Tax Insights

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Biden win changes tax policy and planning outlook

The apparent election victory for former Vice President Joe Biden signals an important shift in the outlook for tax policy and planning. Biden ran on an aggressive tax platform that would reverse many of the recent tax changes, but the failure of Democrats to make more sweeping gains in Congress blunts the potential for many of Biden's more transformational tax proposals.

Democrats entered the election optimistic about the possibility of a "blue wave" that would see them capture the presidency, expand their House majority, and retake the Senate. That kind of sweeping victory did not materialize, though it remains possible for Democrats to control of all three levers of power:

- Biden is now the projected winner by all major news organizations, but many of the state counts are very close and recounts and legal challenges remain possible.
- Democrats are projected to lose several House seats, but are expected to retain a slim majority.
- Republicans are favored to retain control of the Senate, but the final outcome remains in question and will hinge on two January runoffs in Georgia.

If Republicans retain control of the Senate, their influence will severely limit Biden's ability pursue his most ambitious tax proposals. However, there may be room for bipartisan compromise on more modest initiatives. Lawmakers should be expected to come together on economic recovery and stimulus legislation, which could include significant tax provisions. Republicans could also seek to compromise on Democratic priorities in exchange for extending favorable rules in the Tax Cuts and Jobs Act.

Democratic control of the Senate would open up more opportunities for Biden's tax agenda, but there are several other factors that could still check Democratic ambitions. To pass any legislation without Republican support, Senate Democrats would need complete unanimity among their own members, including many moderates from red states. More importantly, Democrats would lack the 60-vote majority needed to avoid filibusters. Democrats could instead use the special reconciliation process used by Republicans to pass the Tax Cuts and Jobs Act (TCJA) or abolish the filibuster altogether. Each of these maneuvers would be difficult with only 50 votes, and each would come with complications that could delay the timing or require moderating the proposals.

While it is always possible that Democrats win both runoffs in Georgia and immediately pursue tax increases with Senate control, it would be surprising. Key Democrats have already indicated their first priority will be legislation battling COVID-19 and offering economic relief, and have signaled a reluctance to raise taxes while the economy is fragile. Taxpayers should exercise serious caution before using planning strategies that would accelerate income in anticipation of tax increases that appear increasingly unlikely to happen immediately.

This article will analyze Biden's campaign tax proposals in more detail, discuss the legislative challenges and potential timing for changes, and highlight important planning considerations.

Election results

White House

Biden currently leads Trump in states with a combined total 306 electoral votes, well exceeding the 270 electoral votes needed to win the presidency. Several states are very close or still counting votes, and there could be recounts in states Biden is leading, including Georgia, Nevada, Arizona, Pennsylvania, Wisconsin, and Michigan. Major news organizations have already called the election for Biden, but President Donald Trump has not conceded and is mounting legal challenges in some states. It is not clear when all these issues will be fully resolved, but there are several key dates to track:

- State certification dates vary, but fall between Nov. 20 and Dec. 1 in the states with the tightest races
- Dec. 8: "Safe harbor" deadline for states to select electors that must be accepted by Congress
- Dec. 14: Electoral college actually votes
- Jan. 3: New 117th Congress is seated
- Jan. 20: Inauguration Day

House

Many House races remain uncalled, but Democrats are currently projected to suffer a net loss of between two and 10 seats for an estimated majority of 226-209, plus or minus a few seats. House rules give the majority fairly strict control of the chamber, so the Republican minority will have little influence. But Democrats' slimmer House majority could make it more difficult for leaders to manage tension between liberal and moderate factions. Moderates, in particular, may seek to assert their power.

It is unclear if the disappointing election results for House Democrats will put the speakership of House Speaker Nancy Pelosi, D-Calif., in danger. She pledged not to serve beyond 2022 when she retook the gavel in the 2018. Pelosi was key to shaping legislation over the last two years, as significant issues were negotiated between Democrats and Republicans at the leadership level. Current Ways and Means Committee Chair Richard Neal, D-Mass., is expected to retain the tax-writing gavel. He was fairly methodical in his approach over the last two years, and seemed to favor a deliberative committee process.

