November 11, 2020

CAPITOL TAX PARTNERS

2020 Post-Election Tax Outlook

Although all of the predictions in this document may not come to fruition due to the status of the COVID pandemic, the related state of the economy, and unforeseen occurrences (or "UFOs" as we at Capitol Tax Partners like to call them) in the next several months, we are confident that our forecast of potential outcomes will be at least as accurate as the polling ahead of the November 3 elections.

While no "blue wave" materialized as many pollsters and pundits predicted, Democrats won the top prize as former Vice President Joe Biden won the Presidency (subject to the outcome of recounts and lawsuits in certain battleground states), causing President Donald Trump to become the first incumbent President to lose an election in nearly 30 years. Meanwhile, Republicans appear to have the inside track to retain control of the Senate. This is dependent on the two Georgia races that are headed to a runoff on January 5 and the outcome of the Alaska race, which still has not been called. It presently appears that Democrats would have to win both of the Georgia runoffs to control the Senate. In addition to determining who controls the Senate, these runoffs could have a large influence on what is, or isn't, accomplished during the lame duck session. Republicans flipped several seats to close the gap in the House, but Democrats still retain control with Speaker Nancy Pelosi (D-CA) almost certain to remain at the helm. The House majority will be the smallest it has been in 20 years.

The relatively narrow majorities in both the House and Senate, regardless the outcome of the outstanding elections, means that lawmakers and the Administration will need to place an increased emphasis on finding a bipartisan compromise on issues they hope to move during the 117th Congress.

After a brief review of the COVID relief legislation passed earlier this year and the state of play before the election, we outline the considerations and likely effects of last week's election on potential tax legislation and regulations, both in the lame duck session and next year. Readers familiar with the 2020 legislative activity (or who just prefer to forget 2020 altogether) may wish to skip forward to page eight for the lame duck session outlook.

Table of Contents

Year in Review

2020 has been an unprecedented year with an impeachment (and subsequent Senate trial and acquittal) of President Trump, a worldwide pandemic resulting in a health crisis and a resulting economic shutdown, and widespread social unrest.

Beginning in March, Congressional efforts have primarily focused on addressing the COVID pandemic. Within seven weeks, Congress passed four pieces of COVID relief legislation representing over $3 trillion in emergency spending. Since May, Congress and the Administration have been unable to find bipartisan agreement on subsequent relief and recovery legislation.

COVID Relief Packages

The first package, the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, provided $8.3 billion of funding to federal agencies in part to help with vaccine and testing development, general preparedness and response, and securing medical supplies.[1] This package was passed as an initial emergency supplemental spending measure to deal with the initial impact of COVID in the United States.

After some areas of the country began shutting down to combat the spread of COVID, Congress passed the second bill, the Families First Coronavirus Relief Act, which provided free COVID testing to certain individuals, unemployment insurance relief to states, and increased funding for food stamps and other nutrition programs.[2] The bill also required public employers and certain small employers, generally those with less than 500 employees, to provide paid family and medical leave (to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19) and paid sick leave for their employees if they or a family member were exposed to or tested positive for COVID-19. To help offset this additional paid leave, Congress provided refundable tax credits to employers and self-employed individuals providing paid leave.

Less than two weeks after passing the Families First Coronavirus Relief Act, Congress passed the historic Coronavirus Aid, Relief, and Economic Security (CARES) Act.[3] Among the provisions included in the $2.2 trillion relief package were $1,200 economic impact payments to most Americans (also referred to as "stimulus checks"), enhanced unemployment insurance benefits, the creation of a Paycheck Protection Program (PPP) for small businesses, and lending facilities for large businesses and state and local governments.

Additionally, the CARES Act contained a number of tax provisions, including:

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[1] P.L. 116-123, Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020. H.R. 6074, March 6, 2020. The bill overwhelmingly passed both chambers: 415-2 in the House and 96-1 in the Senate.

[2] P.L. 116-127, Families First Coronavirus Relief Act. H.R. 6201, March 18, 2020. The bill passed 363-40 in the House and 90-8 in the Senate and had an estimated cost of $192 billion.

[3] P.L. 116-136, Coronavirus Aid, Relief, and Economic Security Act. H.R. 748, March 27, 2020. The bill passed the House 419-6 and the Senate 96-0.

- Deferral of the employer portion of payroll taxes through 2020, with 50 percent due at the end of 2021 and 50 percent due at the end of 2022;
- An employee retention tax credit for 50 percent of qualified wages – up to $10,000 per employee - paid by eligible employers (i.e., those who had business operations at least partially suspended or had a significant decline in gross receipts);
- Allowance of a five-year net operating loss (NOL) carryback of 100 percent of losses incurred in tax years beginning in 2018, 2019, and 2020;
- A delayed effective date of the TCJA excess business loss limitation rule under section 461(l) for non-corporate taxpayers to tax years beginning after December 31, 2020;
- Relief from the business interest expense limitation by increasing the interest limitation to 50 percent (rather than 30 percent) of adjusted taxable income (ATI) for tax years beginning in 2019 and 2020, and, for tax years beginning in 2020, allowing determination of the limitation by using 2019 ATI rather than 2020 ATI;
- Acceleration of corporate alternative minimum tax credits;
- The TCJA technical correction for qualified improvement property; and
- Increased charitable contribution limits for 2020.

Congress passed one final COVID relief bill in April, the Paycheck Protection Program and Health Care Enhancement Act (CARES 2.0), which provided $484 billion of additional funding to certain CARES-created programs, including hospital and testing funding and $321 billion in additional funding to the expiring and depleted PPP.[4]

Failed Negotiations

After passing these bipartisan relief bills in March and April, House Democrats began to work on an additional relief package. In May, the House passed the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act on a mostly partisan basis.[5] The HEROES Act was never considered by the Senate or supported by the Administration. The overall cost of the package was $3.4 trillion and included over $1 trillion in state and local support, extension of the CARES Act unemployment insurance, a $200 billion "Heroes fund" to provide hazard pay to certain front-line workers, expansion of the PPP program, and several hundred billion for health care funding.

The HEROES Act also contained an $883 billion tax title that included a second round of $1,200 stimulus checks to certain Americans, an enhanced child tax credit and earned income tax credit, and the elimination of the TCJA's state and local tax deduction cap for 2020 and 2021. The tax title also expanded and enhanced the employee retention tax credit, provided relief for multiemployer pension plans and single employer pension plans, a payroll tax credit for pandemic-related employee benefit expenses, and provided a refundable business interruption credit for self-employed individuals experiencing a significant reduction in their income.

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[4] P.L. 116-139, Paycheck Protection Program and Health Care Enhancement Act. H.R. 266, April 24, 2020.
[5] H.R. 6800, Health Economic Recovery Omnibus Emergency Solutions Act. The legislation passed the House on May 15, 2020 by a vote of 208-199, with only one Republican voting in support of the bill.

