

# 2020 Post-Election Tax Policy Update



November 11, 2020

## Highlights

- ✓ Biden Win Coupled With Democratic Losses in Congress Make Broad Policy Gains Less Likely
- ✓ Lame Duck Legislation Still Possible
- ✓ Biden Proposed Rollback of TCJA for Higher Incomes

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## Biden’s Win Means Possible Changes, Senate Control May Limit Scope

On November 7, 2020, after a protracted period of vote counting in several states, nearly all media outlets declared that Democrat Joe Biden will be the 46th President of the United States. While, at the time of publication, this outcome is not yet official, given that several lawsuits have been filed by the reelection campaign of President Donald Trump and the Electoral College still has to vote in December, it seems that most people are proceeding as if Biden will be sworn in on January 20, 2021.

Nevertheless, the legislative outlook is far from clear at this point. While the Democrats did retain a (reduced) majority in the House of Representatives, control of the Senate is still up in the air. At the time of publication, votes were still being counted in Alaska, which looks to be leaning toward a win by the incumbent Republican, which would give the GOP 50 seats in the Senate. Georgia’s two Senate seats are heading toward runoff elections on January 5th, 2021, with the Democrats- needing to win both elections to equal the GOP’s 50 seats, giving the Democrats control of the chamber with Democratic Vice-President Elect Kamala Harris providing a tie-breaking vote.

Thus, one of the most contentious election seasons in recent memory draws to a close. Now is the time to look forward to see how policy, specifically tax policy, will be impacted by a new president. While no one was expecting sweeping tax reform like that seen with the Tax Cuts and Jobs Act (TCJA) in 2017, Biden does have proposals that run counter to that once-in-a-generation sized legislation. Whether those proposals can be enacted depends on the outcome of the Georgia elections as well as the Biden administration’s ability to work with lawmakers on both sides of the aisle.

**COMMENT.** *Not to be overlooked is President-elect Biden’s long experience in the Senate and his relationships with many current Senators in both parties. During his 36 years representing Delaware in the Senate, he displayed an ability to work with members of both parties. Also, during his tenure as Vice President, he displayed a talent for making deals with GOP leadership, most notably during the negotiation of legislation to avert the “fiscal cliff” at the end of 2012.*

**COMMENT.** *This briefing is based on President-elect Biden’s statements and proposals on taxes and tax policy during the campaign. Biden’s tax-related proposals may change after Biden assumes office.*



## LAME DUCK RELIEF LEGISLATION

Before getting into the outlook for Biden tax policy, there is the more pressing need for another round of relief legislation in response to the COVID-19 crisis. Lawmakers on both sides of the aisle feel that some sort of relief legislation is needed, but differ wildly in terms of the scope and focus of the legislation.

*“Now is the time to look forward to see how policy, specifically tax policy, will be impacted by a new president.”*

Prior to the election, House Democrats seemed content to wait until after the election, when a predicted increase in their House majority and a possible change in Senate control would give them additional leverage to dictate the terms of the legislation. However, the anticipated “blue wave” never materialized, and Democratic leadership is left with an uncertain negotiation stance.

Meanwhile, before the election, Senate GOP leadership indicated that there would be no chance of lame duck legislation in the event of a Biden win. However, this stance has softened over time, with Senate Majority Leader Mitch McConnell (R-Ky.) even indicating an openness to considering some Democratic priorities.

Regardless of timing, it is widely believed that at some point, another round of relief legislation will be passed. Any legislation is not believed to be very significant from a tax standpoint. The likeliest provisions include another round of stimulus payments (which enjoys broad bipartisan support) as well as some new tax credits to help businesses deal with the increased costs of COVID-19 mitigation measures.

## INDIVIDUAL TAXATION POLICY

### Income Tax Rates

Under current law, there are seven tax brackets: 10, 12, 22, 24, 32, 35, and 37 percent, which are applicable from 2018 through 2025 under the TCJA.

During the campaign, Biden proposed increasing the top rate back to 39.6 percent, where it sat prior to the TCJA.

**COMMENT.** *It is not clear at what income level Biden would have this new top rate apply, however, he has stated repeatedly that only taxpayers with incomes over \$400,000 would see a tax increase. For 2021, the current top rate of 37 percent applies to single taxpayer income exceeding \$523,600.*

### Capital Gains/Dividends

Under current law, a capital gains rate of 0 percent, 15 percent, or 20 percent applies to capital gains and qualified dividends received by individuals, depending upon the amount of the individual’s taxable income. For 2021, the 20 percent rate applies to joint filers with taxable incomes over \$501,600 (\$473,750 for heads of households, \$445,850 for single filers, and \$250,800 for married taxpayers filing separately).

Biden’s proposal would increase the top tax rate on long-term capital gains for taxpayers earning more than \$1 million annually and eliminate the step-up basis tax expenditure that allows decedents to pass capital gains to heirs without tax. The top rate on long-term gains would nearly double from 23.8 percent to 43.4 percent, according to the Tax Foundation.

### Child Tax Incentives

Biden proposed expanding the earned income tax credit (EITC) and dependent care credit. Further, Biden has proposed a refundable \$8,000 child care tax credit for a qualifying child or up to \$16,000 for two or more children. The maximum Child Tax Credit is \$2,000 through 2025 under the TCJA.

Additionally, Biden proposes a new \$5,000 tax credit for caregivers of individuals with certain physical and cognitive needs.

