Advanced Sales

Tax Update: November 2021

As you know, we've been keeping an ear to the ground on new or updated tax laws. Our Advanced Sales team consultant, Tom Commito, has shared the following developments that may impact taxes as we approach 2022.

Where we are now

On July 1, 2021, the Congressional Budget Office released their projections for the federal deficit for the next 10 years. The figures are on an annual basis and are in millions of dollars.

CBO's baseline budget projections

Category	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022-2026	2022-2031
Deficit (-) or surplus	**-3,129**	**-3,003**	**-1,153**	**-789**	**-753**	**-998**	**-1,049**	**-1,077**	**-1,395**	**-1,363**	**-1,661**	**-1,855**	**-4,741**	**-12,093**
On-budget	-3,142	-2,984	-1,067	-718	-648	-852	-869	-859	-1,131	-1,050	-1,294	-1,434	-4,155	-9,923
Off-budget	13	-19	-86	-71	-104	-146	-180	-218	-264	-313	-367	-422	-587	-2,170

Interestingly, the deficit for fiscal year 2021, which ended on September 30, 2021, was $300 billion less than the above projection.[1] The reason for this increase was that individual tax receipts were $435 billion higher than projected. Likewise, estate and gift tax receipts were $9.5 billion higher than projected. In the current tax discussions, a great deal of emphasis is on the effects the proposals will have on the deficit. It is important to keep the above baseline in mind when one looks at the tax proposals.

The bipartisan infrastructure bill (BIB)

On Friday, November 5, 2021, the House of Representatives passed the "Hard" infrastructure bill. Officially it is "H.R. 3684, the "Infrastructure Investment and Jobs Act." The Senate passed the bill 69–30 last August. The infrastructure bill will cost $1.2 trillion over eight years, and offers more than $550 billion in new spending, including:

- $110 billion toward roads, bridges and other much-needed infrastructure fixups across the country; $40 billion is new funding for bridge repair, replacement and rehabilitation and $17.5 billion is for major projects
- $73 billion for the country's electric grid and power structures
- $66 billion for rail services
- $65 billion for broadband
- $55 billion for water infrastructure
- $21 billion in environmental remediation

[1] Joint Statement of Janet Yellen and Shalanda D. Young, 10/22/2021.

- $47 billion for flooding and coastal resiliency as well as “climate resiliency,” including protections against fires, etc.
- $39 billion to modernize transit, which is the largest federal investment in public transit in history, according to the White House
- $25 billion for airports
- $17 billion in port infrastructure
- $11 billion in transportation safety programs
- $7.5 billion for electric vehicles and EV charging; $2.5 billion in zero-emission buses, $2.5 billion in low-emission buses, and $2.5 billion for ferries
- The bill will include language regarding enforcement of unemployment insurance fraud
- It will add $256 billion in projected deficits over 10 years, according to the Congressional Budget Office

The bill raises revenue as follows. It is important to note that none of the funding is due to increases in income or estate and gift taxes.

Revenue raisers

- Requiring information reporting with respect to digital assets such as cryptocurrency, generally effective for returns and statements required to be filed or furnished after December 31, 2023 (estimated to raise approximately $28 billion over a 10-year period).
- Extending certain Superfund excise taxes through December 31, 2031 and modifying the amount of tax applicable to certain chemicals, generally effective as of July 1, 2022 (estimated to raise approximately $14.45 billion over a 10-year period).
- Terminating the employee retention credit earlier than scheduled by making it applicable to wages paid before October 1, 2021 (rather than wages paid before January 1, 2022). (Estimated to raise approximately $8.2 billion over a 10-year period).
- Modifying the section 430(h)(2)(C)(iv) table of applicable minimum and maximum percentages with respect to certain pension plans (that is, pension smoothing). (Estimated to raise approximately $2.9 billion over a 10-year period).