The HEROES Act also curtailed certain business tax benefits included in the CARES Act. For example, it limited the NOL carryback relief provided by the CARES Act to years beginning on or after January 1, 2018, intended to prevent corporations from using losses in a 21-percent corporate tax rate year to offset income from a 35-percent corporate tax rate year. The NOL provision also prohibited businesses with "excessive" executive compensation or "excessive" stock buybacks and dividends from carrying back losses as provided by the CARES Act. The HEROES Act also reinstated the TCJA effective date for the business loss limitation for non-corporate taxpayers. Changing the CARES Act NOL and business loss provisions became a major talking point for certain Congressional Democrats after its passage.[6]

"In the CARES Act, the Republicans – stealthily, I might add – put in $150 billion for the net operating losses, benefiting a small percentage of the American people, the wealthiest in our country," Speaker Pelosi said on October 1.[7] To make their case that the CARES Act business loss limitation provision benefited the wealthiest Americans, Congressional Democrats released an April 9th report from the staff of the Joint Committee on Taxation showing that the largest decreases in tax liability will go toward taxpayers earning more than $1 million.[8]

Republicans, by contrast, supported maintaining the NOL and business loss limitation provisions as passed in the CARES Act, arguing they provide needed liquidity and relief to businesses impacted by the pandemic and government-imposed shutdowns. Further, Congressional Republicans noted that the NOL provisions were generally part of the bipartisan tax provisions included in prior disaster and economic recovery legislation and included in the CARES Act that passed the Senate unanimously.

Although Congressional Republicans and the Administration rejected the HEROES Act as too large and a "left-wing wish list," work began to see if the two sides could find common ground on a relief package, as the CARES Act unemployment provision was set to lapse at the end of July.[9] Negotiations occurred primarily between Speaker Pelosi, Treasury Secretary Mnuchin, and newly-appointed White House Chief of Staff Mark Meadows.

Senate Republicans prioritized providing liability protections for hospitals, schools, and businesses, as well as providing additional funding to reopening schools. Generally speaking, Senate Republicans were not keen to passing a package close to the size of the HEROES Act and specifically wanted to reduce the amount of state and local relief and impose restrictions on use of the relief.

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[6] Biden also proposed repealing the non-corporate business loss provision from the CARES Act to pay for his student loan debt relief proposal. *See* Biden, "Joe Biden Outlines New Steps to Ease Economic Burden on Working People," April 9, 2020. https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322.

[7] Transcript of Pelosi Interview on Bloomberg's Balance of Power with David Westin, October 1, 2020. https://www.speaker.gov/newsroom/10120.

[8] https://www.whitehouse.senate.gov/imo/media/doc/116-0849.pdf.

[9] "The Democratic leaders want the entirety of their massive far-left wish list." McConnell floor statement, August 4, 2020. https://www.republicanleader.senate.gov/newsroom/remarks/dems-wont-budge-from-far-left-wish-list-to-get-covid-19-relief-to-americans.

On July 27, Republicans unveiled a $1 trillion package entitled the Health, Economic Assistance, Liability Protection and Schools (HEALS) Act that they described as “targeted relief.” In contrast, Senate Minority Leader Chuck Schumer (D-NY) described the HEALS Act as “emaciated.” The HEALS Act contained a tax title, including enhancements to the employee retention tax credit, creation of a new targeted group—COVID-19 unemployment recipients—that would be eligible for an enhanced work opportunity tax credit (WOTC), a new safe and healthy workplace tax credit, as well as a state tax certainty proposal providing (i) relief for mobile workers who work in a nonresident state for less than 30 days in the calendar year (similar to prior S. 3995);[10] and (ii) temporary state tax relief maintaining the status quo regarding the tax treatment of employees working remotely during the COVID-19 pandemic. After the Senate stayed in session for an additional week in August to provide extra time to reach a deal, the Members departed without agreeing to any additional relief legislation.

On August 8, President Trump signed an executive order allowing employers to defer collecting and paying their employees’ share of employment taxes for the remainder of 2020.[11] The payroll tax relief was intended to relieve pressure for passing legislation and boost the economy by increasing the paychecks for workers earning less than $4,000 every two weeks. Because deferred payroll taxes would have to be paid in 2021 and it was not clear who would be liable for the repayment, however, most businesses elected not to defer employee payroll taxes.

Upon returning to Washington after the August recess, negotiations continued but again stalled. To try to advance negotiations, House Democrats voted on a pared-down version of the HEROES Act, intended to meet Republicans halfway from their initial offer. That proposal cost $2.2 trillion, a reduction from the $3.4 trillion price tag of the first bill. The second HEROES Act passed the House on October 1 along party lines.[12]

The second HEROES Act tax title was significantly smaller than the first version, reducing revenues by $308 billion compared with $883 billion in the first HEROES Act, in part because it reduced benefits to individuals by reducing stimulus payments to dependents, decreasing the magnitude of the child tax credit expansion, and limiting the SALT cap relief to 2020 rather than 2020 and 2021. Additionally, several HEROES Act provisions were removed in the second version, including the business interruption credit for self-employed individuals and the payroll tax credit for pandemic-related employee benefit expenses. The provisions related to limiting NOL carrybacks and non-corporate business losses remained.

Later in October the Senate voted on a “skinny” package worth around $500 billion, down from the HEALS Act’s estimated cost of about $1 trillion. The reduced-size package included additional PPP funding, liability protections, and additional unemployment insurance. A procedural motion to move forward that package, failed largely along party lines to meet the 60-vote threshold to advance the bill.

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[10] For employees working in another state during 2020 as a result of the COVID pandemic, 30 days is replaced with 90 days.

[11] Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster, August 8, 2020. https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/. See also Notice 2020-65, August 28, 2020, which provides rules implementing the payroll tax deferral memorandum.

[12] H.R. 8406, The Heroes Act.

Even after that Senate vote, negotiations between Secretary Mnuchin and Speaker Pelosi continued; in some instances, those negotiations filtered down to the committee chairs. In the tax realm, on October 20th, we understand that Ways and Means Democrats sent to Congressional Republican tax-writing committees a list of business tax provisions for possible inclusion in COVID-relief legislation. That list included:

- Expansions to the ERTC (included in second HEROES Act);
- WOTC proposal (included in HEALS Act with certain enhancements);
- Credit for COVID-related fixed costs (included in second HEROES Act);
- Safe and healthy workplace tax credit (included in HEALS Act);
- The temporary remote workers state tax relief provision related to COVID (included in the HEALS Act, but not the mobile workers provision);
- PPP deductibility (included in second HEROES Act);
- FSA flexibility provisions (included in HEALS Act); and
- Reserving discussion on the NOL and business loss provisions

Negotiations ultimately hit a standstill at the end of the month.[13] In response to a letter from Speaker Pelosi expressing frustration that she had not received a counteroffer from the Administration on a COVID relief package, Secretary Mnuchin published his own letter saying that he had been engaged in good faith negotiations, including having offered a detailed compromise on the employee retention tax credit.[14]

[13] In the early hours of October 29, Politico released a letter from Pelosi to Mnuchin; in addition to expressing her frustration regarding the lack of a counteroffer, Pelosi complained that she had not been able to negotiate with Senate Committee Chairs, noting that a deal will only get done after the election if the President "can get Mitch McConnell to take his hand off the pause button and get Senate Republican Chairmen moving toward agreement with their House counterparts." Excerpt from October 29, 2020 letter from Pelosi to Mnuchin. https://www.speaker.gov/newsroom/102920. In the letter Pelosi noted that she had not received a response from Mnuchin on whether the Administration would agree to an enhanced EITC or CTC.
[14] Treasury Secretary Steven Mnuchin tweet, October 29, 2020, 4:11 PM.

