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Joe Biden is President-elect of the United States: what's next for US tax and trade policy?

November 10, 2020

Overview

Joe Biden has been projected as the winner of the Presidential election by the Associated Press and others.* Biden pledged during the campaign to implement policy initiatives on infrastructure and manufacturing, healthcare, and the environment, and to pay for them with increased taxes.

President-elect Biden has also signaled, however, that his first priority will be managing the COVID-19 crisis, including its economic impact. To that end, he has already announced he will be forming a COVID-19 task force immediately as part of his transition to the White House. And he has [previously called](#) for the next federal virus response, stimulus and relief package to be larger than the \$2t Coronavirus Aid, Relief, and Economic Security (CARES) Act, although a package of that size may be a near impossibility unless the Democrats control the Senate.

Although Biden had previously signaled that tax increase plans would be implemented on "Day 1," it appears now that such plans may wait until after the virus and its effects are addressed.

The continuing economic damage caused by the pandemic may limit his ability to pay for his policy priorities with tax increases, as some have warned that increasing taxes could impede economic recovery. Political realities may limit his policy ambitions as well.

Biden will thus face similar questions as were faced after the 2008 financial crisis, when he was Vice President: when does the need to provide economic stimulus and relief yield to the need to pay down the debt and reduce deficits? In a time of unprecedented debt and deficits should major spending programs be pursued without paying for them?

President-elect Biden's tax and trade agenda

Regarding taxes, Biden [said](#) he would restore the top personal marginal income tax rate back to 39.6% from 37%. He would also raise the top corporate income tax rate to 28% from 21%. He has proposed taxing capital gains and dividends as ordinary income for those with annual incomes of more than \$1m and setting a 15% minimum tax on the book income of corporations with book income greater than \$100m. These changes are proposed to pay for increased spending, on infrastructure, healthcare, education and the environment, not to reduce the debt or deficit. (Biden also has promised not to raise taxes on households earning less than \$400,000 a year.)

Biden may face a Congress reluctant to raise taxes or increase spending. He may have to draw on his decades of experience as a US senator and his years as Vice President to make progress on any of his initiatives that require legislation.

*The election results will not be certified by the Electoral College until December 14 and several state recounts and legal challenges are ongoing.



Major tax items and spending priorities

At a glance: major tax items

Corporate rate: Now 21% /Biden 28% plus min tax

Minimum tax: Biden 15% on book income for corporations with book income over \$100m

International: Biden 21% global intangible low-taxed income (GILTI) rate applied per country

Plus other Biden 'Made in America' provisions:

- Repeal GILTI relief for foreign profits related to qualified tangible property
- Offshoring Tax Penalty – 10% surtax aimed at those who offshore manufacturing and service jobs to foreign nations in order to sell goods or provide services back to the American market
- 10% 'Made in America' Tax Credit for revitalization, reshoring

Top individual rate: Now 37% /Biden 39.6%

Top capital gains rate: Now 20% + 3.8% net investment income tax (NIIT)/Biden 39.6% + 3.8% NIIT

Estate tax: Biden return to 2009 regime; end stepped up basis

Biden 'Build Back Better' plan: 'Made in America,' climate & infrastructure, caregiving, racial economic equity

\$700b to boost US manufacturers

- \$400b in procurement to spur demand for US products, materials, services
- \$300b in R&D, breakthrough technologies
- Manufacturing Communities Tax Credit that promotes revitalizing, renovating facilities
- Expand and extend clean energy tax credits



Paid for with tax increases

- 10% Offshoring Penalty surtax on profits of production by US co. on sale back to US (30.8% total tax rate on those profits)
- GILTI rate of 21%, applied on a jurisdictional basis
- Repeal GILTI relief for foreign profits relating to qualified tangible property

\$2t for infrastructure, clean energy

- Energy retrofitting for lighting
- Cash rebates, financing to upgrade appliances, windows & buy electric vehicles
- Reform/extend energy efficiency tax incentives



Paid for with tax increases

- Rolling back tax benefits for real estate investors (with incomes over \$400,000), such as like-kind exchanges and using real estate losses to lower income taxes

\$775b for caregiving

- Up to \$8,000 per-child credit for childcare
- Universal pre-K
- Child care construction tax credit for childcare facilities at places of work



Paid for with tax increases

- Unspecified tax increases on corporations and the "wealthiest Americans"

Investments to advance racial equity

- Make permanent New Markets Tax Credit
- First Down Payment Credit, renters' credit
- Opportunity Zone reforms for job creation, greater review and transparency





Although Democrats are projected to retain control of the House, Republicans will gain seats. Control of the Senate is not clear, and Republicans may retain a narrow majority. Several Senate races are still undecided, with both Georgia seats very likely headed for run-off elections on January 5, 2021.

