Insight

The Ticking Clocks of Build Back Better

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Executive Summary

- The Build Back Better Act (BBBA) is a reconciliation bill, which means it is very much time sensitive.
- First, reconciliation allows the BBBA to bypass a Senate filibuster, as debate is limited to 20 hours.
- Second, the BBBA's reconciliation process is available to legislators only until September 30, 2022 – the end of the fiscal year covered by the budget.
- Finally, the fundamental time constraint on the BBBA is political (i.e., this year's midterm elections).

Introduction

The Build Back Better Act (BBBA) was passed by the House of Representatives on November 19, 2021, pursuant to the budget reconciliation process. The reconciliation process is a legislative tool that can override a filibuster in the Senate by limiting the time senators can debate legislation to 20 hours, after which the measure gets an up-or-down vote. To initiate the reconciliation process, Congress must first enact a budget resolution with reconciliation instructions. Those instructions tee up the reconciliation bill itself and grant the bill "privilege," which means it can be considered under expedited procedures. The reconciliation process is time sensitive and is not perpetually available as a legislative pathway for the majority. Indeed, those instructions are only in force for the fiscal year, and effectively expire at midnight on September 30, 2022. So procedurally, the reconciliation process has two key time parameters, but neither appears to be the most limiting principle. Rather, proximity to the midterms is likely the loudest of these ticking clocks.

Which Clocks Are Ticking?

The Congressional Budget Act of 1974 established the current congressional budget process, which includes reconciliation as an optional procedural path for budget-related legislation. More recent experience has shown reconciliation to be an adept approach for new administrations to follow through on often partisan campaign promises that would otherwise be filibustered. Functionally, reconciliation provides Senate majorities with a procedure to overcome filibusters from the minority party. How this is achieved is inextricably linked to a precept that is fundamental to the Senate: unlimited debate. Among the key distinctions between the Senate and the House is the right of Senators to engage in unlimited debate on a matter before the body. Because that right is fundamental, limiting that right typically requires a supermajority, specifically 60 votes. In the Senate, the supermajority vote to end debate, known as "cloture," is more consequential than that to pass the legislation itself, which requires only a simple majority.

The budget reconciliation process avoids supermajority thresholds by obviating the need for cloture. Legislation that is considered under reconciliation is privileged—a senator's motion to proceed to that bill is not debatable, which means there is no need to end debate on that motion. A simple majority is all that is needed for the Senate to consider privileged legislation. Once the Senate considers reconciliation legislation, debate is limited to 20 hours – again obviating the need for a cloture vote. The critical parameter that reconciliation alters is *time*, which in turn precludes a filibuster. Given that a Senate majority opposes the BBBA, this clock has not started in the Senate, and may well not at all. This invites the next question: How long do congressional Democrats have to save the BBBA?

Fundamentally, reconciliation is a feature of the congressional budget process – indeed, one of the few that modern Congresses embrace – and is therefore tied to the congressional budget resolution. The congressional budget resolution is legislation that sets spending levels for annual appropriations bills and other budget limits. The budget resolution that preceded the BBBA included instructions to multiple committees to report legislation achieving certain changes to taxing and spending levels by September 15, 2021. That deadline was met by the House of Representatives, though importantly, failure to meet this deadline would not have jeopardized the reconciliation process. Rather, when the fiscal year ends at midnight on September 30, 2022, the reconciliation instructions also expire, irrespective of the outcome of the BBBA. Fundamentally, congressional Democrats have more than eight months to avail themselves of the reconciliation process.

The last clock ticking against the BBBA is a political one, and its parameters are not found in the Congressional Budget Act of 1974. The November midterm elections will loom ever

larger as the year unfolds. At what point congressional and party leaders button up to campaign in their home states is unclear but working to pass controversial legislation will eventually give way to that growing priority. The timeline of the Affordable Care Act's (ACA) passage may be instructive. Recall that the ACA is actually two laws, the second of which was passed through a reconciliation bill. The ACA reconciliation bill was passed on March 25, 2010, after prolonged intra-party negotiations. The Easter congressional recess is scheduled to begin the week of April 11 in the House, which is also four days past the New York filing deadline for congressional candidates (as is particularly important for the current Senate Majority Leader's reelection cycle). Thus, early April may well be the real deadline for congressional action on the BBBA.

Conclusion

The reconciliation process is very much time sensitive. There are multiple clocks at play when Congress uses it, from the time constraints on considering reconciliation bills on the Senate floor to the shelf-life of a budget resolution. With respect to the BBBA, however, no process clock is ticking faster than the countdown to the political deadline. Nevertheless, congressional Democrats have all the time they need to pass BBBA. They just don't have the votes.