Lame Duck Outlook

Although the Presidential race has not been conceded, the majority for the next Senate remains uncertain, some House seats are still in play, and much political goodwill has been exhausted, Congress must come back to Washington during the lame duck session to address the December 11 expiration of government funding and other provisions and the possibility of a COVID relief package. A number of other items expire at year-end that could also be considered, as described below. The Senate returned to session this week and the House will return on November 16.

The prospects for a COVID relief package during the lame duck session are tricky, as the politics of a deal are a bit like playing a game of three-dimensional chess. In particular, neither party will want to give the other a victory they can tout heading into the two Georgia Senate runoffs, with majority control hanging in the balance. For that reason alone, it is difficult to see how a deal can be reached that is in both parties' interests. Moreover, while President Trump tweeted on October 30 that he wants a "tremendous stimulus package immediately after the election," it is not clear that he still wants to negotiate and sign a COVID relief deal after (presumably) losing the election.[15] The continued dispute over the results of the Presidential election also heightens tensions and hampers negotiations between the two sides.

On the optimistic side, however, despite failing to strike an agreement between May and the election, both sides of the Hill have voiced interest in renewing discussions during the lame duck session. For example, the day after the election, Majority Leader McConnell said that he is hopeful that they can reach an agreement on a COVID relief package during the lame duck session, stating, "we need another rescue package."[16] "Hopefully the partisan passions that prevented us from doing another rescue package will subside with the election and I think we need to do it and I think we need to do it before the end of the year," he added. Majority Leader McConnell also said that government funding is another top priority for the Senate during the lame duck session.

When responding to a November 4 question about state and local funding, which was a significant point of disagreement during the previous negotiations, he said that Republicans may need to make concessions.[17] On November 6, however, following a positive jobs report Majority Leader McConnell reiterated his position that a targeted COVID relief bill is appropriate. "Our economy is really moving to get back on its feet. That I think clearly ought to affect what size of any rescue package we additionally do," McConnell said.[18] He added, "Something smaller, rather than throwing another $3 trillion at this issue, is more appropriate."

Speaker Pelosi on October 29 said that she is interested in legislating during the lame duck session because "we want to have as clean a slate as possible going into January," adding, "we have plenty of work to do in the Joe Biden administration." In response to Majority Leader McConnell's post-election jobs report comment about a targeted bill, however, Speaker Pelosi

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[15] https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-103020/.
[16] Politico, Marianne LeVine, "McConnell calls for coronavirus package before end of the year," November 4, 2020.
[17] Politico, Marianne LeVine, November 4, 2020.
[18] Yahoo, Denitsa Tsekova, "McConnell says big stimulus bill not needed after better-than-expected jobs report," November 6, 2020.

said, "no, it doesn't appeal to me at all because they still have not agreed to crush the virus."[19] Thus, despite an expressed mutual interest between Congressional Democrats and Republicans to negotiate a deal, it is not yet clear the two sides are willing to compromise on the size of an overall package. Majority Leader McConnell said on November 10 that the inability to agree on a topline number is still an issue for reaching a bipartisan agreement.

If they can agree on an overall size, however, there are several areas of agreement between the two sides on tax issues that could become part of a relief package, including an extension and modification of the employee retention tax credit and clarification that expenses related to forgiven PPP loans are deductible. It is also possible that extended unemployment insurance, another round of stimulus checks, and additional small business relief will be part of any COVID relief during the lame duck session. Remote worker state and local tax relief could also be included. Several unemployment enhancements included in the CARES Act expire at the end of the year and could be a catalyst for reaching a deal.

It is unclear, however, whether agreement could be reached on other provisions important to one side or the other, such as employer liability protection or expanded CTC and EITC, with the limited time available for negotiations during the lame duck session. The former is important to Majority Leader McConnell; the latter remains a priority for Speaker Pelosi and House Ways and Means Committee Chairman Richard Neal (D-MA), as well as President-elect Biden.[20]

Rather than a large relief package, it is possible that several discrete, smaller measures could be attached to a government-funding bill. A smaller package could include some of the non-controversial tax measures described above.

Finally, it is worth noting that on October 30 House Republicans, including Minority Leader Kevin McCarthy (R-CA) and Ways and Means Ranking Member Kevin Brady (R-TX) introduced the "Commitment to Defeat the Virus and Keep America Healthy Act," which according to its sponsors would provide needed funding for testing and vaccine distribution, incentivize production of critical equipment and medicines in the U.S., and provide relief to families impacted by the shutdowns.[21] The tax title contains about 15 provisions, some of which include:

- Domestic medical and drug manufacturing credit that would lower the rate to 10.5 percent on income from domestic manufacturing and sales of pharmaceutical ingredients and medical countermeasures;
- Qualified advanced medical manufacturing equipment credit that would provide up to a 30 percent tax credit for new investment in the U.S. in advanced manufacturing equipment used to manufacture medicines and medical devices;
- Enhanced research and development credit of 14 percent (in addition to the current R&D credit) for qualified research costs associated with the development of countermeasures on top of the normal R&D credit that would apply to those same costs;

[19] Reuters, David Morgan, "McConnell: Signs of economic recovery point to smaller COVID-19 stimulus," November 6, 2020.
[20] Bloomberg BNA, Kaustuv Basu, "Ways and Means' Neal Eyes Infrastructure, Aid to Families," November 5, 2020.
[21] H.R. 14, "Commitment to Defeat the Virus and Keep America Healthy Act." Introduced October 30, 2020.

- Doubling the employee exclusion of employer-paid dependent care assistance for 2020 and 2021; and
- Healthy workplace tax credit (substantially similar to the proposal included in the HEALS Act) that would provide a refundable credit against payroll taxes for 50 percent of the costs incurred by the business for COVID-19 testing, personal protective equipment, cleaning and disinfecting, and reconfiguring workspaces, limited to $1,000 per employee for a business's first 500 employees, $750 per employee for the next 500, and $500 for each employee thereafter.

It is possible that any one of these priorities could be included in a COVID relief negotiation and ultimately included in the final package.

