Legislative Tax Update: Looking forward to 2021 and beyond

Jennifer Gray, Washington National Tax

November 30, 2020

Reflects developments as of 11/20/20 2pm EST
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The Elections
2020 Presidential Electoral College *

270 Needed to Win

Biden  306

Trump 232

* Results not Official

Updated 11/20/20 at 2pm EST – based on Wall Street Journal
Election 2020: Key Dates

- **November 3, 2020:** Election Day
- **November 4-23, 2020:** Votes are counted
- **November 10-December 1, 2020:** States certify election results
- **December 8, 2020:** Safe harbor to determine election results and assign electors
- **December 14, 2020:** Electoral votes cast
- **December 23, 2020:**Electoral votes must be received
- **January 3, 2021:** New Congress is in session
- **January 6, 2021:** Electoral college votes are counted
- **January 20, 2021:** Inauguration
## Treasury Department – Senate Confirmed Positions

<table>
<thead>
<tr>
<th>Position</th>
<th>Assistant Secretary – Financial Markets</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secretary</td>
<td>Assistant Secretary – Financial Stability</td>
</tr>
<tr>
<td>Deputy Secretary</td>
<td>Assistant Secretary – Intelligence and Analysis</td>
</tr>
<tr>
<td>Inspector General</td>
<td>Assistant Secretary – International Finance</td>
</tr>
<tr>
<td>Inspector General – Tax Administration</td>
<td>Assistant Secretary – International Markets and Development</td>
</tr>
<tr>
<td>Special Inspector General – Troubled Asset Relief Program</td>
<td>Assistant Secretary – Legislative Affairs</td>
</tr>
<tr>
<td>Commissioner of Internal Revenue</td>
<td>Assistant Secretary – Tax Policy</td>
</tr>
<tr>
<td>Comptroller of the Currency</td>
<td>Assistant Secretary – Terrorist Financing</td>
</tr>
<tr>
<td>Director – Office of Financial Research</td>
<td>Chief Financial Officer</td>
</tr>
<tr>
<td>Director – Office of Thrift Supervision</td>
<td>General Counsel</td>
</tr>
<tr>
<td>Under Secretary – Domestic Finance</td>
<td>Chief Counsel – Internal Revenue Service</td>
</tr>
<tr>
<td>Under Secretary – Terrorism and Financial Intelligence</td>
<td>Director of the Mint</td>
</tr>
<tr>
<td>Under Secretary – International Affairs</td>
<td></td>
</tr>
<tr>
<td>Assistant Secretary – Economic Policy</td>
<td></td>
</tr>
<tr>
<td>Assistant Secretary – Financial Institutions</td>
<td></td>
</tr>
</tbody>
</table>

Source: Congressional Research Service
Senate 2021 (unofficial)

- Democrats: 48* (+1)
- Republicans: 50
- Run-off races: 2

* 2 independent Senators expected to caucus with the Democrats

Updated 11/11/20 at 1pm EST
Poll

At this time, please swap to Poll Everywhere to answer the poll question.

What do you expect the Senate to look like in mid-January 2021 (assuming results of all elections – including January 5, 2021 GA run-off elections – are official)?

A
Republican majority

B
Democratic majority

C
50/50
House of Representatives 2021 (unofficial)

- **Democrats**: 222
- **Republicans**: 204 (+8)
- **Uncalled**: 8
- **Run-off race**: 1

Updated 11/20/20 at 2pm EST – based on Wall Street Journal
## Mid-term elections

### Congressional seats gained or lost by President’s party

<table>
<thead>
<tr>
<th>Year</th>
<th>President</th>
<th>Senate Seats</th>
<th>House Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>1982</td>
<td>Reagan</td>
<td>+1</td>
<td>-26</td>
</tr>
<tr>
<td>1986</td>
<td>Reagan</td>
<td>-8</td>
<td>-5</td>
</tr>
<tr>
<td>1990</td>
<td>Bush 41</td>
<td>-1</td>
<td>-8</td>
</tr>
<tr>
<td>1994</td>
<td>Clinton</td>
<td>-8</td>
<td>-52</td>
</tr>
<tr>
<td>1998</td>
<td>Clinton</td>
<td>0</td>
<td>+5</td>
</tr>
<tr>
<td>2002</td>
<td>Bush 43</td>
<td>+2</td>
<td>+8</td>
</tr>
<tr>
<td>2006</td>
<td>Bush 43</td>
<td>-6</td>
<td>-30</td>
</tr>
<tr>
<td>2010</td>
<td>Obama</td>
<td>-6</td>
<td>-63</td>
</tr>
<tr>
<td>2014</td>
<td>Obama</td>
<td>-9</td>
<td>-13</td>
</tr>
<tr>
<td>2018</td>
<td>Trump</td>
<td>+2</td>
<td>-40</td>
</tr>
</tbody>
</table>
2020 Lame Duck
Possible lame duck agenda items