### Limitation on Itemized Deductions

Prior to the TCJA, a limitation on itemized deductions (the so-called “Pease limitation”) took effect at higher income levels (in 2017, \$318,700 for joint filers, \$287,650 for heads of households, \$261,500 for single filers, \$156,900 for married taxpayers filing separately). The TCJA eliminated the limitation.

Biden proposed restoring the Pease limitation on itemized deductions for taxable incomes above \$400,000.


### Carried Interest

Generally, income that flows to a partner from a private investment fund is taxed at the lower capital gains rates with a three-year holding period requirement for certain

long-term capital gain and loss. Biden proposed eliminating carried interest.

## Payroll Tax

Currently, the FICA tax of 12.4 percent is split between employer and employee. Under an executive action issued in August, employers are allowed to defer the collection and payment of the employee's share of the FICA tax during the September to December 2020 period to January of 2021. Trump promised to eliminate the deferred taxes if re-elected. With Trump not winning a second term, it appears these deferred taxes will come due at the beginning of 2021.

 **COMMENT.** *Anecdotal evidence in the media indicated that very few employers took advantage of this executive action.*

Biden proposed a Social Security payroll tax of 12.4 percent for earnings above \$400,000.

## BUSINESS TAX POLICY

### Corporate Tax Rates

Under current law, the corporate tax rate is 21 percent. Biden proposed increasing the corporate tax rate to 28 percent. Additionally, Biden proposed a minimum tax on corporations with book profits of \$100 million or more.

### Qualified Business Income Deduction

Under current law, the Section 199A deduction allows eligible taxpayers to deduct up to 20 percent of their qualified business income (QBI), plus 20 percent of qualified real estate investment trust (REIT) dividends and qualified publicly traded partnership (PTP) income. The deduction is scheduled to expire after 2025 under the TCJA.

Biden proposed phasing out the qualified business income deduction for incomes above \$400,000.

### Energy Tax Incentives

Various credits are available under current law for oil production, electric vehicles, as well as for the production of solar, wind and other "green" energy.

Biden proposed ending subsidies for fossil fuels, restoring the full electric vehicle tax credit and various

credits and deductions to incentivize both residential and commercial energy efficiency.

## INTERNATIONAL TAX POLICY

### Repatriation

Under current law, U.S. corporations can defer payment of U.S. income tax on profits from offshore subsidiaries until those are repatriated.

Biden proposed ending TCJA incentives for multinationals. Additionally, according to Biden's website, he would establish a "claw-back" provision to "force" a return of public investments and tax benefits when businesses close in the U.S. to send jobs overseas. Additionally, Biden proposed "tightening" anti-inversion laws.

### GILTI


Generally, Global Intangible Low Tax Income (GILTI) was enacted under the TCJA as an anti-base erosion provision. GILTI is a tax on earnings that exceed a 10 percent return on a company's invested foreign assets.

Biden proposed doubling the tax rate on GILTI earned by foreign subsidiaries of U.S. firms from 10.5 percent to 21 percent.

## TAX POLICY AND HEALTH CARE

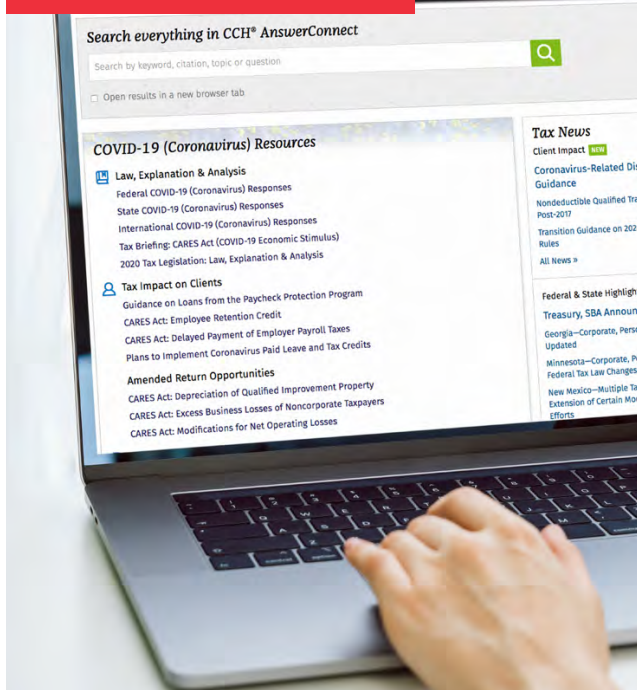
Since passage of the Affordable Care Act (ACA), taxes and health care have become more intertwined than in previous years. The ACA created a number of new taxes and fees. However, the ACA's individual mandate was repealed on a bipartisan basis.

Biden proposed strengthening the Affordable Care Act (ACA) by eliminating the 400 percent income cap on tax credit eligibility and lowering the limit on the cost of coverage from 9.86 percent of income to 8.5. Additionally, he would propose expanding a variety of family tax credits to increase coverage and lower premiums.

 **COMMENT.** *On November 10, the Supreme Court heard arguments in California v. Texas, a suit seeking to invalidate the entire law on constitutional grounds. Obviously, the outcome of that case could significantly impact any Biden plans on health care.*

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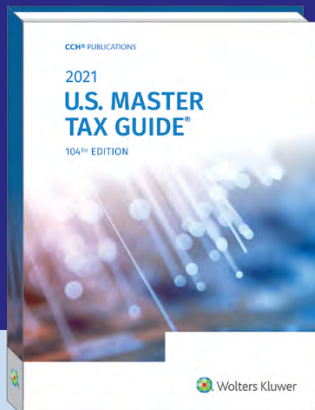
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