Tax Extenders

There are also about 30 tax provisions expiring at the end of 2020 (the "extenders"). While containing mostly non-controversial items, these extenders are not likely to be included in any package that does not also contain COVID relief, as the extenders benefit mostly businesses and generally are not tailored to the current health and economic crisis. If the extenders are not addressed during the lame duck, they could be retroactively extended next year; retroactive extensions have been common in the past.

Efforts are underway, however, to make the case that these provisions should be extended during the lame duck session. For example, advocates for the craft beverage modernization provision argue that a retroactive extension would be administratively difficult because the provision relates to an excise tax rather than an income tax. Also, proponents for the controlled foreign corporation look-through rule are actively seeking extension before year-end to provide taxpayers with the certainty needed to redeploy capital around the globe as their business needs may dictate.

Other extenders that have important constituencies include the new markets tax credit, WOTC, production tax credits for wind energy production, investment tax credits for solar energy investment, and cost-recovery measures dealing with such things as expensing of qualified film and television and live theatrical productions, and expensing of advanced mine safety equipment.[22] A group of nearly 50 trade associations sent a letter to Congressional leadership urging an uninterrupted extension of all provisions expiring at the end of 2020 to provide certainty during the economic crisis.

Further, President-elect Biden and certain Congressional Democrats may prefer to address the extenders during the lame duck session so it is not an item necessary to pass in the new Congress and Administration. Speaker Pelosi said it is her preference to clear the decks heading into the new Congress.

[22] See the attached Capitol Tax Partners expiring provisions chart. *See also* the Joint Committee on Taxation general tax extenders list, "List of expiring federal tax provisions, 2020-2029." January 16, 2020, JCX-1-20, https://www.jct.gov/publications/2020/jcx-1-20.

2021 Preliminary Outlook

A variety of factors will dictate the agenda early in the 117th Congress. First, the state of the pandemic and economy will determine the degree to which there is political pressure to provide additional relief. Second, the agenda will be impacted by what was completed during the lame duck session, including if a COVID relief deal, tax extenders, and whether a full appropriations bill or a short-term CR were passed. Third, as listed below, there are several action forcing dates during 2021, including a possible CR, debt limit caps reduction, and Highway Trust Fund spending expiration. Finally, certain TCJA-related extenders may need to be addressed.

Assuming the Senate remains in Republican control, the most ambitious Democratic priorities, such as sweeping government reform, Affordable Care Act modernization, and expansive green energy reform, likely will not be possible.[23] Instead, legislative efforts will likely be centered on stimulus (possibly including infrastructure), government funding, and other bipartisan priorities, such as infrastructure, encouraging retirement savings, protecting the ACA, and lowering healthcare costs.

Note, however, that as of today, Republican control of the Senate hinges on the ability of a Republican candidate to retain the seat in Alaska and win at least one of the Georgia run-off elections on January 5. If Democrats defeat Republicans in both of those races, then they would have full control of Washington and could be somewhat more aggressive in advancing their primary legislative priorities, as described above. Although the Democrats would not have 60 Senators to overcome the legislative filibuster, they could possibly move legislation through a budget reconciliation vehicle, which only requires a simple majority to pass in the Senate,[24] though it would be subject to significant procedural limitations.[25] Another option would be to waive the legislative filibuster, as was done for Executive and Judicial Branch nominees.

Neither of these options is easy, even with control of both chambers. Reaching an agreement on reconciliation will be difficult given the narrow margins in both Houses, and the often-differing agendas of the House and Senate Democrats and progressive and moderate members. Waiver of the filibuster may be even harder (although the House is not involved), because it is a more drastic step and any "institutionalist" Senator can decide it is improper. Sen. Joe Manchin's (D-

[23] See Pelosi comments on National Public Radio's "All Things Considered," November 2, 2020. "What is at the top of the list when we win, we will lower the cost of health care by lowering the cost of prescription drugs, saving the pre-existing condition benefit, etc. We will increase paychecks by building infrastructure of America in a green way, And we will have cleaner government by passing H.R. 1, legislation to reduce the role of big, dark, special-interest money."

[24] Because of this fact and other procedural protections, both parties have used reconciliation to pass important measures recently, including the Bush tax cuts in 2001 and 2003, significant portions of the Affordable Care Act, and the Tax Cuts and Jobs Act of 2017.

[25] As an initial matter, Congress must pass a budget resolution containing "reconciliation instructions" telling congressional committees how much they can change revenue and mandatory spending. Also, there are procedural rules (e.g., the "Byrd rule") associated with reconciliation that could be difficult to meet or might impact the design of tax legislation. Generally, any member can raise a point of order if such rules are violated, and sixty votes generally are needed to overcome a point of order.

WV) recent comments highlighted the difficulty in waiving Senate rules by saying that he would not vote in favor of waiving the filibuster or expanding the Supreme Court.[26]

COVID-specific proposals are likely to continue to be part of the legislative agenda, to the extent they are not addressed in earlier legislation, such as deductibility of PPP loans, enhanced retention and rehiring tax credits, and credits to businesses for making PPE investments. There was also relief provided in the CARES Act applicable to only 2020 that may be extended, such as an expanded business interest expense limitation and further payroll tax relief. Specific relief for those industries most adversely affected by the pandemic could also be considered. Finally, Chairman Neal has suggested that aid to families through enhancements to the CTC and EITC will remain one of the House Democrats' top priorities, although it likely will continue to face resistance from Republican leadership.

To the extent the economy needs a stimulus package, infrastructure could come into play. Democratic Members have been suggesting that infrastructure, combined with green energy investment, could provide a significant economic boost and create jobs.[27] Chairman Neal's spokesperson recently said that an infrastructure bill is a top priority and "will create good jobs for folks who are out of work and re-energize the economy." Infrastructure advocates also will highlight that the historically low interest rates make it appealing to finance these projects with debt. Further, as states have paused infrastructure projects due to revenue reductions attributable to the shutdowns, infrastructure could be a way to drive money to the states to complete those projects.

If an infrastructure package is pursued, we expect it could contain a robust tax title, including provisions such as direct-pay bonds, credits for sustainable building and construction, expansion of green energy credits and monetization proposals, modifications to bond financing rules, and expansion of private activity bonds.

During the campaign, President-elect Biden released a $2 trillion "Build Back Better" plan to revamp American infrastructure and energy to both curb climate change and spur economic growth over a four-year period. His priorities include: build a modern infrastructure; position the U.S. auto industry to win the 21st Century with technology invented in America; provide American cities with low emissions public transportation; achieve a carbon emission-free power sector by 2035; make dramatic investments to upgrade energy efficiency in buildings and weatherize 2 million homes; build 1.5 million new affordable sustainable homes; invest in clean energy (including battery storage, negative emissions technologies, the next generation of building materials, renewable hydrogen, and advanced nuclear); advance sustainable agriculture and conservation; and secure environmental justice and equitable economy opportunity.