Senate

In the Senate, Republicans and Democrats have each won 48 Senate seats (including two independents who caucus with Democrats), with races in Alaska and North Carolina very likely to be called for Republicans. This would give Republicans a 50-to-48 advantage with the final two seats to be decided by January runoffs in

Georgia. Republicans are likely to be favored in both races, so appear poised to retain at least a 51-vote majority. But it is still possible for Democrats to pull two upsets for a 50-50 tie. This would give Democrats an effective majority with the Vice President as a tiebreaker.

If Republicans prevail, Majority Leader Mitch McConnell, R-Ky., is expected to keep his position. McConnell would become the chief Republican negotiator on any bipartisan initiatives. Over the past two years, the Trump Administration largely represented Republican interests in negotiations with Pelosi, though McConnell and Senate Republicans played a role. McConnell and Biden are said to have a fairly cordial relationship. Sen. Mike Crapo, R-Idaho, is the favorite to take over the Senate Finance Committee. He played an active role in crafting the TCJA and was instrumental in securing the Section 199A deduction for pass-through businesses.

If Democrats seize the chamber, current Senate Minority Leader Chuck Schumer, D-N.Y., is expected to take over as majority leader. Schumer's New York constituency could make him more sympathetic to the investment and financial industries. He has quietly stymied efforts to change the taxation of carried interest in the past, and has long opposed mobile workforce legislation that would exempt employees spending 30 days or less working in a nonresident state from income tax withholding and filing requirements.

Finance Committee ranking minority member Ron Wyden, D-Ore., is expected to take over as chair of the committee if Democrats retake the Senate. With a 50-50 Senate split, the committee ratios would also be equal, making it difficult to move legislation through committee. Wyden has long been a champion of comprehensive tax reform, and in the past released bipartisan tax reform bills that are more moderate than Biden's tax platform. The most recent version proposed a top corporate rate of 24% and a top individual rate of 35%. Wyden, however, has also pushed an ambitious proposal to require high-income taxpayers to mark-to-market publicly traded securities each year and pay ordinary income tax rates on the gain. The proposal would also apply a look-back rule to sales of "non-tradeable assets" like real estate and business interests to eliminate the benefit of deferring the implicit gain throughout the holding period.

Legislative outlook under a Republican Senate

A Republican Senate would be in a position to block the most progressive parts of Biden's agenda, including tax increases. Gridlock could become routine, but there will likely be opportunities for bipartisan compromise on pressing issues and moderate initiatives. Tax policy could be an area where there is room for agreement.

The first priority will be economic recovery and stimulus, which may be addressed in a lame-duck session before Biden even takes office. Lawmakers will also have to address government funding, which is scheduled to expire on Dec. 11. Several important tax provisions are under consideration for the next stimulus deal, including:

- Enhancing the employee retention credit
- Providing a work opportunity tax credit to a new broad category of hires who received unemployment
- Allowing deductions for expenses paid with forgiven Paycheck Protection Act loan proceeds
- Providing relief for the costs of protecting employees from COVID-19

Republicans have also pushed to make general business credits refundable, while Democrats have called for scaling back net operating loss carryback provisions. Both efforts have run into opposition.

Republicans may also be willing discuss advancing the Democratic tax proposals they find most palatable in exchange for some of their own priorities. Republicans are already confronting some TCJA's "sunrise" tax increase that take effect over the next few years. They may be willing to negotiate to avoid provisions that would:

- Require five-year amortization of research expenses beginning in 2022
- Add amortization and depreciation to adjusted taxable income for the Section 163(j) limit on interest deduction beginning in 2022
- Reduce the bonus depreciation rate to 80% beginning in 2023

Many more tax increases tied to TCJA are scheduled to take effect in 2026, including the expiration of the individual provisions and unfavorable changes to the tax on global intangible low-taxed income (GILTI) and the base-erosion and anti-abuse tax (BEAT). This may give Democrats leverage in future negotiations, but these issues are less likely to come to a head in the next two years.

Key Democratic priorities remain enhancing the earned income and child tax credits and repealing the cap and the state and local tax deduction, but could also include alternative energy enhancement and other tax cuts in Biden's tax platform.

Republicans will be in a position to block the major tax increases proposed in Biden's tax platform. It's possible that Republicans consider accepting moderate tax increases to help fund other priorities like infrastructure or other tax incentives, but they have so far signaled nothing but opposition to tax hikes.