If Democrats ultimately win 50 seats in the Senate, which appears to be their absolute best-case scenario, Vice President-elect Kamala Harris's tie-breaking vote could create a working majority, giving Biden more leeway to pursue his campaign proposals.

However, an evenly split Senate, which is a rarity in US history, would be difficult for any Senate leaders or the White House to manage, as it significantly increases the leverage of every individual senator, and may thereby prevent progress on controversial initiatives, such as major tax increases. If the Republicans maintain a narrow majority, progress on controversial initiatives will be even more difficult.

For example, Biden has vowed to protect and expand the Affordable Care Act (ACA) with a plan to insure more than 97% of Americans, at a cost of \$750b over 10 years, paid for in part with revenue from increased taxation of capital gains. Expanding the ACA and paying for the expansion with tax increases with a 50/50 or Republican-controlled Senate would be a very difficult task.

Republicans are likely to resist efforts to increase taxes in general and may be very wary of the potential negative impact of tax increases on the economy in particular. Moreover, moderate Democratic senators and House members may be equally wary.

Biden has also said another key initiative of his presidency will be to revitalize America's middle class.

He says his Made in America package will create millions of middle-class jobs. He has [outlined plans](#) to invest a combined \$700b in procurement and R&D, and \$2t in clean energy and infrastructure investment.

These plans could incentivize a return to more localized supply chains, the desirability of which was highlighted by COVID-19-related disruptions and shortages. Biden says he would pay for his infrastructure plan by "reversing the excesses of the Trump tax cuts for corporations; reducing incentives for tax havens, evasion, and outsourcing; ensuring corporations pay their fair share; closing other loopholes in our tax code that reward wealth, not work; and ending subsidies for fossil fuels."

Regarding discouraging off-shoring and encouraging on-shoring, Biden has proposed increasing the tax rate on profits earned by foreign subsidiaries of US firms by increasing the GILTI tax rate to 21% and applying the regime on a per-country basis. He has also [proposed](#) creating a Made in America tax credit to offset 10% of investments geared toward creating jobs in the United States and introducing a surtax on certain goods and services imported into the United States.



What might happen in a 50/50 Senate?

If Democrats win both Senate runoff races in Georgia, it would result in a 50-50 split in the Senate. Under Article 1, Section 3 of the Constitution, “The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.” So in the case of a tie in the Senate, Vice President Harris would get a vote to break the tie. Accordingly, Democrats could pass legislation so long as they get full support from their caucus. It must be borne in mind, though, that with the filibuster intact, legislation may not get to a substantive vote without Republican support.

However, while untested, this tie-breaking rule could apply to eliminating the filibuster for legislation since the vote would be on Senate precedent and not on a change to the Senate rules (rules changes cannot be passed with a simple majority). Moreover, it could also apply to making the District of Columbia and/or Puerto Rico states (Puerto Ricans voted on November 3, 2020, in favor of statehood, 52% in favor to 48% against), as well as other non-legislative issues. On a practical basis, such changes would be difficult as every Democratic Senator’s vote would be needed. As an alternative, Democrats could seek to use the budget reconciliation process to pass legislation, including tax legislation, and thereby bypass the filibuster.

In addition to legislative procedure, a number of process and workplace issues would need to be decided, including committee chairmanships (unlikely to have co-chairs but possible), committee ratios and office space.

The last time we had a 50-50 Senate split was in 2000, when George Bush took over the presidency from Bill Clinton. Democrats had the tie-breaking vote for 17

days from January 3, 2001 (when the new Senate was sworn in) until January 20, 2001 (the presidential inauguration). Republicans then had the tie-breaking vote, from January 20, 2001 until June 6, 2001, when Republican Senator Jim Jeffords from Vermont left the Republican party to become an Independent and caucus with the Democratic party. This switch resulted in a 51-49 control of the Senate by Democrats.