House Democrats passed a $1.5 trillion comprehensive infrastructure package earlier this year, including not only spending on roads, bridges, airports and transit, but also investments in

[26] The Hill, Jordain Carney, "Manchin shoots down chance that Senate Democrats nix filibuster, expand court," November 9.
[27] The Associated Press, Lisa Mascaro, "Pelosi wants 'big' health care, infrastructure push in 2021." October 29, 2020.

schools, housing, broadband access, green energy and child care. Many of those proposals would likely be the starting point of their negotiations.[28]

In addition to stimulus and leftover items from the lame duck session, Republicans will remain committed to ensuring that the TCJA continues to be implemented and functions as intended. This means that they could push for technical corrections, in addition to their continued advocacy for extending key provisions from the TCJA, such as continuing to allow taxpayers to add back depreciation and amortization deductions for purposes of determining the business interest expense limitation and to expense (rather than amortize) research and experimentation expenses.

Sen. Rob Portman (R-OH) said on October 30 at an event sponsored by the Tax Policy Center that he thinks there will be a focus on bipartisan issues in 2021. "I think it's much better to have some bipartisan buy-in, not just on tax policy but on any major policy," he said, because "over time, there's a lot more certainty and predictability around that, which actually increases the impact of the tax provisions." He suggested that there is bipartisan interest in restoring essential health product production into the United States.

Sen. Portman also predicted that the House and Senate could seek to move forward on retirement security legislation in the new Congress. He noted that "there is a lot of overlap" between the retirement security proposal he offered with Sen. Ben Cardin (D-MD) and the "Securing a Strong Retirement Act of 2020" introduced by Chairman Neal and Ranking Member Brady on October 27. The latter, commonly referred to as "Secure 2.0"[29] includes an amalgam of items, intended to encourage "more workers to begin saving earlier – and saving more – for their futures." The bill would:

- Promote savings earlier for retirement by enrolling employees automatically in their company's 401(k) plan, when a new plan is created;
- Create a new financial incentive for small businesses to offer retirement plans;
- Increase and modernize the existing federal tax credit for contributions to a retirement plan or IRA (the Saver's Credit);
- Expand retirement savings options for non-profit employees by allowing groups of non-profits to join together to offer retirement plans to their employees;
- Offer individuals 60 and older more flexibility to set aside savings as they approach retirement;
- Allow individuals to save for retirement longer by increasing the required minimum distribution age to 75;

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[28] H.R. 2, "The Moving Forward Act," Passed the House on July 1, 2020 by a 233-188 margin, with two Democrats opposing the legislation and three Republicans supporting it. The fact sheet can be found at: https://transportation.house.gov/download/fact-sheet-moving-forward-act#:~:text=H.R.,access%2C%20and%20so%20much%20more.&text=It's%20about%20investing%20in%20infrastructure,safer%2C%20and%20made%20to%20last

[29] The SECURE Act was passed as part of the federal spending bill for fiscal year 2020, signed into law by President Trump on December 20. It included a variety of defined contribution plan reforms designed to broaden access for employees of small businesses while also making it easier for plan sponsors to include annuity options within those plans.

- Allow individuals to pay down a student loan instead of contributing to a 401(k) plan and still receive an employer match in their retirement plan;
- Make it easier for military spouses who change jobs frequently to save for retirement;
- Allow individuals more flexibility to make gifts to charity through their IRAs;
- Allow taxpayers to avoid harsh penalties for inadvertent errors managing an IRA that can lead to a loss of retirement savings;
- Several changes regarding the use of annuities in retirement plans;
- Protect retirees who unknowingly receive retirement plan overpayments; and
- Make it easier for employees to find lost retirement accounts by creating a national online database of lost accounts.

Finally, the issue of how to stabilize underfunded multiemployer plans remains unresolved and will remain an important issue for Congressional tax-writers next year. In the HEROES Act, the House Democrats attempted to narrow the gap between them and Senate Republicans by modifying the approach they had previously taken. Instead of relying on Treasury loans as in the Butch Lewis Act, the revised proposal would allow PBGC to "partition" certain underfunded portions of certain plans, known as orphan liabilities. Partitioning these liabilities is similar to the Senate Republicans' approach in the Multiemployer Pension Recapitalization and Reform Plan (MPRRP) released by Senate Finance Committee Chairman Charles Grassley (R-IA) and Senate Health, Education, Labor and Pensions Committee Chairman Lamar Alexander (R-TN) late last year. However, the Democrats would still rely solely on taxpayer funding and would not increase PBGC premiums. Thus, while this appears to be the new starting point for any negotiations, significant differences still need to be resolved.

Biden Administration

Campaign Proposals

As described above, the ambition of President-elect Biden's tax agenda likely hinges on the results of the Georgia runoff elections and control of the Senate. His tax agenda will also be affected by a number of other important factors next year, such as the state of the virus and the economy when he takes over, what items from this year remain undone, his desire to push other important non-tax priorities (e.g., health care, immigration, etc.), and who the personnel are named to key positions, such as Treasury Secretary, National Economic Council Director, and White House Chief of Staff.

During the campaign, Biden has proposed rolling back many of the TCJA provisions, as well as several other revenue raisers that would significantly raise taxes on businesses.[30] The Tax Policy Center estimated that Biden's complete tax plan would increase revenues by $2.1 trillion, with most of those increases impacting businesses and the top one percent of individuals.[31]

Throughout the campaign, Biden remained committed to ensuring that lower and middle-income families do not pay more tax. "Under my tax plan, no one making under $400,000 will see their taxes go up. But it's time large corporations and the wealthiest Americans pay their fair share."[32] Biden faced constant criticism in his campaign from Republicans, including President Trump, for raising taxes by trillions of dollars.

Senate Republicans are likely to oppose any efforts that undermine their 2017 signature legislative achievement. Thus, if Republicans retain control of the Senate, it is likely to inhibit Biden's ability to push elements of his campaign agenda, particularly items affecting the TCJA. Additionally, it is important to note that Biden's tax proposals were not intended to be passed in a vacuum, but rather as a means to raise revenue for other Democratic priority items, such as expanding access to healthcare, affordable housing reform, or student loan debt relief. If such packages attract bipartisan support, this may allow some of these revenue offsets to be included in some form.

Some of Biden's proposals impacting corporations include raising the corporate tax rate to 28 percent, imposing a 15 percent minimum tax on global book income for companies with net income of more than $100 million, increasing the effective tax rate on global intangible low-taxed income (GILTI) to 21 percent, and imposing a bank tax on large financial institutions.[33]

For individuals, Biden proposed restoring the top individual rate to pre-TCJA levels for taxpayers earning more than $400,000, phasing out the passthrough business deduction that was enacted in the TCJA for taxpayers earning more than $400,000, capping itemized deductions at

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[30] For a complete list of the Biden campaign's tax proposals, see the attached chart prepared by Capitol Tax Partners.
[31] https://www.taxpolicycenter.org/publications/updated-analysis-former-vice-president-bidens-tax-proposals. November 6, 2020.
[32] Vice President Joe Biden tweet, November 1, 2020, 8:10 PM.
[33] Note that Biden's GILTI proposal would also apply it on a country-by-country basis and eliminate the exemption for qualified business asset investment.

