Following Up On "Election Day is Coming – Will Major Tax Changes Follow?"

B. Wade Bowen
wbowen@mwlaw.com
(870) 938.6254

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On August 10, 2020, we published a post outlining some of President Biden's tax proposals set forth on the campaign trail. This post takes a deeper look at some of those proposals and some of the factors likely to influence the chance of the proposals becoming law.

When we wrote in August, we were writing about proposals set forth by *candidate* Biden. As a candidate, Biden's general tax policy agenda was based on his belief that the benefits from the 2017 Tax Cuts and Jobs Act disproportionately aided high-wealth individuals and large corporations. He repeatedly stated he wanted to modify the income tax system to make sure those taxpayers paid in "their fair shares."

To revisit one such proposal, on the trail, Biden repeatedly advocated for an increased rate on long-term capital gains. As stated on his website:

Joe Biden believes in rewarding work, not just wealth – and investing in hard-working Americans' health, not protecting the most privileged Americans' wealth. Warren Buffett said it best when he stated that he should not pay a lower tax rate than his secretary.

As President, Biden will make health care a right by getting rid of capital gains tax loopholes for the super wealthy. Today, the very wealthy pay a tax rate of just 20% on long-term capital gains. According to the Joint Committee on Taxation, the capital gains and dividends exclusion is the second largest tax expenditure in the entire tax code: $127 billion in fiscal year 2019 alone. As President, Biden will roll back the Trump rate cut for the very wealthy and restore the 39.6% top rate he helped restore when he negotiated an end to the Bush tax cuts for the wealthy in 2012. Biden's capital gains reform will close the loopholes that allow the super wealthy to avoid taxes on capital gains altogether. Biden will assure those making over $1 million will pay the top rate on capital gains, doubling the capital gains tax rate on the super wealthy.

From other statements made by the campaign, we know that Biden meant those making more than $1 million when he said "wealthy."

Of course, that was also when Biden had to consider the possibility of a Republican-controlled Senate. In January 5, Raphael Warnock and Jon Ossoff won Senate runoff races in Georgia, leaving a 50-50 split in the Senate. If the Senate is gridlocked, Vice President Kamala Harris casts the tie-breaking vote.

One might think major tax changes are a still long shot despite Republicans' loss of Senate control, given that invocation of the filibuster procedure by the Republicans would generally require 60 Senate votes for the passing of any new tax legislation. However, as Congress continues to negotiate what they aim to pass as the latest coronavirus relief bill, it has become increasingly clear that the Democrats have not ruled out using the budget reconciliation process to pass major legislation on a simple majority basis. Of course, there is precedent for use of the budget reconciliation process to implement major tax changes – the Republicans did so to pass the Tax Cuts and Jobs Act in 2017, and did so to pass the Bush Tax Cuts in the 2000s as well.

Democrats' willingness to use budget reconciliation would certainly increase the likelihood of tax changes being passed, and increasing the capital gains rate is not the only sweeping change President Biden has proposed. Our August post contains a more robust review.

But, factors other than the availability of budget reconciliation weigh on the likelihood of changes coming. First and foremost, the recovery of the US economy from the damage caused by the pandemic looms large on tax changes. For one, Congress is currently engaged in efforts to pass the latest relief bill, and the latest relief bill is to be a "downpayment" on further relief efforts. Perhaps there is not yet time for Congress to focus on tax policy. Further, Biden's administration and Congress may be hesitant to pursue tax policies viewed and causing job losses or business failures. Pressing for tax hikes in the current economic environment is likely not a popular political choice.

Second, time may be lacking in the near future due to the upcoming impeachment trial of former President Trump. While the impeachment trial may not last long, it might for a brief time impede the Senate's ability to conduct ordinary business.

Then, there is the makeup of the Senate. While holding the tiebreaking vote is certainly an advantage, absent Republican support, the Democrats would need all 50 members of its caucus to support any reconciliation attempts. Any one member's effort at making a reconciliation bill more or less progressive may thwart a reconciliation effort.

For now, it is worth the effort for you and your advisors to evaluate legislative proposals as they are set forth and making a plan of action as certain proposals move from proposals to introduced legislation, and to pay attention to executive actions President Biden might take without the need for Congressional approval. Additionally, we suggest paying close attention to the proposed effective date contained within introduced legislation. Typically, such legislation becomes effective on the date of enactment or prospectively into the future. Congress does have the legal ability to make tax legislation retroactively effective, and it does so commonly with respect to tax *reductions*. The same cannot be said for tax *increases* – the last time Congress made an increase retroactively was 1993. While it is impossible to predict exactly what Congress will do, we are hopeful that any changes will be accompanied by sufficient time to implement appropriate tax planning strategies to address them.