Biden may turn increasingly to the regulatory process if Republicans are able to thwart much of his agenda. Importantly, Senate Republicans would also have control over approving his nomination of a Treasury Secretary. Tax regulations have historically been less politicized than regulations in other areas, but a Biden administration could still bring a meaningful shift. After Trump was elected, he ordered a broad review of tax regulations issued in the year before he took office. This led to changes in a small number of rules, including the debt versus equity regulations under Section 385. Trump also removed an exception that had allowed tax regulations to avoid administrative review.

Much of the TCJA guidance issued over the last two years has been favorable. Biden has not yet indicated any plans to revisit tax guidance, but any change in approach could at the very least have a meaningful incremental impact moving forward.

Legislative outlook under Democratic Senate

If Democrats take the Senate, it would give them control over both chambers of Congress and the presidency for the first time since 2010. Seizing control over all three levers of power has led to major legislative breakthroughs for both parties in the past. Democrats used their power in 2009 and 2010 to pass the Affordable Care Act (ACA), while Republicans leveraged their control in 2017 and 2018 to pass the TCJA.

Control of Congress and the White House by party

■ Republican control ■ Democratic control

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
House	D+78	R+49	R+50	R+33	R+33	R+59	R+59	R+47	R+45	D+36	D+35	~D+17
Senate*	D+20	D+6	D+6	D+10	D+10	R+8	R+8	R+4	R+2	R+5	R+6	?
White House	Obama							Trump				Biden

Source: NationalJournal
**Independents Sanders and King, who caucus with the Democrats, have been included in the Democratic tally*
***Projected*

However, there are several reasons that Democrats may be unlikely to pursue or achieve the massive tax increase proposals in Biden's platform even if they take control of the Senate. Most importantly, they would have only 50 votes. This would leave them 10 votes short of the 60 needed to overcome filibusters, giving Republicans significant leverage. Democrats would have three basic options to pass tax legislation through the Senate, all with important limitations:

- **Compromise with Republicans** – Democrats could choose to seek bipartisan agreement, and pass legislation by getting at least 10 Republican votes. This would likely require significant compromises, resulting in a final bipartisan product that would look similar to any bipartisan legislation passed under a Republican Senate.

- **Use reconciliation** – Democrats could use a budget reconciliation procedure that bypasses filibusters on revenue bills. There are important restrictions to this process. Lawmakers must agree on a budget resolution before using reconciliation. This could significantly extend the timeline for passing a reconciliation bill. In addition, only one reconciliation bill can be passed for each budget cycle. Democrats would need to weigh using reconciliation on tax legislation against other priorities such as COVID-19 relief, infrastructure or health care, though bills covering those issues could also carry tax provisions. Finally, a reconciliation bill cannot cause a net revenue loss outside the 10-year budget window. Republicans used the reconciliation process to pass the TCJA and were forced to sunset the individual tax changes in order to remain revenue neutral outside the budget window. Democrats may not feel as hindered by this rule as Republicans, since their tax platform includes significant tax increases that could offset other tax benefits. There are no restrictions on a tax bill raising revenue through reconciliation.

- **Change the Senate rules** – Democrats could abolish the filibuster altogether and allow for legislation to pass on simple majority votes. This issue remains very controversial and could have major political downside. It would also require every Democrat, even the moderates, to agree. This would be a significant hurdle, and Democrats are likely to consider this "nuclear" option only after significant deliberation and only for a transformative legislative priority. Tax reform is unlikely to be the impetus for such a move, and a tax bill should not be expected to benefit from this kind of rule change immediately.

There are several other reasons that could dampen Democratic ambitions for tax increases in the near-term. Key Democrats have signaled a reluctance to raise taxes too quickly. Typically, an economic crisis also allows lawmakers more leeway to spend on recovery without the pressure to pay for it with revenue offsets. Ben Harris, a top economic advisor for the Biden campaign, has said that: "If any of these tax initiatives are found to be economically damaging at this point during this fragile recovery, they're not going to be part of the plan." Fellow Biden economic advisor Jared Bernstein has said any tax increases will be "very dependent on economic conditions."