28 percent, and taxing capital gains as ordinary income for taxpayers with more than $1 million in income. He also proposed modifying retirement incentives to equalize the benefits across income brackets, expanding the child tax credit and EITC, and providing credits for taxpayers providing care for family members.

Biden, Digital Taxes, and the OECD Process

An incoming Biden Administration will be faced with the ongoing tax challenges arising from the digital economy on both the trade and tax fronts. In response to digital service taxes (DSTs) imposed (or planned to be imposed) by several countries, both the Trump Administration and Congressional bipartisan leaders have voiced strong opposition that these taxes are inappropriate and discriminatory. The Office of the United States Trade Representative (USTR) launched section 301 investigations first of the French DST (installments of which have been suspended until December 2020), and subsequently, of the DSTs adopted or proposed by Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom. On July 10, 2020, USTR announced tariffs on French imports following its investigation of the French DST, but the tariffs were suspended for 180 days (January 6, 2021 is the end of the 180-day suspension). USTR must conclude the investigations and make determinations with respect to the subsequent DSTs by June 2, 2021.

On October 12, 2020, the OECD released Pillar 1 and Pillar 2 Blueprints with respect to its Base Erosion and Profit Shifting process. The Blueprints were endorsed by the G20 Finance Ministers in October as a basis for continued negotiation with a view of reaching political consensus by mid-2021. The OECD will hold a public consultation on the Blueprints in January 2021, with comments due December 14, 2020. The US position in the negotiations has centered around (1) not ring-fencing the digital economy, (2) adopting Pillar 1 on a “safe harbor” basis, and (3) treating GILTI as a deemed compliant income inclusion rule under Pillar 2.

The Biden Administration will need to determine whether to continue with USTR’s section 301 tariffs and investigations, whether to continue engaging in the OECD process and, assuming they do, whether and how to alter US negotiating positions. They will also need to keep Congress apprised and determine how any potential agreement will factor into the development of potential Congressional action in legislative and treaty contexts.

Important Dates

The following represents several important upcoming dates that may impact the tax legislative calendar over the next several years:

November 9, 2020	Senate reconvenes
November 16, 2020	House reconvenes
November 18-19, 2020	House Democratic leadership elections
December 11, 2020	FY2021 continuing resolution expires, TANF funding expires, healthcare extenders expire
December 31, 2020	Several tax provisions expire,[34] CARES Act unemployment provisions expire
January 1, 2021	Payroll tax repayment begins under President Trump August 8 executive order (penalties begin to accrue on May 1, 2020)
January 3, 2021	Beginning of the 117th Congress
January 5, 2021	Georgia Senate Election Run-off
January 20, 2021	Inauguration Day
July 31, 2021	Debt limit extension expires
September 30, 2021	Highway Trust Fund spending authorization expires
December 31, 2021	TCJA expiring tax provisions[35]
December 31, 2022	Additional TCJA expiring tax provisions[36]
December 31, 2025	Additional TCJA expiring tax provisions[37]

[34] See attached chart for specific expiring provisions.
[35] See attached chart for specific expiring provisions.
[36] See attached chart for specific expiring provisions.
[37] See attached chart for specific expiring provisions.

Senate Finance Committee Leadership and Member Changes

The Senate Finance Committee will have a new Chair during the 117th Congress because Sen. Grassley will hit his six-year limit as Chairman at the end of this Congress.[38] Sen. Mike Crapo (R-ID), current Banking Committee Chairman, is widely expected to replace Grassley as the Republican leader of the Finance Committee. Sen. Ron Wyden (D-OR) is expected to remain the top Democratic Senator on the Finance Committee. Either Crapo or Wyden will become Chairman depending on which party controls the Senate.

Two Finance Committee members will be retiring at the end of this Congress: Sens. Pat Roberts (R-KS) and Michael Enzi (R-WY). With those two retirements, we expect new members to be on the committee next Congress. The five Finance Committee members who were up for reelection in this cycle all won their bids for re-election: Sens. Bill Cassidy (R-LA), John Cornyn (R-TX), Steve Daines (R-MT), Ben Sasse (R-NE) and Mark Warner (D-VA).

At this point it is unclear what the Finance Committee ratio of majority-to-minority members will be until the January runoffs are concluded.

Sen. Mike Crapo (R-ID)

If Republicans retain the majority, Sen. Mike Crapo (R-ID) is expected to become the chairman of the Finance Committee. During the 116th Congress, Crapo has been serving as the Banking Committee Chair, and in that role he played an integral part in the development and oversight of coronavirus relief legislation. He is also Chief Deputy Whip and a member of the Budget Committee, Judiciary Committee, and Joint Committee on Taxation.

He said during a September 24, 2020 Banking Committee hearing that he would support moving forward on individual elements of a coronavirus relief package while lawmakers continue to work on a broader agreement. He said, "Frankly, I believe that there are many items that we have already reached agreement on, or which we could reach agreement on very rapidly if we had the willingness to simply take them up and do them individually." He said, "There is a significant amount of good solid relief that we can put forward rapidly if we can just get agreement to move forward to do what we can do and continue working on putting the rest of that package together."

Sen. Crapo is a strong supporter of the TCJA and had a long history of advocating for tax reform in the years leading up to passage of the Tax Cuts and Jobs Act. During 2010, Sen. Crapo was a member of President Barack Obama's National Commission on Fiscal Responsibility and Reform, which developed a proposal to achieve a $4 trillion deficit reduction through 2020. The "Simpson-Bowles" commission report called for a series of tax changes, including an across-the-board tax rate cut and elimination of several tax expenditures. In 2011, Sen. Crapo was part of a bipartisan group of senators, dubbed the "Gang of Six," that sought to reach an agreement on tax reform and spending reductions. The Gang of Six plan called for a combination of spending reductions and tax reforms that would seek to reduce the deficit by $4 trillion over 10 years. Tax

[38] Under Senate GOP rules, Senators are only allowed to serve as Committee Chairs for six years. Grassley served as Finance Committee Chairman for part of 2001, from 2003 through 2006, and from 2019 through 2020.

reforms called for under the plan included a lowering of personal and corporate tax rates, elimination of the Alternative Minimum Tax, and elimination of many deductions and tax breaks.

Sen. Crapo introduced three tax bills during the 116th Congress:

- The Building Rail Access for Customer and the Economy Act of 2019 (S. 407), or the BRACE Act, which would permanently extend the railroad maintenance tax credit – also known as the short-line railroad credit;
- The Hearing Protection Act (S. 817), which would remove silencers from the definition of firearms and therefore exclude their purchase from the firearm excise tax among other provisions; and
- The Veterinary Medicine Loan Repayment Program Enhancement Act (S. 1163), which would exclude from gross income assistance provided to participants in certain veterinary student loan repayment or forgiveness programs.

