone (D-NJ). The \$456 billion slice will contain the most consequential provisions for climate and greenhouse gas emissions, including leaving out natural gas from a clean electricity payment program, funding zero-emissions vehicles, and imposing a methane fee on oil and natural gas systems.
- The path forward is still murky politically and procedurally, with committees of jurisdiction continuing to work with the Senate parliamentarian to get initial forecasts into how provisions might fare during the upcoming scrutiny by the Senate Parliamentarian under the Byrd Rule.

Details on the Clean Energy Payment Program

Regarding the CEPP, the House Energy and Commerce Committee released:

The Build Back Better Act invests \$150 billion in a Clean Electricity Performance Program (CEPP) at the Department of Energy (DOE). The CEPP, which complements tax incentives for clean energy, will issue grants to and collect payments from electricity suppliers from 2023 through 2030 based on how much qualified clean electricity each supplier provides to customers.

- *An electricity supplier will be eligible for a grant if it increases the amount of clean electricity it supplies to customers by 4 percent compared to the previous year. The grant will be \$150 for each megawatt-hour of clean electricity above 1.5 percent the previous year's clean electricity.*
- *Electricity suppliers must use the grants exclusively for the benefit of their customers, including direct bill assistance, investments in qualified clean electricity and energy efficiency, and worker retention.*
- *An electricity supplier that does not increase its clean electricity percentage by at least 4 percent compared to the previous year will owe a payment to DOE based on the shortfall. If, for example, the electricity supplier only increases its clean electricity percentage by 2 percent, the supplier will owe \$40 for each megawatt-hour that represents the 2 percent shortfall.*
- *The CEPP gives electricity suppliers the option to defer a grant or a payment for up to two consecutive years.*
- *Eligible clean electricity is electricity generation with a carbon intensity of not more than 0.10 metric tons of carbon dioxide equivalent per megawatt-hour.*

PRG Analysis:

1. With respect to the 4% clean-energy increase rate, supporters argue that the bill has a large carrot (\$150/mwh) versus a small stick for the alternative compliance payment (ACP) (\$40/mwh). The differential should buy a larger rate of incline, they reason. But given unknown factors like the rate of transmission uptake, reliability needs, and the lumpiness of renewable investment, 4% still

seems to be a reach goal. However, the best of years to date do not typically reach 2% even with a range of available credits.

2. CEPP mechanism appears to work this way: If you make the 4% increase, you are paid the CEPP fee for every mwh above the first 1.5% of your clean energy growth. The first 1.5% is considered business as usual (frankly, just inertia), and the drafters feel they shouldn't pay for that.
3. The 0.10 metric tons figure for eligible clean energy was arguably designed to allow natural gas with CCS to qualify. However, there is much additional analysis and assessment to be understood to determine the net effect on gas.
4. The proposal is not supposed to confer special reliability authority on DOE. Nor does it require DOE to set up a trading program, but it is anticipated that DOE will do so anyway as a matter of administrative convenience and implementation. All of this seems at least in part to help clear the Byrd Rule.

Details on the Methane Fee

Regarding the Methane Fee, the House Energy and Commerce Committee released:

The Build Back Better Act establishes a methane fee on pollution from the oil and gas industry above specific intensity thresholds. The methane fee builds on EPA's existing Greenhouse Gas Reporting Program, recognizes the cleanest performers, holds individual companies responsible for their own leaks and excess methane pollution, drives innovation in the sector, and supports the creation of good-paying jobs.

PRG Analysis:

- The provision is no longer based on the architecture of the Whitehouse March bill or subsequent draft. The Treasury Department is NOT charged with determining a basin-by-basin structure. Rather, EPA is authorized to build off of its existing GHG reporting.
- The sources covered will be those identified in Subpart W, including upstream, midstream and downstream components.
- The methane fee WILL NOT be applied to imports of oil and gas. The only trade implication is that it will likely apply to EXPORT facilities, but not to imports of either oil or gas.
- Many have suggested that the provision could be criticized as double taxation (or double regulation) in light of the pending EPA upstream methane regulation. They argue that the fee kicks in TWO YEARS, allowing for implementation of the regulation before imposition of the fee. Given the potential for litigation and delay, we are dubious as to this effect.