Key Senate Democrats have echoed these sentiments. Sen. Dianne Feinstein, D-Calif., said: "We ought to make a decision [on tax increases] when we have a better sense of where the economy is going." When asked about tax increases, Sen. Debbie Stabenow, D-Mich., said the number-one priority would be COVID-19 and Sen. Richard Blumenthal, D-Conn., said: "A tax bill can be made effective at a time when we think the economy will be sufficiently robust that some increase in taxes will have no detrimental effect." Biden was initially more aggressive, pledging at one point to make corporate tax changes on "day one." He softened that stance in a later town hall, acknowledging that he'll need to build consensus.

The longer it takes to put together any tax legislation, the harder it will become for lawmakers to justify an effective date retroactive to Jan. 1, 2021. Retroactive tax rate increases are relatively rare, but not unprecedented. There have been six major rate increases since 1980, and as the table shows, only the 1993 increases in the corporate and individual rates were retroactive. The 1993 bill was passed in August and made retroactive to the beginning of the year. It may be difficult to match this timeline. Trump and Republicans made tax reform a top priority, and it took all of 2017 to enact.

Tax rate increases since 1980

Rate increase	Date enacted	Date effective
Capital gains rate increase from 20% to 28%	Oct. 22, 1986	Jan. 1, 1987
Ordinary income rate increase from 28% to 31%	Nov. 5, 1990	Jan. 1, 1991
Ordinary income rate increase from 31% to 39.6% Corporate rate increase from 34% to 35%	Aug. 10, 1993	Jan. 1, 1993
New 3.8% tax rate on net investment income	March 23, 2010	Jan. 1, 2013
Ordinary income tax rate from 35% to 39.6%*	Jan. 2, 2013	Jan. 1, 2013

**Lower rate was not extended and expired under previous sunset provision*

Biden tax platform

Biden will take office with one of the most robust and ambitious tax plans in recent history. He has unveiled an extensive set of proposals covering most areas of tax. Many of these proposals now look less likely to gain traction in the absence of broader Democratic gains in the Senate. Even with a better election outcome, they would always have been expected to evolve. It's important to keep in mind that the campaign proposals lack many details by design. Campaign tax platforms are intended first and foremost as talking points to appeal to voters, and candidates are generally free to avoid fleshing out details, addressing administrability, or even making sure the proposals work consistently. Congress is an equal partner in the legislative process and compromises necessary for enactment can often blunt the impact of proposed changes.

Biden's proposed top tax rates versus current rates

	Current	Joe Biden
Corporate rate	21%	28%
Top individual rate	37%	39.6%
Top effective rate on pass-through income eligible for Section 199A	29.6%	39.6%
Top rate on long term capital gains	20%	39.6%

**Does not include net investment income tax or any state and local tax*

Corporate rate
Biden has proposed a corporate rate of 28%, significantly higher than the current corporate rate, but well below the former 35% rate that many other Democratic presidential candidates championed. Biden has made raising the corporate rate a major campaign focus, and but Senate Republicans are likely to resist any increases.

Minimum tax on book income
Biden has proposed a 15% minimum tax on corporate book income "so that no corporation gets away with paying no taxes." There are virtually no details available on this proposal, which often appeared to be more of a talking point in response to press reports revealing large corporations showing financial statement profits while paying little federal income tax. Although there is little information in official campaign documents, the press has reported that it is intended to apply only to companies with more than $100 million in net income. This proposal would likely face an uphill battle in Congress, and it is unclear how it could be structured. The most practical mechanism would likely involve applying a 15% rate to a measurement of taxable income that adjusts the tax treatment of certain items to align them more closely to book. Lawmakers would need to make policy decisions over which preferences to target.

Onshoring initiative
Biden has made "onshoring" production a major campaign issue, using tax proposals as a major aspect of a carrot-and-stick approach. To incentivize onshoring, he has proposed 10% advanceable credit for companies that make investments to:

- Revitalize manufacturing plants that have closed or are on the verge of closing
- Retool facilities to "advance manufacturing competitiveness and employment"
- Re-shore production or service jobs, including shipping, moving and training costs
- Increase overall manufacturing wages in the United States above a company's pre-COVID baseline up to $100,000.

