Post-election Forecast: Tax Policy Agenda is Clearer but Still Hazy

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Senate Outcomes Will Shape the Biden Tax Agenda

The waiting is over and Joe Biden is the declared winner of the presidential election. Because both Senate races in Georgia have gone to run-offs we won’t know until January which party will control the upper chamber in the next Congress, although it appears likely that Republicans will retain their majority. Control of the Senate will have a big impact on Mr. Biden’s ability to execute his tax agenda. This alert considers what is likely to happen based on what we know now.

The New President’s Core Tax Agenda

Mr. Biden has been transparent about his tax agenda. He has made no secret of his plan to increase taxes across the board on corporations, high-income individuals, capital gains and dividends, and estates. He would use those tax revenues to pay for family-friendly policies like child-focused tax credits and other policy priorities, like clean energy policies and infrastructure.

In addition, Mr. Biden would promote tax policies to encourage production in the United States and discourage US companies from locating operations offshore. He also proposes to modify the Opportunity Zone incentive to ensure investments are impact focused and more transparent. He has said he intends to pay for any policy changes, so in addition to increasing tax rates he is expected to propose closing loopholes (generally unspecified) and eliminate what he considers to be preferential tax treatment of certain industries like real estate.

Getting to Yes With 51 Votes

Achieving his agenda will be easier for Mr. Biden if there is a Democratic majority in the Senate together with continuing Democratic control of the House. Counting the vote of Vice President-elect Harris, Democrats need to garner at least 50 Senate seats. At this point, that result appears unlikely but is still possible.

If, however, Democrats win at least 50 seats in the Senate, they will have two procedural mechanisms to move the Democratic agenda forward with a majority vote: budget reconciliation and setting aside the filibuster. The Byrd Rules in the Senate impose restrictions on what can travel in a reconciliation bill, limits that would not apply using a filibuster work-around. Both the Affordable Care Act and the Tax Cuts and Jobs Act were approved using budget reconciliation, so even with limitations it is a very powerful tool. Speaker Pelosi recently stated that Democrats would use budget reconciliation to advance various policies, including perhaps another round of stimulus, if the Senate is under the party's control.

Do Not Underestimate What a Mixed Government Can Do

If Democrats fail to win at least 50 seats in the Senate, we will have mixed government, meaning Democrats and Republicans will necessarily have to work together to get anything done. The House, which retained a Democratic majority, will be able to pass anything that Democrats want on a majority vote. However, it is not a beeline to the president from the Speaker's desk; Senate Democrats will need some number of Republicans to get to 60 votes before legislation goes to the White House.

This means that mixed government will require negotiation and compromise, with each party giving up something in order to get other things they want. This also means that Senate Republicans could stop some Democratic-driven legislation dead in its tracks simply by not considering it.

Importantly, *do not assume that a Democrat in the White House and Republicans in the Senate means nothing gets done*; there will be issues that both parties can agree on and others that are of sufficient priority that each party will be willing to compromise.

Often overlooked in this partisan era are the issues that each party has in common. A good example is a set of policies aimed at incentivizing production in America and discouraging production offshore. Both parties have general policies utilizing a carrot and stick approach focused on providing tax breaks to businesses operating in the US and imposing additional tax burdens on businesses operating elsewhere.

Digital taxes are another potential area of common ground. Leadership of the tax writing committees have issued bipartisan statements opposing perceived targeting of U.S. multinationals by countries enacting unilateral digital tax regimes.

Another is retirement security, as demonstrated by the recent introduction by House Ways and Means Chairman Neal and ranking member Brady of a comprehensive retirement bill. Similar bi-partisan legislation has been introduced in the Senate. Other mutual interests include an infrastructure package and Opportunity Zones.

While there may be differences in the details, fundamental consensus on policy could be a starting point for broader legislation, even on issues where the parties are far apart but are willing to work together to reach consensus. President-elect Biden is expected to exercise his reputation for reaching across the aisle to make that happen.

