

President Biden's tax proposals

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On January 20, 2021, Joseph R. Biden, Jr., took office as the US President. As Washington's focus now turns to policy-making, there are serious questions about the future US tax system and whether and to what extent the dramatic policy changes of former President Trump's signature legislative achievement—2017's Tax Cuts and Jobs Act (the TCJA)—will remain in place.

The Biden campaign proposed a number of significant changes to the US corporate tax regime that would affect cross-border transactions. These changes face significant political obstacles to implementation but if they are put into place, they will generally result in a higher tax burden to US corporations both with respect to their US operations and their foreign subsidiaries. In the context of cross-border M&A transactions, that result is likely to make it more tax-efficient, where possible, to structure transactions that result in foreign-parented groups.

Foremost, President Biden's campaign proposed increases to the tax rates applicable to corporations, including increasing the corporate tax rate from 21% to 28%. The Biden campaign also proposed a new alternative minimum tax on corporations, under which US corporations with profits of at least \$100 million would pay the greater of a 15% tax on "book" (i.e., GAAP) income or their regular tax liability.

For U.S. corporations with foreign subsidiaries, President Biden has previously proposed increasing the tax rate from 10.5% to 21% with respect to foreign earnings taxable under the Global Intangible Low-Taxed Income (GILTI) regime, which the TCJA introduced into the US tax system. In addition to increasing the GILTI tax rate, President Biden has also proposed calculating GILTI on a country-by-country basis rather than by blending income from multiple jurisdictions. If implemented, this proposal would mean that more income could be subject to GILTI tax because the tax rate on earnings in high-tax jurisdictions would no longer reduce the earnings in low-tax jurisdictions

subject to GILTI tax. Finally, the current GILTI regime applies only to income in excess of 10% of the value of certain property held by US corporations abroad. President Biden's proposal would remove this 10% floor, asserting GILTI tax on the first dollar of foreign earnings and thereby subjecting additional income to tax under the GILTI regime.

Aside from the corporate tax regime, President Biden, in his campaign, also proposed substantial increases to taxes for individuals. Most notably, the highest income tax bracket would move from 37% to 39.6%, which would reinstate the highest bracket from the pre-TCJA era. In addition, significant social security taxes would be levied on individuals earning more than \$400,000. Under present law for 2021, social security taxes are imposed only on the first \$142,800 of earnings; these taxes are imposed at a rate of 6.2% on individual employees and 6.2% on employers (deductible for employers), for a total tax burden of 12.4% on income subject to the tax. (Self-employed individuals bear the entire 12.4% burden and receive a deduction for the 6.2% employer portion.) Biden's proposal would leave this ceiling in place for all earners but begin taxing earnings over \$400,000 at the 12.4% rate. Under this proposal, a self-employed individual earning \$1,000,000 would owe nearly \$60,000 more in taxes relative to current law, after taking into account deductions for the employer portion of this higher tax.

The US political realities of 2021 are just beginning to reveal themselves. The Democratic party now controls the White House and both houses of Congress, but the majorities in each house are vanishingly small. (The Senate itself is tied 50-50, but Vice President Kamala Harris has the right to cast a deciding vote in the case of ties, so unified Democrats can pass certain legislation, 51-50, if need be.) Republicans, in the senate minority for the first time in several years, have many tools at their disposal to challenge Biden's proposals—most notably, the filibuster, an arcane procedure that has the effect of requiring 60 votes to advance many proposals.

Add to all of this: the impeachment trial against former President Donald Trump beginning in the second week of February; the urgent need for another COVID-19 relief package; and a statement by a Biden administration official who recently indicated that tax increases will not be a priority of the new administration over the short-term and left the impression that any such increases are not likely to be made retroactive to the beginning of 2021—and the only thing certain about future US tax legislation is that nothing is certain at all.