Revenue losers

- Expanding the definition of exempt facility bonds to include certain qualified broadband projects and qualified carbon dioxide capture facilities; providing a partial exemption to the private activity bond volume cap for exempt facility bonds relating to such projects and facilities; and increasing the national limitation amount for qualified highway or surface freight transportation facilities (estimated to lose approximately $1.2 billion over a 10-year period).
- Modifying the Code section 118 contribution-to-capital rules to apply to certain amounts received by regulated public utilities for water or sewerage disposal services (estimated to lose approximately $1.25 billion over a 10-year period).

Scored as having no revenue effect

- Extending various highway-related excise taxes (including fuel taxes and heavy vehicle use taxes) as well as certain related exemptions for six years.
- Extending the authority to spend out of the highway trust fund, the sport fish restoration and boating trust fund, and the leaking underground storage tank trust fund until October 1, 2026.
- Modifying the automatic extension of certain deadlines in the case of taxpayers affected by federally declared disasters.
- Providing the Treasury Secretary with authority to postpone certain deadlines in the case of certain "significant fires."
- Tolling of time for filing a petition with the U.S. Tax Court in certain cases in which a filing location is inaccessible or otherwise unavailable on the date the petition would otherwise be due.
- Modifying the rules for postponing certain acts due to service in a combat zone or contingency operation.

The Build Back Better Act

The House Rules Committee on October 29, 2021, released a modified version of H.R. 5376, the "Build Back Better Act."

The modified version of the bill includes a substantial number of changes to the tax-related provisions of the bill as approved by the House Budget Committee in September 2021, which was originally contained in the Chairman's markup from the House Ways and Means committee. Given the current inability of the Democratic majority in the House, a final vote on this bill has been repeatedly postponed. Speaker Pelosi has scheduled a final vote for November 15.

What's in: Expenditures

- **$400 billion for childcare and universal preschool.** The plan is designed to save most American families more than half of their spending on childcare by providing two years of free preschool for every 3- and 4-year-old in America, and additional funding for childcare.
- **Family and medical leave.** Permanently authorizes the first-ever national paid family and medical leave guarantee for U.S. workers that provides up to four weeks of paid leave.
- **$200 billion for Child Tax Credit and Earned Income Credit.** The proposal extends the expanded Child Tax Credit for one year and provides additional funds to extend the expanded Earned Income Tax Credit.
- **$150 billion for home care.** This funding expands home care for older people and those with disabilities.
- **$150 billion for housing.** The plan invests in affordable housing, including construction and rehabilitation of homes, as well as investments in rental assistance and housing vouchers.

- **$40 billion higher education and workforce development.** The legislation will increase Pell grants and provide post-high school education opportunities, including apprenticeship programs for underserved communities.
- **$25 billion for the Small Business Committee.** This provides for small business access to credit, investment and markets.
- **$90 billion for equity and other investments.** Spending in this area will be designed to achieve equity through investments in maternal health, community violence interventions and nutrition, according to the White House.
- **$5 billion in supply chain investments.** These investments will be designed to safeguard our economy and support domestic job growth.
- **$10 billion to support child nutrition.** This investment will help expand eligibility and eliminate paperwork so more children can receive free school meals.
- **State and Local Tax (SALT) deduction relief.** The revised House bill would lift the current $10,000 cap on "SALT" deductions that's in place through 2025 to $72,500 retroactive to the start of this year and extend that through 2031.
- **Agreement to lower prescription drugs costs.** The bill would empower Medicare to negotiate prices of certain costly medications administered in doctors' offices or purchased at the pharmacy. The Health and Human Services Secretary would negotiate up to 10 drugs in 2025. The number would rise to up to 20 medications starting in 2028. This controversial provision, which was dropped from the package and then restored after a deal was reached in the Senate, is a far more limited proposal than the one House Democratic leaders have backed in the past. The bill would empower Medicare to negotiate prices of certain costly medications administered in doctors' offices or purchased at the pharmacy. The legislation will also impose penalties if drug companies increased their prices faster than inflation. And it would redesign Medicare's Part D drug plans so that seniors and people with disabilities wouldn't pay more than $2,000 for medications bought at the pharmacy. The bill would also cap what Americans pay for insulin at $35 a month. Older Americans, in particular, would benefit from Medicare's ability to negotiate prescription drug prices in its Part B and Part D program.
- **$130 billion in ACA credits.** This money will be used to expand affordable healthcare coverage, reduce premiums for more than 9 million Americans, and deliver healthcare to uninsured people in states that are not enrolled in expanded Medicaid coverage.
- **$35 billion Medicare hearing coverage.** While dental and vision coverage did not make the cut, Medicare recipients will have coverage for hearing aids and hearing tests.
- **The funding will cover nursing home transparency and staffing standards**, and bolster funding for the Elder Justice Act program.
- **$550+ billion for clean energy and climate.** The plan proposes cutting greenhouse gas pollution by over a gigaton in 2030, reducing consumer energy costs, helping to create more clean air and water, and creating hundreds of thousands of jobs.
- **$100 billion for immigration.** This is part of the framework, but also separate since it requires a ruling by the Senate parliamentarian. This would constitute an investment to reform the immigration system, reduce backlogs, expand legal representation, and make border processing more efficient and humane.
- **Expansion of Pell grants and apprenticeship training.**