- Temporary spending bill (expires 12/11/20)
- Further COVID-19 response legislation?
- Expiring provisions?
- Other?
Select 2020 “extenders”

- CFC look-through §954(c)(6)
- Work opportunity tax credit (WOTC)
- New markets tax credit (NMTC)
- Empowerment zone tax incentives
- Craft beverage excise tax relief
- Employer credit for paid FMLA
- Energy efficient commercial buildings deductions §179D
- Incentives for alternative fuel and fuel mixtures
- Alternative fuel vehicle refueling property
- Qualified fuel cell motor vehicles
- Oil Spill Liability Trust Fund rate (OSLTF)
- Certain CARES bill provisions
Looking forward to 2021 and 2022
Washington Bandwidth

- COVID-19
- Economic stimulus
- Administration nominees
- Election reform
- Health care
- Debt limit increase
- Government spending levels
- Infrastructure spending
- Trade issues
- 2022 election
- Others
Poll

At this time, please swap to Poll Everywhere to answer the poll question.

What would happen if neither a short- nor a long-term spending bill were approved by both the Congress and the President before the current short-term spending bill expires at midnight on 12/11/20?

A. Nothing would happen

B. There would be a partial or total government shut down until a new spending bill is enacted

C. The President may “deem” a short-term spending plan to avoid a government shutdown for up to 30 days

D. The Secretary of the Treasury may use “extraordinary measures” to find funding mechanisms to avoid a government shutdown for up to 30 days
Elections matter

Personalities matter
The 2020 U.S. Senate

Small margins

Floor control

Committee control

Budget process/reconciliation
## Major legislation in a divided government

### Control of Congress and the White House by party

- 2009-2021; Composition on January 20 of each year

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

<table>
<thead>
<tr>
<th>Year</th>
<th>House</th>
<th>Senate*</th>
<th>White House</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>D+77</td>
<td>D+16</td>
<td>Obama</td>
</tr>
<tr>
<td>2010</td>
<td>D+78</td>
<td>D+20</td>
<td>Obama</td>
</tr>
<tr>
<td>2011</td>
<td>R+49</td>
<td>D+6</td>
<td>Obama</td>
</tr>
<tr>
<td>2012</td>
<td>R+50</td>
<td>D+6</td>
<td>Obama</td>
</tr>
<tr>
<td>2013</td>
<td>R+33</td>
<td>D+10</td>
<td>Obama</td>
</tr>
<tr>
<td>2014</td>
<td>R+33</td>
<td>D+10</td>
<td>Obama</td>
</tr>
<tr>
<td>2015</td>
<td>R+59</td>
<td>R+8</td>
<td>Obama</td>
</tr>
<tr>
<td>2016</td>
<td>R+59</td>
<td>R+8</td>
<td>Obama</td>
</tr>
<tr>
<td>2017</td>
<td>R+47</td>
<td>R+4</td>
<td>Trump</td>
</tr>
<tr>
<td>2018</td>
<td>R+45</td>
<td>R+2</td>
<td>Trump</td>
</tr>
<tr>
<td>2019</td>
<td>D+36</td>
<td>R+6</td>
<td>Trump</td>
</tr>
<tr>
<td>2020</td>
<td>D+34</td>
<td>R+6</td>
<td>Trump</td>
</tr>
<tr>
<td>2021</td>
<td>D+?</td>
<td>?</td>
<td>Biden</td>
</tr>
</tbody>
</table>

**Republican control** | **Democratic control**

*Based on Wall Street Journal*
### Historical perspective – First year tax legislation

<table>
<thead>
<tr>
<th>Legislative Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Omnibus Budget Reconciliation Act of 1989</td>
</tr>
<tr>
<td>Omnibus Budget Reconciliation Act of 1993</td>
</tr>
<tr>
<td>Economic Growth &amp; Tax Relief Reconciliation Act of 2001</td>
</tr>
<tr>
<td>American Recovery &amp; Reinvestment Tax Act of 2009</td>
</tr>
<tr>
<td>An act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018</td>
</tr>
</tbody>
</table>
Selected scheduled changes

What might happen?*

- Interest limitation ramps up with expiration of special "50% of ATI" rule (2021)
- Five-year NOL carryback & suspension of 80% of taxable income limit expire (2021)
- Excess business loss limitation kicks back in through 2025 (2021)
- Interest limitation ramps up due to change in treatment of DD&A (2022)
- R&E amortization (2022)
- 100% expensing ends & begins to phase down (2023)
- Individual changes, passthrough deduction, & excess loss limit end (2026)
- GILTI & FDII rates decrease and BEAT rate increases (2026)

*Blue reflects expiration of some temporary CARES Act provisions, while green reflects scheduled changes included in TCJA. Year in parenthetical generally indicates first year affected (for calendar year taxpayers) absent a law change.
Split-control government

Possible areas of bipartisan cooperation?
Democratic Senate: possible paths to tax legislation

- Bipartisan agreement
- Filibuster
- Budget reconciliation
Poll

At this time, please swap to Poll Everywhere to answer the poll question.