Sen. Ron Wyden (D-OR)

If Democrats win the majority, Ranking Member Wyden is in line to become Finance Committee Chair. He previously served as Chair for part of 2014, when Democrats last held the Senate majority. If the Republicans control the Senate, he will remain Ranking Member.

Sen. Wyden has expressed an interest in tackling a wide range of issues if he becomes Finance Chairman, including:

- Coronavirus relief legislation that includes a stimulus/infrastructure component.
- Tax extenders, if not addressed in lame duck.
- Health care legislation.
- Infrastructure legislation. Potential components of such a package could include a technology neutral green energy credit and reforms to the low-income housing tax credit and the New Markets Tax Credit.
- Retirement savings. Such a bill is expected to include bipartisan input from Senators, including Sens. Cardin and Portman.
- International tax issues. This could include a review of proposals and regulations related to the TCJA that he views as incentivizing businesses to leave the U.S.
- Opportunity Zones. He is expected to seek a bipartisan agreement on improvements to the program.

Ranking Member Wyden also is expected to release legislative text of his mark-to-market proposal early in 2021.[39]

Beyond the priorities listed above, the following bills introduced by Ranking Member Wyden during the 116th Congress could indicate his tax priorities in the new Congress if they regain control of the Senate:

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[39] See attached Capitol Tax Partners summary.

- Save America's Main Street Act (S. 3549), which would provide advance tax refunds to small businesses.
- Blocking New Corporate Tax Giveaways Act (S. 3280), which would clarify that high-taxed amounts are excluded from tested income for purposes of determining global intangible low-taxed income (GILTI) only if such amounts would be foreign base company income or insurance income.
- Clean Energy for America Act (S. 1288), which would provide tax incentives for increased investment in clean energy.
- 2020 Disasters Tax Relief Act (S. 2461), which would provide tax relief to the individuals, families and small businesses in Presidentially-declared disaster areas, including those impacted by the Iowa derecho, the wildfires in California and Oregon, and Hurricanes Laura and Isaias.
- Opportunity Zone Reporting and Reform Act (S. 2787), which would require reporting for qualified opportunity funds and make modifications to opportunity zones.
- Ending the Carried Interest Loophole Act (S. 1639), which would treat carried interest as ordinary income.
- Save Affordable Housing Act of 2019 (S. 1956), which contains several provisions to increase the value of the low-income housing tax credit and to make sure that projects are not abandoned.
- Providing Real Opportunities for Growth to Entrepreneurs for Sustained Success (PROGRESS) Act (S. 2738), which would provide for a new angel investor credit to promote investment in start-up businesses.
- Taxpayer Protection and Preparer Proficiency Act of 2019 (S. 1192), which would set minimum standards for tax return preparers.
- Craft Beverage Modernization and Tax Reform Act of 2019 (S. 362), which would reform the taxation of alcoholic beverages.
- E-Cigarette Tax Parity Act (S. 2463), which would provide for the regulation and taxation of electronic cigarettes and alternative nicotine products.
- Pandemic Unemployment Assistance Act

He also was an original cosponsor of the Pandemic Unemployment Assistance Act (S. 3497), which would provide unemployment assistance to individuals affected by COVID-19.

2022 Elections

During the 2022 Senate elections, Republicans will be defending 22 seats, compared with Democrats defending only 12. Although Democrats will be faced with fewer defensive positions, since 1974 only twice has the sitting President's party gained Senate seats during a midterm election. Republicans will likely view this as an opportunity, although Democrats will not have to defend any seats in states won by Trump.

Several Finance Committee members will be up for reelection in 2022, including the following Republicans: Crapo, Grassley, Portman, Todd Young (R-IN), Tim Scott (R-SC), and James Lankford (R-OK). The following Democratic Finance Committee members will be up for reelection in 2022: Wyden, Michael Bennet (D-CO), Maggie Hassan (D-NH), and Catherine Cortez Masto (D-NV).

Finance Committee Members Pat Toomey (R-PA) and Richard Burr (R-NC) have announced they are not seeking reelection in 2022.

House Ways and Means Committee Leadership and Member Changes

Democrats remain in control of the House and it is expected that Chairman Neal and Ranking Member Brady will remain their party's respective leaders on the Committee. Brady is expected to serve as ranking member during the 117th Congress, and then step down due to House GOP term limits for committee chairs and ranking members.

Two Ways and Means Committee members will retire at the end of this Congress: Reps. Kenny Marchant (R-TX) and George Holding (R-NC).

Due to the GOP retirements and the shrinking Democratic majority in the House, it is possible that the majority-to-minority ratio may decrease in the Committee, though Ways and Means doesn't always follow the ratio of the entire House. At a minimum, we expect Republicans to add two members to the committee to make up for the two Members not returning.

Rep. Richard E. Neal (D-MA)

Neal has served as Ways and Means Chairman since the beginning of the 116th Congress and has served as either the chair or ranking member of the subcommittee on tax policy since 2007.

In the next Congress we expect Chairman Neal will continue focusing the Committee's tax work on easing burdens of the tax code on lower-income and middle-class Americans through items such as expanding the CTC and EITC and providing credits for childcare and paid family leave, enhancing retirement savings, extending and expanding community development provisions such as the new markets tax credit, and reforming the TCJA.

In October, Chairman Neal and Ranking Member Brady introduced the Securing a Strong Retirement Act of 2020 (SECURE 2.0) to increase the number of Americans who can successfully save for retirement. As described above, the bill contains several dozen proposals that are aimed at expanding retirement savings access. Neal and Brady intend to build upon the SECURE Act, which became law in late-2019.

During the 116th Congress, Chairman Neal also sponsored the following tax legislation, all of which passed the House this Congress:

- The Economic Mobility Act (H.R. 3300), which would expand refundable tax credits for low- and middle-income workers and families with children;
- The Moving America Forward Act (H.R. 2), a $1.5 trillion infrastructure investment program put forward by House Democrats; and
- The Rehabilitation for Multiemployer Pensions Act of 2019 (H.R. 397), which would reform multiemployer pension plan rules to provide for their solvency.

Rep. Kevin Brady (R-TX)

Rep. Brady will be serving his last term as ranking member of the Ways and Means Committee during the 117th Congress.

Ranking Member Brady's priorities will include defending the TCJA and extending its key provisions, further promoting economic growth, making medical supply chains independent from China, and fostering innovation. On October 9, Rep. Brady joined House Minority Leader McCarthy in introducing the Commitment to American GROWTH Act (H.R. 11) which laid out Republican priorities, including making key provisions of the TCJA permanent, encouraging investment in research and development, and encouraging domestic production of pharmaceutical ingredients, medical supplies and equipment.[40]

Ranking Member Brady introduced other tax bills during the 116th Congress, including:

- Support for Workers, Families and Social Security Act (H.R. 8201), which would exempt employees from the payment of employment taxes for the period beginning on September 1, 2020, and ending on December 31, 2020; and
- Reopening America and Supporting Businesses Act of 2020 (H.R. 7066), which would provide time-limited back to work bonuses for workers returning to work after COVID-19 –related unemployment.