What's in: Tax increases

- **Corporate alternative minimum tax** — the bill would impose a 15% minimum tax on adjusted financial statement income for corporations with a three-year average of such income in excess of $1 billion. This was proposed by Senators Elizabeth Warren (D-MA), Angus King (I-ME) and Ron Wyden (D-OR) has been added to the House's version of the Build Back Better legislation.
- **Excise tax on repurchase of corporate stock** — the bill would impose a 1% excise tax on publicly traded U.S. corporations based on the value of any of its stock that is repurchased by the corporation during the tax year.
- International tax proposals would bring U.S. taxation with the OECD agreement but would be deferred one year.
  - **FDII and GILTI:** the bill would tax "global intangible low-taxed income" (GILTI) at 15% and "foreign-derived intangible income" (FDII) at 15.8%.
  - **BEAT rate:** the bill would increase the "base erosion and anti-abuse tax" (BEAT) rate to 12.5% for 2023, 15% for 2024, and 18% for 2025 and thereafter.
- **Surcharge on high-income individuals, estate and trusts** — the bill would impose a tax equal to 5% of a taxpayer's modified adjusted gross income (MAGI) in excess of $10 million and an additional tax of 3% of a taxpayer's MAGI in excess of $25 million. For trusts and estates income tax consequences, the floors are $200,000 and $500,000, respectively.
- **The elimination of the "Backdoor Roth" strategy is apparently back in.** At its simplest, the strategy involves an investor contributing after-tax money to a non-Roth account and then converting it to a Roth IRA.
- **Wealthy individuals with more than $10 million in retirement savings would have to draw down their accounts each year**, in a new type of required minimum distribution, or RMD, according to updated legislation issued November 3 by the House Budget Committee.

What's out: Expenditures

- Medicare dental and vision benefits. Although these became victims of the budgeting axe, hearing aids and testing survived the cut.
- Free community college was taken out.

What's out: Taxes

- Billionaires' capital gains tax on a "mark to market" basis. This funding plan, which would have annually taxed the unrealized gains of certain assets of around 775 of the richest taxpayers in the country was removed.
- Corporate income tax rate increase
- Individual ordinary income rate increases to a maximum rate of 39.6% (but see surcharge below)
- Individual capital gains and qualified dividends income rate increases to a maximum of 25% (but see surcharge below)
- Carried interest modifications

- The proposed reduced limit on the IRC 199A pass-through deduction for partnerships, LLCs and S-corporations on "qualified business income" of certain high-income individuals was removed.
- Changes to rules applicable to grantor trusts. This very complicated provision has caused great consternation in the estate planning community. It was completely removed.
- The elimination of discounting for valuation purposes for transfers of nonbusiness assets
- Increase in limits on estate tax valuation reduction from "highest and best use" for ranch and farm property under IRC 2032A
- Decrease in the unified credit/lifetime exemption. The original proposal would have sunset the higher exemption mandated by the 2017 "Tax Cuts and Jobs Act." The proposal would have reduced the exemption from the 2021 amount of $11.7 million for an individual to around $6 million in 2022.