During the short time of the 50-50 split, Senate leaders from both parties entered into negotiations resulting in Republicans becoming chairs of the Senate committees and resulting in equal number of members on committees, equal budgets, and office space.

Significantly, President Bush’s signature tax cut bill, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), was passed during this time, in May 2001 (signed into law by President Bush on June 7, 2001). The Senate vote was 58-33 with 46 (of the 50) Republicans and 12 Democrats voting in favor of the bill. As can be seen from the name of the bill, the reconciliation process was used to pass it.

While in theory partisan issues could pass by a simple majority, with or without use of the reconciliation process, the focus may be on issues on which bipartisan agreement is possible:

- Infrastructure
- Virus response
- Buy American/onshoring initiatives
- Retirement and childcare incentives
- Expiring tax provisions, including some expiring Tax Cuts and Jobs Act provisions



Biden has said he would work to restore traditional international alliances and re-engage globally on issues such as climate change and trade, with input from labor unions and environmental organizations. In particular, Biden has said he will return the United States to the Paris Climate Change Agreement and has signaled he would return the United States to a more rules-based trade environment that opens markets to US goods and services.

“We need to be able to build the very best in the United States and sell the very best around the world,” Biden has [written](#). “That means taking down trade barriers that penalize Americans and resisting a dangerous global slide toward protectionism.”

On China in particular, Biden strikes a different tone from Trump’s, although it may be that his policy goals with respect to China would be similar. Biden was critical of the Trump Administration’s tariffs on China. But Biden has stopped short of saying he would repeal current tariffs or indicating how his administration would address such issues as intellectual property, state subsidies, and state-owned industries.

Observations

Tax, healthcare, immigration and climate policy are four areas where the incoming Biden Administration likely will diverge most significantly from the Trump Administration.

Focusing on tax and trade policy, the potential significant legislative changes to US tax rules and uncertainty regarding trade may cause many US-parented businesses with offshore operations to weigh whether to keep those operations offshore and risk higher taxes or bring them back to the United States, perhaps taking advantage of Biden’s planned

incentives for doing so, and keeping in mind changes to tariffs and other trade barriers. The likelihood and scope of any such changes will become clearer only after control of the Senate is decided.

Clearly, if the Senate remains in Republican control, the chance of significant tax legislative changes lowers significantly, and a Biden Administration may look to changes that can be made without Congress, such as through the regulatory process.

Companies must also consider potential non-US developments, including responses to fiscal concerns arising from pandemic relief and stimulus measures (e.g., tax increases to address deficits).

They must also monitor the Organisation for Economic Co-operation and Development (OECD) BEPS 2.0 project, which seeks to drive basic international tax principles toward more multilateral agreement, to develop global minimum taxes, and to create the framework critical to making the system work. Some of the changes being discussed would change the calculus with respect to the foreign tax cost of offshore operations.



Regarding US engagement in the OECD, historically the United States has been a very active participant in OECD tax discussions regardless of the party in the White House. And the changes Biden has proposed to the existing GILTI tax rules in the United States would more closely align those rules with the design the OECD is pursuing. Thus, one might expect a Biden Administration to continue to be supportive of that part of the project, perhaps even more so than the Trump Administration.

The other aspect of BEPS 2.0 concerns tax jurisdictional and profit allocation rules and encompasses digital services taxes. This issue has provided a rare recent instance of bipartisan agreement: Both parties have been opposed to digital services taxes and other tax measures that single out digital businesses. That's a strong signal that under President Biden, changes to tax jurisdictional and profit allocation rules that would target income from digital services would remain of real concern to the US government.

Regarding trade, Biden has stated he believes in "fair trade," and he likely will re-engage multilaterally and with allies. In developing his trade policy in Asia, Biden may look to the Trans-Pacific Partnership as a starting point, although that is very unclear at this point. Biden's goals with respect to China, intellectual property protections, and cybersecurity may be similar to Trump's, but the approach may be less confrontational.

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