House Progressives

The House Progressive Caucus of course sees the list of desirables as much larger than E&E and health care upgrades – but with a race against the clock, pressure from the White House and Democratic leaders to bring Manchin and Sinema on board, and ongoing Byrd Rule issues, the wish list will need to narrow over time.

Energy/Environment Tax with Timothy Urban

On the cusp of one of the more significant tax bills affecting the energy and environment sectors in many years, the outlook is anything but clear. While many years have been characterized by divided government and modest extensions (sometimes retroactive) of existing credits, taxpayers are much more excited over the possibilities represented by the FY2022 reconciliation bill. Presuming that the President and the House and Senate majorities can find their way to consensus, this bill could send hundreds of billions of dollars of tax incentives to the Rose Garden for a signing ceremony before the end of the year. Eight big questions that we will look to answer over the next few months:

1. Will lawmakers raise revenue to offset the clean energy tax incentives by repealing conventional energy tax provisions (e.g. Obama budget revenue raisers) or by instituting new taxes on fossil fuels?
2. Which provisions will be stripped out of the bill, or caused to be significantly rewritten, by threat of the Byrd Rule, that ever-present sword of Damocles in the Senate during reconciliation, and how will that affect the content of the final bill?
3. In the end, how will the House and Senate negotiators overcome the seemingly insurmountable conflict between the Senate's "tech neutral" approach versus the House's more conventional "GREEN Act" approach? Will the administration officials have to serve as the tie-breaker in these discussions?
4. After so much talk about the need for tax credit refundability to help startups with no current year tax liability, will the fiscal constraints allow tax writers to provide a Direct Pay option to developers? If they do, will the payment represent a dollar-for-dollar alternative to the tax credits, or will there be some discount applied?
5. Carbon sequestration tax credits may become a center for heated debate - advocates see this technology as a key ingredient to the President's plans for national decarbonization and are pushing for enhancements to existing law, but a spirited assembly of environmental groups are mounting a determined counter-attack in an effort to defund the fossil fuel industry.
6. Hydrogen energy has sat in the shadows for over twenty years; will 2021 be the year that Congress approves a seminal clean hydrogen PTC/ITC package and jumpstarts the sector?
7. Few proposals have greater potential impact on the grid, but a less lucky history on Capitol Hill, than energy storage. Can legislators overcome their remaining differences and approve an important energy storage enhancement to the investment tax credit?
8. For those of you who relish issues with more than their share of drama, there is always the new Sustainable Aviation Fuel tax incentive proposal. With multiple House and Senate bills characterized by different mechanisms and different environmental standards, it's anybody's guess which approach lawmakers will elect...

Wyden Partnership and Stock Buyback Tax Proposals

Analyses from the New York Times and Wall Street Journal were utilized in this report.

Finance Committee Chairman Ron Wyden (D-OR) and Sen. Sherrod Brown (D-OH) offered proposals for tighter tax rules on partnerships and an excise tax on stock buybacks.

The proposal would make it harder for partnerships to divide up income and deductions to their partners in the ways that do the most to minimize taxes. Under the new rules, if two partners who were members of a single corporate group sold a shared asset, the profit would have to be divided equally, not parceled out disproportionately to maximize tax advantages. Similarly, partnership debt, which allows partners to take deductions and claim cash distributions, could not be shuffled from partner to partner to reduce their tax liabilities. Those changes, without any increase in tax rates, would raise \$172 billion over 10 years, according to the Joint Committee on Taxation, Congress's official scorekeeper on tax matters.

The bill would impose a 2% excise tax on publicly traded companies' stock buybacks, a move that is typically seen as helping shareholders. There is no independent score yet, but the plan could raise about \$100 billion over a decade, an aide to Mr. Brown said. Some Democrats have favored making buybacks illegal, or setting the tax so high that buybacks would make no economic sense. But Democratic tax aides said that they were trying to balance the desire to curtail stock buybacks with the need to raise revenue for the social policy bill. At the very least, a 2 percent tax on buybacks could encourage companies to use excess cash to pay higher dividends, which shareholders already pay taxes on.

