



THE SMALL BUSINESS LEGISLATIVE COUNCIL ALERT

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HOW RECONCILIATION WORKS

There has been much discussion and speculation regarding whether the Democrats will try to pass parts of President Biden's proposed COVID relief bill using a process known as reconciliation.

As we watch all this play out, we thought this would be a good opportunity to bring back our quick refresher on reconciliation – how it works and what its limitations are.

Some History

As a product of the 1974 Congressional Budget Act, the process of reconciliation is relatively new compared to other elements of American democracy. Since its introduction, a number of important measures have been enacted through the reconciliation process, the most recent example being the 2017 Tax Cuts and Jobs Act (TCJA). Other recent examples of legislation enacted through reconciliation have been Bush-era tax cuts and the Health Care and Education Reconciliation Act of 2010, which made a number of budgetary changes to the Affordable Care Act (despite common misconception, the ACA itself was not passed using the reconciliation process).

The Process

The first step in the reconciliation process is the passage of a budget. Taking advantage of the reconciliation process is optional and not all budgets are structured to provide for reconciliation. Where the budget is teeing up reconciliation, it will include what are known as reconciliation instructions (or reconciliation directives). These instructions will direct specific committees to develop legislation that meets certain budgetary parameters. While the reconciliation instructions do not specifically spell out how any particular committee is expected to meet these targets, they are structured with an understanding as to the end goal of the bill (ex. reforming certain provisions of the tax code).

From there, the committees to which the reconciliation instructions have been directed draft legislative language that meets the instruction's parameters (or, as was the case last time around with the TCJA, the leadership drafts the language and the committees review and sign off on it).

If the reconciliation instructions are only addressed to one committee, that committee will produce the reconciliation bill. If the reconciliation instructions are targeted to multiple committees, each committee's legislative language will go to the Budget Committee which will make no substantive changes but which will bring the various parts together into a single omnibus reconciliation bill.

Once the bill has been produced, the chambers will discuss and vote on it much like they would any other bill (with the exception that, as discussed further below, the bill will only need the support of a simple

majority to pass the Senate). Just as with any other piece of legislation, both the House and Senate need to pass the same version of the reconciliation bill. Accordingly, if the chambers initially pass different versions, they will either need to reconcile the two and hold new votes or have one of the chambers pass the version already passed by the other.

Again, as with any other bill, the President has the opportunity to sign or veto the reconciliation bill. This typically becomes simply a formality when the same party holds the White House and the Senate. Because reconciliation is really only used when the legislation lacks the support of at least sixty Senators (because of the time limits discussed below), if the President does veto a reconciliation bill the legislation is almost surely dead (because two-thirds of the Senators won't vote to override the veto). This is exactly what happened in 2016, when President Obama vetoed the ACA repeal bill that Congress had passed under reconciliation.

The Benefits

The primary benefit of using the reconciliation process, rather than simply trying to pass a bill through the standard procedure, is that reconciliation bills are passed under special rules with time limited debate in the Senate. Give the availability of the filibuster to any one objecting Senator, when a bill is going forward through the ordinary legislative course, it will need the support of at least sixty Senators who will vote for cloture to end the filibuster and allow the chamber to actually vote on the substance of the bill itself. Without enough votes to get cloture, the bill will generally stall and die. However, under reconciliation where the debate is limited and there is no need for cloture, the bill can pass with the support of only fifty Senators (assuming, as we expect will be the case here, the Vice President supports the bill and will break the tie).

The Limits

There are a few limiting factors when it comes to reconciliation and it is these factors that we expect to see make their mark on the language of any relief bill.

First and foremost, provisions can only be included in a reconciliation bill if they directly impact federal spending, revenues or the debt limit (this is part of what is known as the "Byrd Rule"). If a provision has only an indirect impact or is otherwise extraneous, any Senator can raise a parliamentary point of order to get the provision removed. In other words, there are a number of policies and items that could not be included in a reconciliation bill.

Also part of the Byrd Rule, the reconciliation provisions cannot increase the deficit outside of the budget window (typically ten years). This means that if the reconciliation bill does not include sufficient revenue raisers to offset any cuts over the long term, these cuts cannot continue after the end of the budget window. This is the reason why certain of the tax cuts in the TCJA (such as the increased federal estate tax exemption and the 199A deduction for pass-through companies) will sunset at the end of the budget window.

The final, and least addressed, limitation of reconciliation is that the reconciliation bill is tied to the underlying budget. As we saw in prior years with the ACA repeal and replace efforts, using reconciliation means that Congress only has until the end of the fiscal year to pass the bill.

Of course, we will keep you apprised as we learn more about if, and how, reconciliation might be used this year. Interestingly, since Congress did not pass a budget for the 2021 fiscal year (which began on Oct. 1, 2020 and runs through Sep. 30, 2021), the Democrats have the opportunity to utilize two reconciliation bills this year – one for the FY2021 budget and one for the FY2022 budget.

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