

TAX TAKE: BBBA: The Final Countdown(?)

Tax Alert

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As the Biden Administration and Congressional Democratic leadership continue to determine a path forward on the [Build Back Better Act](#) (BBBA), tax policy observers are asking about the ultimate "drop dead" date by which the bill must be enacted given the pending mid-term elections. Many believed that the bill needed to be enacted by the end of last year to avoid any voter blowback given the potentially large amount of spending and offsetting tax increases of the legislation. Now that the year-end has passed, however, there is no set timeline for the Administration and Congress – other than "the sooner the better."

Recent history demonstrates that significant reconciliation bills can be enacted in a mid-term election year – the [Tax Increase Prevention and Reconciliation Act](#) was enacted in May of 2006 and the reconciliation portion of the Affordable Care Act (the [Health Care and Education Reconciliation Act](#)) was enacted in March of 2010. It should be noted, however, that the majority party utilizing reconciliation in these years suffered significant losses in the subsequent mid-term elections (in 2006, [Republicans lost control](#) of both the House and Senate and in 2010, [Democrats lost control](#) of the House and suffered significant losses in the Senate). History shows it is possible to enact reconciliation legislation in a mid-term election year, but that such action is not without potentially significant political consequences.

More than history, the current Congressional calendar and other scheduled events may be the most informative in setting a potential timeline for the BBBA as Congress often utilizes scheduling deadlines – real or perceived – to force action on significant legislation. The first deadline on the calendar is the need to [fund the federal government](#) by February 18, although it seems unrealistic given the current pace of negotiations between Senator Joe Manchin (D-WV) and the White House to have any agreement, even a skeletal framework, by that date.

The next and potentially more significant date is the scheduled [State of the Union address](#) by President Biden on March 1. Presumably, the State of the Union was delayed from its usual late January/early February date in the hopes of having some type of agreement on BBBA, which then hopefully could be enacted by the end of the first quarter.

Going beyond the first quarter, one could look to the many scheduled Congressional recesses ([Senate calendar here](#); [House calendar here](#)) during the year (generally around major federal holidays such as Memorial Day and the Fourth of July) as potential inflection points that would be considered a deadline for enactment of BBBA. The weeks leading up to the traditional August recess, when members of Congress are particularly anxious to return to their states and districts with a legislative victory as they start the final push on the campaign trail, could create a targeted effort to enact BBBA. The outside date for enactment is the end of the fiscal year on September 30, as it is unlikely that policymakers can act on the underlying [Fiscal Year 2022 reconciliation instructions](#) beyond the actual fiscal year for which the instructions were adopted.

Whatever the new targeted deadline for BBBA is, it is clear the prospects for enactment of BBBA dramatically decrease as the year goes on given the mid-term elections and the potential political ramifications – even if Congress has until September 30 in theory, it's impractical to think such a large bill would be enacted so close to the actual elections.

It is also important to note that the ability to satisfy any particular deadline for enactment of BBBA will certainly be impacted by Justice Stephen Breyer's [recent announcement](#) that he plans to retire from the Supreme Court at the conclusion of this year's session. The White House will begin working with the Senate Judiciary Committee immediately to [identify and vet potential nominees](#) and President Biden has [committed to announcing](#) the nominee by the [end of next month](#). Senate aides have confirmed that it is possible to confirm a nominee despite the fact that Justice Breyer's seat is [not yet vacant](#). Even if the confirmation process begins immediately after President Biden announces his nominee and she is confirmed with the same speed as was [Justice Amy Coney Barrett](#), the process would not conclude before the end of March. In the last 50 years, the confirmation process has lasted

on average around 70 days. [#TaxTake](#)

Upcoming Speaking Engagements and Events

On February 4, Loren will present "U.S. Activities of Foreigners & Tax Treaties" at the [ABA 2022 Virtual Midyear Tax Meeting](#).

In the News

In *Tax Notes*, Jorge [commented](#) on the possibility some form of BBBA gets enacted. He noted that the revenue-raising proposals which were designed to offset the spending provisions of the bill have the support of the moderate members of the House and Senate. **"Whatever those spending provisions are, I think it's going to determine what the scope of the revenue raisers going to be,"** Jorge said.

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