What happens to control of the Senate whenever there are exactly 50 Senators in each party (or that caucus with one of the two major parties, in the case of an independent Senator)?

- **A** The Senate leaders of both parties negotiate a power sharing agreement
- **B** The party that controls the House also has functional control of the Senate
- **C** The party that controls the White House also has functional control of the Senate
- **D** The Senate leaders of both parties arm wrestle to determine functional control
Effective dates generally

- Administrative ease
- Detrimental reliance

Option - date of enactment
- Better for transactional taxes than rate changes

Retroactive tax increases do exist
- See 1993 Clinton tax increases
Biden – Select business proposals

<table>
<thead>
<tr>
<th>Corporate rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Increase corporate rate from 21% to 28%</td>
</tr>
<tr>
<td>• Consider effective dates</td>
</tr>
<tr>
<td>• Revenue raised</td>
</tr>
<tr>
<td>• Are there collateral consequences?</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Minimum tax</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 15% minimum tax on corporate global book income of $100M or more</td>
</tr>
<tr>
<td>• Attributes / carryforwards?</td>
</tr>
<tr>
<td>• Does book work?</td>
</tr>
<tr>
<td>• Preference items and exceptions</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>199A deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Phase-out 199A deduction for high income individuals</td>
</tr>
<tr>
<td>• Entity choice considerations</td>
</tr>
<tr>
<td>• Related party issues</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Manufacturing Communities Tax Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>• 10% advanceable ITC (revitalizing, retooling, restoring)</td>
</tr>
<tr>
<td>• Onshoring benefit coupled with offshoring penalty</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Industry-focused proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Tax on large financial institutions</td>
</tr>
<tr>
<td>• Repeal fossil fuel incentives</td>
</tr>
<tr>
<td>• Real estate – unspecified limitations on losses</td>
</tr>
</tbody>
</table>
Biden – Select international proposals

Increase foreign mintax rate from 10.5% to 21%
- Not GILTI?
- QBAI, country by country, FTC differences
- And what of FDII?

Tighten anti-inversion rules
- Why?
- How? (management and control as the final frontier?)

Offshoring / Anti-roundtripping penalty
- 10% penalty rate * 28% corporate rate = 2.8% additional penalty tax
- Definitional quagmire
Biden – Select individual tax proposals

Marginal tax rate
• Increase top rate to 39.6% for income over $400,000

Payroll taxes
• Subject wages over $400,000 to OASDI taxes

Itemized deductions
• Cap itemized deductions at 28%

Tax credits
• Credit for first-time homebuyers and certain low-income renters
  • $8000 tax credit for child care

Estate tax
• Exclusion and rates returned to pre-TCJA levels
• Tax unrealized capital gains at death
  • Backstop to capital gains rate?
  • Eliminate need to mark-to-market?
Biden – Taxation of investment income

**Tax rates**

- Capital gains and qualified dividends of high income individuals at 39.6%
- Equalization of rates as a historical rarity
- Ordinary income or long- or short-term capital gains?
- Effective date consequences
- Ideal rate = 28%?

**Mark-to-market**

- Hard to value assets and diminutions?
- Capital losses?
Ron Wyden – Select tax proposals

Taxation of Investment Income

- Capital gains/Mark-to-market

Everyone needs to pay their fair share and the best approach to achieving that goal is a mark-to-market system that would require the wealthy to pay taxes on their gains every year at the same rates all other income is taxed. This eliminates serious loopholes that allow some to pay a lower rate than wage earners, to delay their taxes indefinitely, and in some cases, to avoid paying tax at all. (Press release – April 2, 2019)

Taxation of Business Income

- Modernization of Derivatives Act (MODA) – modification of taxation of derivatives, including mark to market regime
- Clean Energy for America Act – simplify energy incentives
- Foreign minimum tax proposal?
- Corporate rate and others?
Some resources
Some resources

Selected resources:

- *Catching Up on Capitol Hill* podcast series
- KPMG report: Trump Campaign Tax Proposals
- KPMG report: Biden Tax Proposals
- KPMG report: Notice 2020-65, guidance on employee payroll tax deferral
What questions do you have?
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