To combat offshoring, Biden has proposed a penalty on the profits of U.S. companies derived from producing goods or services overseas and selling them in the United States. For services, the penalty applies if those jobs could have been performed in the United States. The penalty is imposed as a 10% surtax on the amount of a company's corporate tax, which, under Biden's proposed 28% corporate tax rate, would result in a 30.8% tax against applicable profits.

There is bipartisan interest in encouraging the return of supply chains to the United States, particularly for medical devices and pharmaceutical equipment. Republican and Democrats could explore bipartisan tax legislation in this area, but it may need to evolve significantly from the current Biden proposals. The surtax may be less palatable to Republicans, and there would be many definitional challenges in writing clear and administrable standards for implementing any of these rules.

Other international changes

Biden has proposed reforming GILTI significantly. He has discussed raising the effective rate to 21% and applying it separately to each country. It is not entirely clear how else he envisions reforming the operational rules, and how this might affect the proposed rate. Much of the language surrounding this proposal appears to contemplate expanding the scope of GILTI so that it operates more like a true global minimum tax. In addition, the 21% proposed rate appears to derive from the idea of repealing the current GILTI deduction. Under current corporate rates, this would result in a 21% effective GILTI rate. Under Biden's proposed 28% corporate rate, the effective GILTI rate would be 28% without a deduction. Given his repeated use of the 21% rate in his material, he may be considering a mechanism to limit the GILTI rate to 21% even with a 28% corporate rate.

Biden has not offered significant commentary on efforts by the OECD to create a global minimum tax under a "Pillar 2" approach to the tax challenges arising from digitalization. Any change in the negotiating tactics under a Biden Administration could have an impact on the outcome. The United States has so far been resistant to OECD efforts, and has threatened to retaliate against any countries that impose digital services taxes unilaterally.

Finance and investment

Biden never formally proposed a financial transactions tax, although he has expressed support for it in informal comments. Financial transaction tax proposals floated by other Democrats during the presidential primary would generally tax high-volume trade of stocks, bonds and derivatives at varying rates equal to a fraction of 1%. Any effort to enact such a tax would generate resistance Republican and possibly even Schumer.

Biden has also criticized the tax treatment of carried interest in the past, but has not formally called for its repeal as part of his campaign documents. This silence is likely because his proposal to treat all capital gains as ordinary income would effectively end any carried interest benefit. If a preferential rate for capital gains in general is retained, carried interest specifically could get renewed scrutiny. Schumer could also provide key opposition to any congressional efforts to address the issue.

Green energy

Biden has focused significant attention on encouraging green energy, including many tax proposals that would:

- End "tax breaks" for the fossil-fuel industry
- Enhance tax incentives for carbon capture, use and storage

- Allocate tax credits for upgrading to energy efficient equipment and processes and deploying low-carbon technologies
- Adopt “scaled-up” tax credits for renewable energy projects that meet certain labor standards
- Restore the electric vehicle credit and refining it to benefit middle-class taxpayers
- Reinstate the “Cash for Clunkers” program, which provided incentives to trade older vehicles in for newer, more fuel-efficient ones
- Create direct cash rebates for individuals to upgrade appliances, install more efficient windows and cut energy bills

While Biden has placed a great deal of emphasis on promoting green energy, particularly to promote economic growth and create jobs, several of his tax proposals lack specificity. He hasn’t identified which particular fossil fuel tax incentives he intends to eliminate. Similarly, while his plan appears to suggest he would restore expired green energy incentives or revamp existing ones, he has offered few details on which incentives he’s considering, the value of the incentives, or how they would be administered.

Republicans have opposed extending and enhancing many green energy incentives in the past, but it could be something they would consider in exchange for their own tax cut priorities.

Employee benefits

Biden’s plan pairs two tax priorities aimed at workers with corresponding business incentives. To encourage retirement savings, Biden is proposing tax credits for small businesses that would offset “much of the costs” of implementing workplace savings plan. He has also proposed a childcare construction tax credit to encourage businesses to provide employer childcare facilities. The credit would be worth half of the first $1 million in construction costs per facility.

Retirement and savings

Biden’s tax plan includes a number of individual proposals designed to encourage retirement savings, including creating an “automatic 401(k)” for taxpayers without employer plans and allowing informal caregivers to make “catch-up” contributions to retirement plans even if they are not otherwise employed.

