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Tax Briefing | Wolters Kluwer

Infrastructure Investment and Jobs Act

November 15, 2021

Highlights

- ✔ $1.2 Trillion Act Includes More Than $500 Million in "New" Spending
- ✔ Modest Tax Changes Help Raise Revenue
- ✔ Cryptocurrency Reporting Comes in 2023
- ✔ Changes to Filing Relief for Disaster Areas

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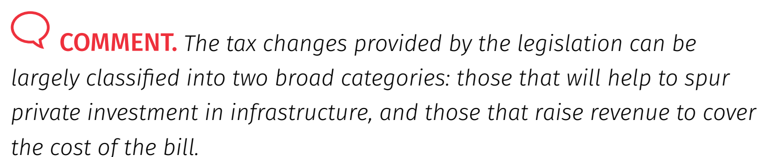
SPECIAL REPORT

President Signs $1.2 Trillion Bill; Minor Changes to Code

Just before midnight on November 5, 2021, Congress passed the Infrastructure Investment and Jobs Act. The House voted 228 to 206 to approve the bill, which followed passage in the Senate on August 10 by a 69 to 30 vote. President Biden signed the bill into law on November 15.

Like any infrastructure act, the legislation provides spending, more than $500 million of it "new," on roads, highways, bridges, public transit, and utilities. The act is significantly smaller than what was originally proposed by President Biden in April. In his American Jobs Plan, Biden proposed a package that would cost more that $2 trillion, providing for so-called "human infrastructure" (including funding for schools, jobs training, and broadband access) in addition to traditional infrastructure outlays. Much of Biden's proposal was paid for with increased IRS funding to improve enforcement, and thus increase revenue, as well as an increase in the corporate tax rate. During bipartisan negotiations, the size of the bill was trimmed, and both of those methods of raising revenue were dropped. Much of the remaining "human infrastructure" provisions of Biden's initial proposal, as well at the IRS enforcement and corporate tax provisions, have found their way into proposals for the Build Back Better Act, which is currently under consideration in Congress, though with an uncertain fate.

The act contains a modest number of tax changes, largely relating to private activity bonds, excise taxes, and an extension of highway trust fund provisions. Notably, the act does call for increased reporting requirements on cryptocurrency transactions, as well as an earlier termination of the employee retention credit for businesses closed due to the ongoing COVID-19 pandemic. For the most part, the tax changes do not come into effect until 2022, at the earliest.


COMMENT. *The tax changes provided by the legislation can be largely classified into two broad categories: those that will help to spur private investment in infrastructure, and those that raise revenue to cover the cost of the bill.*

CRYPTOCURRENCY REPORTING

The Infrastructure Investment and Jobs Act imposes new reporting requirements on brokers of cryptocurrency, specifically persons responsible for regularly providing service effectuating transfers of any "digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology."

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Currently, cryptocurrency reporting generally is only required in the context of reporting requirements applicable to capital property (which may not be required for transactions under $600), or where the currency is used as compensation to employees or independent contractors. The act requires reporting of any other transactions where the current rules do not apply.

The provision is included due to the concern that large amounts of cryptocurrency transactions are not being reported as taxable income, and the taxation of that income helps to offset the total cost of the act. Additionally, the penalties imposed on taxpayers for failure to file information returns are extended to apply to this new requirement, helping to raise more revenue.

> *"For the most part, the tax changes do not come into effect until 2022, at the earliest."*

Almost immediately upon the release of the legislative text, lawmakers and industry experts expressed concerns about the provision, claiming that the text is too broad, and could potentially extend the reporting requirements to cryptocurrency "miners" (people who generate new cryptocurrency by verifying complex chained transactions). Nevertheless, the amount of revenue generated by the provision made it essential to include in the act, and amendments have been included to narrow the focus of the provision.

The reporting requirements do not take effect until 2023.

REVENUE RAISERS

The act uses the Code to increase revenue in two other ways: extension of funding stabilization requirements for retirement plans, and an early termination of the employee retention credit for business forced to close due to the COVID-19 pandemic.