Summary of House Ways and Means Committee Markup

The House Ways and Means Committee led by Chairman Richard E. Neal (D-MA) met on September 9 and 10 to markup measures spanning from universal paid family and medical leave, to expanding child care access, to strengthening retirement savings, to modernizing trade programs that prioritize American workers. The slate of announced measures demonstrates that Democratic leadership at the committee level intends to march forward with relevant markups; however, the markup omits many of the most important and politically fraught battles over energy and environment issues.

Included in this week's markup are investments that will:

Expand workplace support by:

- Providing up to 12 weeks of universal paid family and medical leave for all U.S. workers;
- Reauthorizing the Health Profession Opportunity Grant (HPOG) program to strengthen this effective health care job training program and making it available nationwide; and
- Investing in child care access and equity by:
 - Ensuring that parents and caregivers have the most useful and up-to-date information on available child care options and helping them easily apply for slots;
 - Funding the construction and remodeling of child care facilities to make them safer and more aligned with public health guidelines; and

- Raising the wages of child care workers, who currently earn a median wage of \$12.24 per hour and often live in poverty.

Strengthen retirement security by:

- Requiring employers without employer-sponsored retirement plans to automatically enroll their employees in IRAs or 401(k)-type plans; and
- Making the Saver's Credit refundable so that those without any income tax liability are eligible to receive the benefit in the form of a contribution to their retirement account.

Improve elder health by:

- Expanding Medicare coverage to include dental, vision, and hearing benefits, quickly getting new vision and hearing services to beneficiaries in 2022 and 2023, respectively, to eliminate cost and coverage barriers to this care.

Protect the elderly and people with disabilities in nursing homes by:

- Funding elder justice programs that increase support for state and local Adult Protective Services offices and long-term care ombudsman programs to better prevent elder abuse, neglect, and exploitation;
- Addressing the staffing shortages in long-term care facilities by providing funds for recruitment and retention, including wage subsidies, access to child care, tuition reimbursement, and student loan repayment; and
- Improving the accuracy and reliability of the data collected in these facilities to increase transparency for patients and their families, and strengthen the federal understanding of care quality and reimbursement, and study and update staffing – a key predictor of quality and safety.

Modernize and reform the Trade Adjustment Assistance (TAA) programs by:

- Increasing benefits and expanding eligibility to meet the needs of today's workers under TAA for Workers program;
- Re-establishing the TAA for Communities program to target support and initiate proactive outreach in trade-affected communities;
- Delivering additional funding to the TAA for Community Colleges and Career Training program to better support students served by community colleges;
- Expanding eligibility, improving outreach, and increasing funding for TAA for Firms to assist firms facing competition from abroad; and
- Improving outreach and increasing benefits for TAA for Farmers, which hasn't received new funding in a decade.

Other Markups Week of September 7, 2021

Other Committee markups on the House budget resolution include:

- House Natural Resources Committee
- House Science, Space, and Technology Committee
- House Small Business Committee
- House Financial Services Committee
- House Education and Labor Committee
- House Agriculture Committee

Relevant committee documents are linked in the Document Library below.

Document Library

Useful Background Material

For the Congressional Research Service report on “The Senate’s ‘Byrd Rule’” click [HERE](#).

Provisional Text

For the summary of the Senate budget resolution click [HERE](#).

- For the text of the Senate budget resolution click [HERE](#).
- For the committee print to accompany the FY22 budget resolution click [HERE](#).
- For Senate Majority Leader Chuck Schumer’s (D-NY) dear colleague letter regarding the climate impacts of the budget resolution click [HERE](#).

For the summary of the House budget resolution click [HERE](#).

- For the text of House Resolution advancing the bipartisan infrastructure agreement, the Senate budget resolution, and H.R. 4 the John R. Lewis Voting Rights Advancement Act of 2021 click [HERE](#).