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[40] "Brady, McCarthy Introduce H.R. 11, the 'Commitment to American GROWTH Act,'" October 9, 2020. https://gop-waysandmeans.house.gov/brady-mccarthy-introduce-hr-11-the-commitment-to-american-growth-act/.

Regulations on the TCJA

For the remainder of 2020, the Treasury Department and the IRS will continue their focus on issuing regulations to implement the TCJA. Based on conversations with Treasury and IRS officials, the government's goal is to release as much TCJA-related guidance as possible by the second week of December 2020. Based on the most recent Treasury/IRS Priority Guidance Plan (PGP) (dated September 2, 2020) and comments made by government officials, the attached chart provides a status summary of key TCJA guidance projects remaining in 2020. As of the date of publication, only three of these projects have gone to OMB's Office of Information and Regulatory Affairs (OIRA) for review (see chart). While OIRA may waive review of some regulations, any OIRA-reviewed regulations could add approximately a month to the process.

Potential Efforts to Unwind TCJA Regulations

In early 2021, efforts could potentially be made by the Biden Administration or Congress to alter regulations related to TCJA.

In general, federal law requires a 60-day waiting period before any major regulatory change becomes law. Non-major rules have a 30-day waiting period. During the final months of some recent presidential administrations, federal agencies have issued a larger number of rules relative to comparable time periods earlier in the administration. This process has been referred to as "midnight rulemaking."

With respect to any "midnight" regulations that the Trump Administration may issue, a Biden Administration could explore several avenues to postpone or withdraw such regulations. If a regulation has not been signed by the appropriate government official (in this case, the Secretary of the Treasury or his designees), they can order "pens down." If a regulation has been signed, but not yet published in the Federal Register, they can withdraw the regulation. We understand that there already is a significant backlog at the Federal Register of regulations to be published. The Administration can extend the effective date of a regulation that has been signed and published, but is within the 30- or 60-day window described above. Regulations that have become effective can be withdrawn and modified, but must be done so pursuant to the Administrative Procedure Act.

Additionally, Congress has a legislative tool to overturn recently published regulations. The Congressional Review Act (CRA), enacted in 1996, was intended to reassert control over agency rulemaking by establishing a special set of expedited legislative procedures for this purpose. In short, the CRA requires all final rules be submitted to both houses of Congress before they can take effect. Congress then has 60 legislative days to introduce a joint resolution of disapproval of a regulation and act on such a resolution to disapprove of it. A CRA disapproval resolution only requires a simple majority to pass. Under a "carryover" provision in the CRA, it could be interpreted that the 60-day period re-starts for a new Congress for any regulation that is submitted within the last 60 legislative days of the prior Congress. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If signed, the CRA specifies not only that the rule shall not take effect but also that it may not be reissued in substantially the same form. If vetoed, then Congress can only override by a two-thirds vote in both houses of Congress. The Republican Congress and the Trump Administration used the CRA to overturn 16 rules and regulations issued by the outgoing Obama Administration.

State/Federal Issues

Many states had ballot initiatives for tax proposals. Several states rejected tax increases, including a flat tax repeal in Illinois, a business tax increase in California, and an oil production tax increase in Alaska. Arizona passed a tax increase on individuals earning more than $250,000 a year.[41] An income tax cut passed in Colorado, as did a repeal of a statewide limitation on increasing residential property taxes. Voters in California passed Proposition 22, which classifies most app-based transportation and delivery drivers as independent contractors. Puerto Rico also voted "yes" on a statehood provision, though further action by Congress is still necessary for Puerto Rico to become a state.

As the 116th Congress ends, there are several Federal bills outstanding that address state tax concerns. The Mobile Workforce State Income Tax Simplification Act of 2019, introduced in both the House and Senate remains a priority for the business community.[42] Members have introduced other bills, such as the Digital Goods and Services Tax Fairness Act of 2019,[43] End Discriminatory State Taxes for Automobile Renters Act of 2019,[44] and Protecting Retirement Savers and Everyday Investors Act,[45] targeted to prevent state and local tax increases on specific industries.

Since the Supreme Court *Wayfair* decision,[46] Members have introduced several bills seeking to either simplify the collection of state and local sales taxes or to require physical presence for states to require the payment of business activity taxes or the collection of sales taxes. None of the introduced bills have become law, but these issues remain a concern among the states about the court decision.

Due in large part to the COVID crisis, many states are facing fiscal crises and may be forced to raise taxes or cut services due to their balanced budget requirements.[47] States will likely target large interstate businesses and high-income individuals to address revenue shortfalls; this will likely increase the risk of facing double taxation and increase burdens on interstate commerce as states will increasingly compete for tax revenues. For example, New Hampshire filed a case in the U.S. Supreme Court alleging that Massachusetts is unconstitutionally taxing New Hampshire residents who normally work in Massachusetts but have been working remotely.[48] Connecticut, New Jersey, and other states are considering joining the case, and one state official called remote

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[41] Similar measures were on the ballot at the local level. For example, Multnomah County, OR, passed a measure increasing the rate on individuals with incomes higher than $125,000 ($200,000 for joint filers) by 1.5% and 3% for higher incomes.
[42] S. 604, Sen. John Thune (R-SD). H.R. 4796, Rep. Gregory Steube (R-FL).
[43] S. 765, Thune; H.R. 1725, Rep. Steve Cohen (D-TN). The bill would prevent states from enacting DSTs.
[44] H.R. 4311, Cohen. The bill would prohibit state or local governments from imposing discriminatory taxes against the motor vehicle rentals.
[45] H.R. 8695, Rep. Patrick McHenry (R-NC). The bill would prevent states from imposing financial transaction taxes on certain industry participants.
[46] *South Dakota v. Wayfair, Inc.* No. 17-494. 138 S. Ct. 2080 (2018).
[47] Wall Street Journal, Heather Gillers and Gunjan Banergi, "U.S. States Face Biggest Cash Crisis Since the Great Depression," October 28, 2020. See also Moody's Analytics, Dan White, "U.S. State and Local Government Shortfall Update," September 21, 2020.
[48] *State of New Hampshire v. Commonwealth of Massachusetts*, October 19, 2020, U.S. Supreme Court. https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/nh-v-ma-action.pdf.

work taxation "the hottest issue right now in state tax administration."[49] Also, recently Arizona sued California alleging that California unconstitutionally imposes its minimum franchise tax on Arizona businesses investing in California limited liability companies but do not conduct business there.[50]

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[49] John Biello, Acting Commissioner of the Connecticut Department of Revenue, comment in response to a question posed by Law360 at a teleconference hosted by the Connecticut Society of Certified Public Accountants.
[50] *Arizona v. California*, No. 150, 589 U.S. ___(2020).