Republicans Won't Be Mr. Biden's Only Challenge

While Mr. Biden is considered by many to be a moderate Democrat, his policies will be influenced by the composition of the Democratic caucus. Influential progressives, including former presidential candidates, Senators Bernie Sanders and Elizabeth Warren, who worked to convince their voters to support Joe Biden, and numerous left-leaning House Democrats, will put pressure on the new president to support more liberal positions, including, perhaps, a wealth tax or a financial transactions tax to help pay for free college education or education loan forgiveness. On the other end of the spectrum will be Democrats from traditionally Republican states and districts who will need to lean to the more conservative side of Democratic policies. President Biden will have an interesting time juggling the two factions, who may turn out to be nearly as problematic in striking a deal as Republicans.

Other Pressing Tax Considerations

A number of other important considerations affecting tax policy and tax administration will fall under Mr. Biden's purview. Of immediate concern will be deciding whom he will nominate to be the Secretary of the Treasury. This key position is one of the first Cabinet members that new presidents nominate, and is a high priority for the Senate Finance to vet and the full Senate to consider.

The Internal Revenue Service Commissioner generally would stay on, as that position runs on a five-year statutorily fixed schedule and not according to an election cycle. The position is, however, an at-will job so President Biden could ask for the current commissioner's resignation upon taking office. Given the controversy over Treasury and the IRS not turning over President Trump's tax returns, the Democratic caucus may push Mr. Biden to replace the incumbent commissioner.

Another pressing concern will be developing the FY 2022 budget recommendations. Traditionally the president sends a budget to the Congress the first week in February (this date sometimes slips in the first year of an administration), replete with a package of tax compliance and administrative proposals known as the "Blue Book" or the "Green Book" depending on which party is in the White House. These recommendations generally are incorporated into the list of offsets that will be considered as pay-fors for policy priorities.

Funding for the Department of Treasury and the IRS is part of this process. In recent years IRS funding has been reduced in real dollars, triggering a significant reduction in staff. IRS studies show the gross annual tax gap, the difference between taxes legally owed and taxes timely paid, is about $450 billion per year. The Government Accountability Office has estimated that the government receives a return on investment of at least $4 for every $1 spent on the IRS. A bump in funding could help reduce the tax gap and those revenues could be used to provide better taxpayer service, enhance enforcement of the wealthiest tax returns, clamp down on tax avoidance schemes, and improve the agency's information technology, as well as to offset the cost of expensive policies the Biden administration will support.

The Power of the Executive Pen

The new president will also have the power of the executive pen. This will take on more significance in the event of a mixed Congress. The Trump administration has demonstrated the impact that revamping regulations and issuing executive orders and memoranda can have under those circumstances. Even if Democrats do not control the Senate, Mr. Biden will have the authority to unwind prior executive orders, issue new ones, and use the regulatory and guidance process to impact the way that new, and even existing, tax laws are interpreted, implemented, and enforced. If Democrats control the Senate, they could invoke the Congressional Review Act to overturn Trump-era regulations released late in Mr. Trump's term.

International Considerations

Aside from his policies to disincentivize offshore production, the details of Mr. Biden's international tax agenda are not as defined as his domestic goals. Whether a Biden administration would take a different approach than the Trump administration on digital taxes, including current efforts by the Organization for Economic Cooperation and Development to develop a global approach to the digital economy, is unclear. Many authorities perceive Mr. Biden as more likely to work with the international community than the current administration. In addition to digital taxes, a number of climate and energy tax proposals are pending in the European Union, concepts that may align with Mr. Biden's energy policies and could influence U.S. policies.

Conclusion

As the election results are finalized and we know the composition of the Senate we will have a clearer picture of how tax policy is likely to evolve in the 117th Congress. Despite the uncertainty of the outcomes, however, it is almost certain that taxes will be on the Congressional agenda - deductions, credits and other tax issues that could affect the tax obligations of you and your business.

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