Biden has also pledged to “equalize” the tax benefits of defined contribution retirement plans. He has offered few details on the meaning of this phrase. He is likely proposing to increase the benefit of deducting or excluding from income any contributions from taxpayers in lower tax brackets, but it is also possible he is proposing to limit the benefit of these deductions or exclusions for taxpayers in higher tax brackets.

Retirement savings could emerge as an area of agreement. Neal and House Ways and Means ranking minority member Kevin Brady, R-Texas, recently released the Securing a Strong Retirement Act, a bipartisan tax bill to encourage retirement savings.

Infrastructure

Biden proposes to make the New Markets Tax Credit permanent with a $5 billion allocation each year. This is similar to enhancements made in the infrastructure bill advanced by House Democrats in July. However, the House proposal raises the allocation for 2020 and 2021 before setting it at $5 billion per year and would adjust it annually for inflation thereafter.

Biden also supports Opportunity Zone tax incentives, but is critical of the way the program is currently administered. He has proposed reforms similar to many in Congress, which are largely aimed at increased reporting. Infrastructure could also emerge as an area of bipartisan agreement, though funding is a challenge.

Individual rates

Biden has pledged not to raise income taxes on "a single person making under $400,000 per year." For those earning $400,000 per year or more, his plan calls for:

- Raising the top rate from 37% to 39.6%
- Capping itemized deductions at 28%
- Reinstating the "Pease" phaseout of itemized deductions
- Phasing out the Section 199A deduction

He has not specified whether the $400,000 threshold would apply to taxable income or adjusted gross income, or how it could differ by filing status. There is no information on the potential interaction between a cap on the value of itemized deductions and the Pease phaseout, and it is unclear how either of these provisions could interact with any potential modification or repeal of the $10,000 cap on state and local tax (SALT) deductions. Biden himself has been relatively quiet on the SALT cap, but raising or repealing the cap is a top priority of many congressional Democrats.

Biden has generally made individual tax increases for high-income taxpayers a focus on the campaign trail, but Republicans should be expected to oppose many of these efforts or demand significant concessions for any consideration.

Capital gains

Biden proposes taxing capital gains as ordinary income for taxpayers with over $1 million in income, nearly doubling the current rate from 20% to 39.6% (not including net investment income tax). Biden has made this a frequent talking point, but it would likely encounter some of its fiercest opposition from Republicans and even Democratic moderates.

Social Security taxes

Biden has proposed imposing Social Security tax on earned income over $400,000. The current cap would be retained ($137,700 for 2020). This is often called a "doughnut hole" approach because only wages between the current cap and $400,000 would be free from tax. It is not clear, however, whether Biden is proposing to impose only the individual 6.2% share of the Social Security tax on earned income over $400,000, or if employers would also be required to pay their 6.2% share on this income.

Social Security has long been a politically fraught issue, and this change may be one of the more difficult proposals to enact. It would require changes to the benefit calculations to prevent the extra taxes from creating extra benefits, which would likely be contentious.

Estate tax

Biden has not made the estate tax a major focus. For most of his campaign, the only proposal he included was to eliminate the stepped-up basis for inherited capital assets. As part of the Unity Task Force report with Sen. Bernie Sanders, I-Vt., he then pledged to restore estate taxes to "historic norms." No further details were provided. This likely implies at least cutting the exemptions in half to their pre-TCJA thresholds, but could also envision even lower exemptions and higher rates that have been in place in the past.

Individual tax credits

Biden proposes enhancing and creating several individual tax credits, including:

- Raising the child tax credit to $3,600 per child under the age of 6 and $3,000 per child between the ages of 6 and 17 while making it fully refundable and allow taxpayers to receive the credit in monthly installments
- Making the earned income tax credit (EITC) available to taxpayers over the age of 65 and raising the child and dependent care tax credit to $8,000
- Creating a $5,000 tax credit for informal caregivers
- Creating a 50% credit of up to $8,000 in child care costs per child under the age of 13 (maximum $16,000) for families earning less than $125,000 per year (full phaseout at $400,000)
- Allocating $5 billion for a renter's credit that would reduce rent and utilities to 30% of income for low-income individuals and families that earn too much to qualify for housing assistance
- Creating a "First Down Payment" credit modeled after but more generous than the temporary first-time homebuyer credit enacted under President Barack Obama in 2009