What's next: The Senate

On August 10, the Senate began consideration of and passed the budget resolution that will clear the way for a budget reconciliation bill that will include the Build Back Better Act proposals. By using the budget reconciliation process, Senate Democrats will be able to pass the major social policy bill through the Senate without any Republican support, assuming that all 50 Democratic Senators support the eventual bill and Vice President Harris breaks a 50–50 tie in favor of passage. The Senate passed the budget resolution on the next day on August 11. It directs Senate and House committees to write legislative language that changes federal spending, revenues and deficits by specific amounts.

While the budget resolution does not specify the provisions of the resulting reconciliation bill, it does set forth various progressive objectives that the committees are expected to follow as they draft the legislation, including:

- Expanding Medicare coverage and lowering the program's eligibility age.
- Lowering prescription drug costs.
- Extending child tax credits.
- Providing paid family and medical leave.
- Providing universal pre-K and tuition-free community college.
- Expanding tax incentives for clean energy, manufacturing and transportation.
- Instituting a Clean Energy Payment Program to incentivize utilities to adopt clean energy.
- Expanding the state and local tax (SALT) breaks.

The measure is intended to be paid for largely by raising taxes on corporations and high-income individuals.

As has been reported, Senators Sinema and Manchin have yet to agree on the House passed bill. Also, Senators Sanders and Wyden have far-differing views from what the House passed. It is important to note that Senator Sanders proposed a sweeping tax bill last Spring. Among the increases he proposed were the following:

- Currently, the maximum gift, estate and generation-skipping tax rate is 40%. The proposal changes the rate structure so that estates over $3,500,000 but under $10,000,000 will be taxed at 45%; over $10,000,000 up to $50,000,000 will be taxed at 50%; over $50,000,000 but under $1,000,000,000 will be taxed at 55%; and over $1,000,000,000 will be taxed at 65%.
- The proposal makes it clear that assets in an intentionally defective irrevocable grantor trust ("IDIGT") will not receive a step-up in basis upon death unless the property is includible in the gross estate of the transferor.
- The proposal requires that a GRAT have a minimum term of 10 years and a maximum term of the life expectancy of the annuitant plus 10 years, and the remainder interest must not be less than an amount equal to the greater of 25% of the fair-market value of the trust assets or $500,000.
- The proposal would require that (1) assets in a grantor trust be included in the grantor's estate (unless the trust is grandfathered), (2) distributions from a grantor trust during the life of the deemed owner would be considered a gift, and (3) the assets of a grantor trust will be a gift if the grantor status is turned off during life. The Act would apply to trusts created after enactment but, this change would apply to transfers made to preexisting trusts after enactment.

Another interesting development is the capital gains battle between Senator Ron Wyden and Elon Musk. Musk sent out a Twitter survey to see if he should sell 10% of his Tesla stock. Apparently, Musk is proposing this since he has a large number of stock options, at a $6 option price due next year — resulting in many billions of ordinary incomes. "Whether or not the world's wealthiest man pays any taxes at all shouldn't depend on the results of a Twitter poll. It's time for the Billionaires Income Tax," Wyden, chair of the Senate Finance Committee, hit back in a statement issued on November 6. So apparently, he is still interested in the so-called Billionaires tax, as well as no step-up in basis at death.

The end result is to expect changes and challenges when the Senate addresses the bill.

About the author

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