For Sen. Ron Wyden’s (D-OR) proposals for tighter tax rules on partnerships and an excise tax on stock buybacks click [HERE](#).

- For the text of Sen. Wyden’s proposals click [HERE](#).

Markups

For the summary of the House Ways and Means Committee markup of the Build Back Better Act click [HERE](#).

- For a memorandum on the markup click [HERE](#).
- For legislative recommendations on Universal Paid Family and Medical Leave click [HERE](#).
- For legislative recommendations on Retirement click [HERE](#).

- For legislative recommendations on Child Care Access and Equity click [HERE](#).
- For legislative recommendations on Trade Adjustment Assistance click [HERE](#).
- For legislative recommendations on Health Careers click [HERE](#). On Elder Justice click [HERE](#). On Skilled Nursing Facilities click [HERE](#). On Medicare Dental, Hearing, and Vision Coverage click [HERE](#).

For a summary of the House Committee on Energy & Commerce markup of the Build Back Better Act click [HERE](#).

- For a memorandum on the markup click [HERE](#).
- For legislative recommendations on Air Pollution click [HERE](#).
- For legislative recommendations on Hazardous Materials click [HERE](#).
- For legislative recommendations on Drinking Water click [HERE](#).
- For legislative recommendations on Energy click [HERE](#).
- For legislative recommendations on Drug Pricing click [HERE](#).
- For legislative recommendations on the Affordable Care Act click [HERE](#).
- For legislative recommendations on Medicaid click [HERE](#).
- For legislative recommendations on CHIP click [HERE](#).
- For legislative recommendations on Medicare click [HERE](#).
- For legislative recommendations on Public Health click [HERE](#).
- For legislative recommendations on Next Generation 9-1-1 click [HERE](#).
- For legislative recommendations on Wireless Connectivity click [HERE](#).
- For legislative recommendations on Distance Learning click [HERE](#).
- For legislative recommendations on the Manufacturing Supply Chain click [HERE](#).
- For legislative recommendations on FTC Privacy Enforcement click [HERE](#).
- For legislative recommendations on the Department of Commerce Inspector General click [HERE](#).

For the text of the House Science, Space, and Technology Committee print containing legislative proposals click [HERE](#).

- For an amendment in the nature of a substitute offered by Chairwoman Eddie Bernice Johnson (D-TX) click [HERE](#).

For the text of the House Natural Resources Committee print containing legislative proposals click [HERE](#).

- For the notice of the markup to be held on September 9 click [HERE](#).

For the text of the House Committee on Small Business print containing legislative proposals click [HERE](#).

- For the notice of the markup to be held on September 9 click [HERE](#).
- For an amendment in the nature of a substitute offered by Chairwoman Nydia Velázquez (D-NY) click [HERE](#).

For the text of the House Committee on Education & Labor print containing legislative proposals click [HERE](#).

- For an amendment in the nature of a substitute offered by Chairman Bobby Scott (D-VA) click [HERE](#).

For the text of the House Agriculture Committee print containing legislative proposals click [HERE](#).

- For a summary of the proposals click [HERE](#).

Letters

For a letter from Democratic governors supporting the budget reconciliation bill click [HERE](#).

For Senator Joe Manchin's Opinion piece calling for a strategic pause on spending click [HERE](#).

For a letter from Democrats calling for increased support for biofuels click [HERE](#).

For a letter from House Democrats supporting the Polluter Pays Climate Fund Act click [HERE](#).

For a letter from Rep. Stephanie Murphy (D-FL) and Rep. Henry Cuellar (D-TX) rejecting deficit spending except on climate policy click [HERE](#).

For a letter from House Democrats supporting an array of international tax provisions see [HERE](#).

For a letter for Senate Majority Leader Chuck Schumer on the environmental benefits of the infrastructure bill and reconciliation bill see [HERE](#).

For an endorsement of the environmental provisions from a coalition of environmental groups see [HERE](#).