Planning considerations

The threat of tax increases under a Biden presidency had prompted many taxpayers to begin exploring options to accelerate income into 2020. The prospects for tax increases effective on Jan. 1, 2021 seem to have dimmed considerably with the election results. There are still many important year-end planning considerations for taxpayers in a loss position or unconcerned with a potential rate increase, including:

- Accelerating deductions and deferring income using accounting method to increase an NOL in 2020, allowing a refund for a five-year carryback and a rate arbitrage opportunity
- Claiming a disaster loss attributable to COVID-19 for a refund based on the 2019 return
- Claiming the employee retention credit
- Accelerating an AMT refund claim
- Claiming the retroactive benefit of bonus depreciation on qualified improvement property

It's important to note that it remains possible for Democrats to take control of the Senate and pursue tax increases quickly, although it does not seem likely. The challenge for taxpayers considering action in advance of tax increases will be the fact that control of the Senate will not ultimately be determined until January.

Taxpayers holding assets with significant built-in gain or planning transactions that will generate significant income early next year could still consider accelerating transactions to protect against the risk of a tax increase if the downside of acceleration is not prohibitive. But be very cautious about rushing transactions or asset sales in ways that forfeit value, especially as immediate tax increases not look much less likely. Income and tax acceleration strategies should also be balanced against liquidity needs during this period of economic disruption, and only after considering the time value of money. It is also important to consider the effect of such planning on state and local income taxes, as many states have not conformed to some of the most significant benefits provided under the TCJA and the CARES Act. For taxpayers that have analyzed the outlook and determined that it still makes sense to act before year-end, there are a number of income acceleration and other planning strategies available. Some changes may offer the flexibility of making a decision when filing the tax return for the year, and do not need to be performed by year-end.

Individual considerations

Individual taxpayers can consider a number of options to mitigate the potential impact on increases in both marginal rates on ordinary income and capital gains tax rates:

- **Sell securities and other assets** – Taxpayers can generally control the timing of capital gains by choosing when to dispose of an asset. Selling the asset will trigger the gain. The wash-sale rule that limits the recognition of capital losses when the same security is sold and bought within 30 days does not apply to gains. It is possible to sell stock and immediately buy it back to pay tax on the gain and reset the basis. Be cautious rushing sales on more complex business assets or business interest, as the current economic challenges could decrease value. In addition, pay attention to the holding period. Triggering gain early could result in paying at ordinary income rates if the assets have been held one year or less (or three years or less for some profits interests in investment partnerships). Strategies that seek to recognize gain but allow a taxpayer to retain some control or use of the assets must satisfy rules that determine whether ownership has been effectively transferred for tax purposes.

- **Exercise stock options** – Taxpayers recognize income on many types of options, including nonqualified stock options and incentive options, when they are exercised. Exercising the options before year-end would trigger the income for 2020. This will also typically accelerate the deduction for the employer when employers themselves may be seeking to defer deductions in anticipation of a rate increase.

- **Convert to a Roth account** – Converting a traditional retirement account such as a 401(k) or individual retirement account (IRA) into a Roth version will create an income inclusion now and allow distributions tax-free in retirement. Consider the consequences carefully as this income would be taxed at ordinary rates, which are only facing an increase from 37% to 39.6% under Biden's plan. Many taxpayers expect to pay lower marginal rates in retirement, so paying tax at a higher marginal rate now may not be beneficial. In addition, depending on age, this strategy can accelerate tax by many years.

- **Reverse an installment sale** – Individuals (or businesses) can consider electing out of the deferral of gain recognition available for an installment sale. Deferred income on most installment sales made after 1987 can be accelerated by pledging the installment note for a loan.

- **Defer deductions** – As cash basis taxpayers, individuals often have the ability to control in what year a deduction is taken by when they make a payment. Waiting to pay deductible expenses such as mortgage interest until 2021 may defer the deduction. Waiting to pay state taxes could also be worthwhile not only because of potential rate increases, but also if the $10,000 SALT cap is modified or repealed.