Funding Stabilization

The Moving Ahead for Progress in the 21st Century Act ("MAP-21") signed into law in 2012, included changes to the segment rates that enabled electing employers to postpone minimum required contributions, thus postponing deductions. The legislation was cast in terms of funding relief for employers during an extended period of low interest rates. Low rates mean a higher present value, which in the pension funding context means a higher funding target, which means a higher minimum required contribution.

The provision is often extended, or the ranges narrowed, as a means to help cover the cost of a legislative package from a budgetary standpoint. This method was most recently used in the American Rescue Plan Act of 2021 and is used here for the same purpose.

Employee Retention Credit Termination

As extended and modified by the American Rescue Plan Act of 2021, an employer can claim a refundable credit against the employer's portion of Medicare tax for 70 percent of wages paid during the coronavirus (COVID-19) crisis if (1) business operations were suspended due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 20 percent as compared to the same quarter in the prior year. The credit applies to the first $10,000 of qualified wages per employee for any calendar quarter, and applies only to wages paid after June 30, 2021, and before January 1, 2022.

The act cuts short the applicable period, eliminating the credit for wages paid after September 30, 2021.

INFRASTRUCTURE-RELATED TAX CHANGES

Contributions to Water and Sewer Utilities

The Infrastructure Investment and Jobs Act restores the exclusion from a corporation's income for contributions in aid of construction where the corporation is a water or sewer utility. The exclusion was eliminated by the Tax Cuts and Jobs Act of 2017. Under the restoration, a regulated public utility that provides water or sewage disposal services can treat money or property received from any person as a tax-free contribution to capital if it meets the following requirements:

(1) the amount received is a contribution in aid of construction;

(2) the amount contributed, or property acquired or constructed with that amount, is excluded from the utility's rate base for rate-making purposes; and

(3) if property other than water or sewage disposal facilities is contributed, the contribution meets certain expenditure rules.

The provision is effective for contributions made after 2020.

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Private Activity Bonds

Generally, interest earned on state and local bonds is only exempt from tax if the bond proceeds are used exclusively for traditional governmental purposes. However, the tax-exempt status can be extended to private activity bonds if they are qualified private activity bonds, including exempt facility bonds where at least 95 percent of the net bond proceeds are used to finance certain projects. These projects include airports, docks, mass transit facilities, and water or sewage facilities.

The Infrastructure Investment and Jobs Act adds two types of projects to the list of exempt facilities. First, tax-exempt private activity bonds can be issued to finance the qualified broadband projects. A qualified broadband project is one designed to provide broadband internet access at certain minimum download and upload speeds to areas that are currently underserved.

The second type of exempt facility bond that can be issued under the act is a qualified carbon dioxide capture facility. Such a facility is one that captures, treats, compresses, transports or stores certain amounts of carbon dioxide from a facility that produces carbon dioxide or directly from the air.

COMMENT. *A credit currently exists for operation of a carbon oxide sequestration facility, which would be reduced by a portion of the proceeds derived from the issuance of exempt bonds.*

Extension of Excise Taxes

As is typical of any infrastructure legislation, several infrastructure-related excise taxes are also extended. Excise taxes on fuels, diesel and special fuels, retail sales of heavy trucks and trailers, and tires are extended through September 2028 by the act. Related exemptions and other provisions are extended through the same period.

Superfund excise taxes on potentially polluting chemicals, which expired after 1995, are brought back into effect. The taxes will apply starting in July 2022, and will apply through 2031.

TAX PROCEDURE CHANGES

The act also makes some other changes to tax procedure that are not related to infrastructure. Under the legislation, the determination of the start of the mandatory 60-day extension of the deadline for time-sensitive acts effective for federal disasters declared after December 20, 2019 is slightly modified, as is the calculation of the 60-day period in the case of multiple declarations. Additionally, the authority to postpose deadlines due to federally declared disaster is expanded to also apply in the case of “significant fires” for which federal assistance is provided.

In the case of a taxpayer serving in a combat zone, the list of items that can be extended due to such service is expanded to include appeals from decisions of the Tax Court, or for the filing of petitions by the government to recover erroneous refunds.

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