Business considerations

Business taxpayers also have a number of potential considerations at the entity level for income acceleration planning:

- **Sell securities and other assets** – Like individuals, business entities can generally control the timing of capital gains. Businesses should be cautious rushing M&A transactions or asset sales, as the current economic challenges could suppress the value and wash out any potential tax benefit. Businesses can also consider electing out of the deferral of gain recognition available for an installment sale. Taxpayers should carefully consider other potential tax consequences from strategies that trigger gain by making distributions out of a business entity and then recapitalizing. Taxpayers with investment services partnership should also be aware of the now three-year holding period for receiving long-term capital gains treatment on certain profits interests. Triggering gain early might not offer a benefit depending on the holding period.

- Accounting methods – Most businesses employ dozens of separate accounting methods for recognizing revenue and expenses. Changing to a less favorable method of accounting may appear to be a valuable option to accelerate income and tax, but this type of planning may not offer much opportunity. IRS rules generally require an unfavorable Section 481 adjustment to be spread over four years, so this income will be pushed into future years anyway. Consider instead opportunities to use elections or other actions to change the timing of when expenses are recognized.

- Deferring expenses – There are many potential elections that affect the timing of significant deductions. Taxpayers may have opportunities to elect:

    - Slower depreciation, including electing out of bonus depreciation
    - Expanding the costs capitalized under Section 263
    - Capitalizing transaction costs or certain costs related to intangibles
    - Amortizing research and development expenses

  These types of strategies should be considered carefully as they will not merely defer a deduction into the following year, but can push the deduction out much further or spread it over a number of years.

- Compensation and benefits – There are many compensation and benefit rules that affect the timing of deductions, but it's important to note that businesses may have competing interests with employees. High-income employees may seek to recognize income before tax increases take effect, while the business may want to save compensation deductions for when the tax increases take effect. For business that do want to defer deductions, there are many options that could push a deduction from 2020 into 2021, including how bonuses and other compensation are structured and paid. Companies should pay particular attention to year-end bonuses, especially employers that deduct bonuses paid in the following year using the "2.5-month rule." However, consideration should always be given to Section 409A nonqualified deferred compensation (NQDC) rules when making changes to compensation arrangements. Employers could also consider accelerating payroll taxes on NQDC avoid the potential application of Social Security taxes to earned income over $400,000. It may be possible to reverse any planning that has allowed employers to postpone payroll tax because the value of future benefits could not be ascertained.

- Converted S corporations – Special opportunities exist for S corporations that converted from a C corporation. Normally, distributions from a profitable S corporation are considered to come first from the income passed through to the shareholder and taxed at their level. In order to prevent double taxation, these distributions are considered nontaxable to the extent they do not exceed the amount in the S corporation's accumulated adjustment account. However, an S corporation may elect to treat the distribution as first coming out of accumulated earnings and profits, and thus taxable. If insufficient cash is on hand, an election to make a "deemed" distribution is available under the S corporation regulations.

Transfer tax planning considerations
This is the ideal time for transfer tax planning thanks to the combination of depressed asset values, historically low interest rates, and favorable temporary estate and gift tax rules. Many estate and gift tax strategies hinge on the ability of assets to appreciate faster than interest rates prescribed by the IRS. Interest rates are at unprecedented lows. Even with the election results reducing the threat of immediate changes, there is less downside to this planning than in other areas. If Democrats fail to proactively address the estate and gift tax exemptions, they are still scheduled to expire in 2026. The IRS has issued guidance that said gifts made under the current exemption would not be "clawed back" if exemptions are lowered in the future.

Next steps

Biden's election victory changes the tax outlook, and taxpayers should begin to evaluate their long-term and short-term tax planning. While there are strategies that can offer benefits in advance of tax increases, taxpayers should be cautious with these as the sweeping Democratic gains that would have made tax increases more likely did not occur as many anticipated. It will be important to monitor the legislative process to see how the proposals evolve and how quickly tax legislation is moving so that planning can be adjusted appropriately.

For more information, contact:

Dustin Stamper
Managing Director
Washington National Tax Office
Grant Thornton LLP
D +1 202 861 4144
E dustin.stamper@us.gt.com

Omair Taher
Manager
Washington National Tax Office
Grant Thornton LLP
T +1 202 861 4143
E omair.taher@us.gt.com

To learn more visit **gt.com/tax**

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